IN THE COURT OF APPEAL
AT SUVA, FIJI ISLANDS

[Civil Appeal No. ABU 0055/07]
[Civil Appeal No. ABU 0025/08]

CORAM : Byrne, AP
Calanchini, JA

BETWEEN : NATIVE LAND TRUST BOARD
(1st APPELLANT)
: AUSTRALASIAN CONFERENCE ASSOCIATION LIMITED
(2nd APPELLANT)

AND : RATU NEUMI LEQATAQA and 4 Others
(RESPONDENTS)

COUNSEL : S. Valenitabua for the 1st Appellant
: S. Banuve for the 2nd Appellant
: N. Nawaikula for the Respondents

Date of Hearing : 10th March 2010

Date of Judgment: 19th July 2010

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# JUDGMENT OF THE COURT

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[1] Disputes over land are frequently before the Courts in Fiji. The appeal now before this Court is against the judgment of Jitoko, J in the High Court in Civil Action No. HBC 034 of 2005S delivered on 19th July 2007. Two separate appeals were filed in this Court and were consolidated. The appellants are the first defendant, Native Land Trust Board (NLTB) and Australasian Conference Association Limited (ACAL), the fourth defendant in the Court below. The second defendant, Native Lands Commission (NLC) and third defendant, the Attorney-General are not appealing.

[2] The only issue before Jitoko, J in the High Court and the subject of this appeal is whether the area of 100 acres where Fulton College is located is Native Reserve Land or not. There is no lease as yet on this land, the previous one having expired in 2005.

[3] The Court below found and declared that the land is Native Reserve and required the appellants to first obtain the consent of the native owners before any new lease was issued.

[4] In the High Court the respondents obtained declarations that the land on which Fulton College is situated was unlawfully excluded and its lease to the second appellant was not made in accordance with the Native Land Trust Act Cap. 134 and was therefore illegal.

**THE RELEVANT DOCUMENTS BEFORE THE HIGH COURT**

[5] There were five critical documents before the High Court which the Court examined and arrived at its conclusion in favour of the respondents. There were:

(i) The Staff Report by Ian Thompson, the Native Reserves Commissioner in 1958 recommending the reservation of NLC Lot 18, Plan No. J/18.4, Vide Claim No. 262 contained in Reserve Volume No. 57 appearing on pages 66 to 68 of the Court Record.

(ii) Minutes of the NLTB Board Meeting of 29th December 1961 appearing at pages 70 to 72 of the Record.

(iii) Fiji Royal Gazette of the 15th of December 1967 - pages 74 to 76 of the Record.

(iv) Minutes of the NLTB Board Meeting of January 1983 set out at page 79 of the Record.

(v) Fiji Royal Gazette Volume 110 No.7 of Friday, 11th February 1983 on pages 78 to 83 of the Record.

[6] The High court ultimately ruled in favour of the respondents. It stated that the 100 acres on which Fulton College was situated was Native Reserve for the purpose of the Native Lands Trust Act Cap. 134 and any dealings with it required the consent of its native owners.

[7] Although separately represented, the appellants filed five similar grounds of appeal namely:

That the Learned Trial Judge erred in law in failing to consider and hold that:

(a) the 100 acres leased for the Fulton College in Tailevu were at no time set aside as Reserved Land under the Native Land Trust Ordinance of 1940;

(b) the said 100 acres were never de-reserved to accommodate the school lease for Fulton College in Tailevu;

(c) the said 100 acres were never recommended by Mr. Ian Thompson to be returned and reserved upon expiry of the school lease;

(d) the 100 acres being a school lease and being susceptible to various developments for educational purposes, were not intended to be returned and reserved at the expiry of the lease in that any refusal of consent by the landowners for continuation of the lease would have caused severe losses to the school.

(e) The learned judge in the Court below erred in law in holding that the 100 acres was to be returned to the landowners in future as reserved land because the provision of education in the school was a continuing phenomenon and to limit it to fifty (50) years, unless consent for extension was granted by the landowners, was unreasonable.

[8] We comment here that the use of the word "phenomenon" seems strange when referring to the provision of education. It might perhaps have been better to refer to it as a necessity of life in a civilized community.

**BRIEF HISTORY OF THE LAND IN QUESTION**

[9] The determination of the respondents' ownership of the land was made by the first Native Land Commission sitting held on the 4th of April 1905 by Mr. David Wilkinson for the Namalata District Sitting at Dakuivuna Village.

[10] Archival records show that by 1909, Native Lands in the Tailevu North area were being opened up to lease. In July 1910, with the consent of the Namalata District Council, the Government by an Order in Council, granted one Arnold Kellar a lease over an area of approximately 400 acres of the respondents' land. Its term was for 50 years for agricultural grazing and dairy purposes. The records show that on 30th of May 1940, Mr. Kellar transferred part of his lease to the second appellant ostensibly for the same use. The second appellant became the registered proprietor of Memorandum of Native Lease Book No. 27 Folio 383. Over the balance of the approximate 20 years of the life of the lease, the second appellant began to build the school to be known as the Fulton College on the leased property.

[11] In June 1940, barely after a few weeks of the transfer of the part of the lease from Mr. Kellar to the ACAL, the Native Land Trust Board came into existence with the promulgation of the Native Lands Trust Ordinance 1940 (Ordinance No. 12 of 1940). With it, and for the first time, the creation of Native Reserves under Part III of the

Ordinance by Sections 16 and 19, the Board and the Governor respectively could set aside land as Native Reserves. Also under the new Law, the Board as administrator of all native lands, succeeded in this case as Lessor to the ACAL lease.

[12] The Commissioners, after holding such hearings would then recommend to the Board the setting aside of certain native lands as native reserves (Regulation 10 of the Native Lands Native Reserves Regulations).

[13] In December 1958, Reserves Commissioner Ian Thompson (later to become Sir Ian Thompson) carried out the inquiry on Reserve Claim No. 262 of Yavusa Salatu over their 560 acres. In his recommendation to the Board, Mr. Thompson first noted that Reserve Claim No. 262 was the only reserved claim of the Yavusa Salatu. He added that :

> **"This Lot covers an area of 560 acres, of which ¾ is under lease to the Fulton Mission School. The owners are hard pressed for cultivable land close to their village of Nakalawaca, and are planting in fact on Verata land (Yavusa Qalibure and Naloto)".**

[14] In his recommendations to the Board, Mr. Thompson said that:

(a) the leased areas now under bananas and cattle (i.e. the area in the North-Eastern and North- Western (west of Kings Road) portions of the lot) should be returned in reserve to the Native owners on the expiry of the lease;

(b) an area of 100 acres including the school lease should be placed outside reserve;

(c) the remainder of the Lot should be reserved for the use of the native owners, the Yavusa Salatu, excluding (i) Sufficient land to provide a right of way for the school water supply and (ii) a right of way between the school buildings and the landing place the Naduruka Creek near its junction with the Waidalice River".

[15] The Commissioner's recommendations were approved on 29th December 1961 by the Board. This meant that except for the 100 acres on which the school, Fulton College, was situated all the land the subject of Native Lease Book No. 27 Folio 383, was to be set aside as Native Reserve. The 100 acres was to remain outside the reserve portion. The Board also decided that pending proper survey and proclamation, the approval should be made public. Gazette Notice No. 1577 of 15th December 1967 (Fiji Royal Gazette Volume 94 No. 56) informed the public of the Board's decision. It stated that the Board had approved and set aside the portions of land belonging to Yavusa Salatu as recommended by Commissioner Thompson, as **"Fijian Reserve"**, adding that, **"it is not practicable at the present time to demarcate the boundaries by survey on the ground until such time as the areas are proclaimed however, the areas indicated above will for the purpose of administration be treated by the Board as if they were Native Reserves proclaimed under the Native Land Trust Ordinance Cap. 104 and no part of the lands comprised therein would be leased, either as an extension of an existing lease beyond the normal date of expiry or as a new lease".**

[16] This brief history which is set out in Mr. Justice Jitoko's judgment on pages 7 to 9 of the Record shows clearly in our judgment that there could be no question that the 100 acres was to be excluded from reserved land permanently.

[17] The Learned Judge said that this was illogical for, that to do so, would in his view be in conflict with the objects and reasons for the creation of Native Reserves, and in fact contrary to the very objective of the holding of Native Lands Commission's enquiries such as that chaired by Sir Ian Thompson in December 1958 dealing with this claim. The Judge said that Sir Ian's findings lent considerable credence to his conclusion that the exclusion of the 100 acres of the Yavusa Salatu land recommended by Sir Ian and accepted by the Board , could only be legally effected through the operation and under the purview of Section 17 of the Act. The Judge said on page 17 of the Record that as to the appellants' arguments that the excluded land had never been proclaimed nor

gazetted, the answer was simple: "It was incumbent on the Board, in a case where land is returned after being de-reserved, to do whatever is necessary to have it reserved. The fact that land has never been proclaimed as such does not prevent it at any future time of it being so proclaimed".

With this last sentence we respectfully agree but the appellants submit that the learned Judge here showed that he had overlooked the fact that the 100 acres had never been reserved.

[18] In so finding, the appellants submit that the Judge misconstrued the meaning of Sections 15 and 17 of the Native Lands Trust Act by in effect finding that these sections were part of the one process which the appellants say they are not. Here we set out the two sections which are in Part III of the Act under the heading :

***Native Reserves***

"15. – (1) It shall be lawful for the Board, by notice in the Gazette, to set aside any portion of native land as a native reserve.

(2) Every such notice in the Gazette shall also be published in a newspaper published in the Fijian language and circulating in Fiji.

***Exclusion of land from native reserve with consent of native owners***

17. – (1) The Board may, upon good cause being shown and with the consent of the native owners of the land, exclude either permanently or for a specified period any portion of land from any native reserve.

(2) Every such exclusion as aforesaid shall be published in the Gazette and in a newspaper published in the Fijian Language and circulating in Fiji.

(3) When any native land has been excluded from a native reserve for a specified period such land shall upon the expiration of such period resume the same character and incidents as were attached to it before its exclusion from the native reserve".

[19] We have no doubt that the Board is empowered under Section 17 to exclude either permanently or for a specified period any portion of land from any native reserve if good reason for so doing be shown.

[20] The respondents argue however that Section 17 does not apply to the 100 acres with which we are concerned here simply because this land was never reserved by the Thompson Commission. To put it simply, it is impossible to de-reserve land which was never reserved. In our judgment, with respect, in reaching his conclusion the learned judge ignored the basic principles of statutory interpretation. The first essential guide in this process was stated by Lord Dunedin in *Whitney v. Inland Revenue Commissioners (1926) A.C.37 at p.52*: "A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable".

[21] It was said by a great American Authority – Kent's Commentary on American Law, 12th Edition, Volume 1, pp 447- 448 : *"It is a principle in the English Law, that an Act of Parliament, delivered in clear and intelligible terms, cannot be questioned or its authority controlled in any Court of Justice".* As Sir William Blackstone put it, : **"This is the exercise of the highest authority that the Kingdom acknowledges upon Earth".**

[22] It would appear that the learned Judge allowed his obvious sympathies for the respondents to colour his interpretation of the Notification in the Government Gazette of the 27th of January 1983. His Lordship said dealing with the Thompson recommendation, at page 17 of the Record, : "While he ultimately recommended the exclusion of the 100 acres from the reserved portion of the claim, the expectation must surely be, given the future needs of Yavusa Salatu, that the land was going to be returned to the landowners sometime in the future. It is illogical to argue that the land was going to be excluded permanently as part of their reserve claim. To do so, would in my view be in conflict with the objects and reasons of the creation of native

reserve, and in fact contrary to the very objective of the holding of Native Lands Commission enquiries in Sittings such as the one chaired by Sir Ian Thompson in December 1958 dealing with this claim".

[23] With great respect to the Learned Judge it is not for a Court to read in to a statute words which are not there unless to do so would make the statute meaningless. That cannot be said either of the recommendation of the Thompson Enquiry or the notification in the Government Gazette 27th of January 1983.

[24] For these reasons this Appeal must be upheld and we order the respondents to pay the appellants' costs which we fix at $5000.00.

Dated at Suva this 19th day of July 2010.

COURT OF APPEAL FIJI ISLANDS

**JOHN E. BYRNE, AP**

**W. D. CALANCHINI, JA**