NATIVE LAND TRUST BOARD v MESULAME NARAWA and Anor (CBV0007 of 2002S)

SUPREME COURT — APPELLATE JURISDICTION

GAULT P, FRENCH and WEINBERG JJ

13, 21 May 2004

Practice and procedure — applications — leave to appeal — locus standi — whether case involves matters of great significant importance — whether Supreme Court had jurisdiction over matters of great significant importance — Constitution of the Republic of Fiji 1997 ss 6(b), 117, 117(2), 120(1), 120(2), 121, 122, 122(1), 186 — Companies Act (Cap 247) — Court of Appeal Act 1978 s 3 — Forest Act (Cap 150) — High Court Rules O 15 r 6(2)(a), O 15 r 14 — Native Land Trust Act (Cap 134) s 4 — Supreme Court Act 1998 s 7(3).

In 1983, the Native Land Trust Board (the Petitioner) and the Conservator of Forest had an agreement in which the Petitioner granted Timbers (Fiji) Limited (Timbers (Fiji)) a license to fell, take and sell timber growing on certain native lands (the Navua concession agreement). In 1985, another agreement was made between the same parties (the Navutulevu concession agreement) wherein the agreement contained a description of the applicable concession area to customary land-owning groups or units known as the mataqali. Eleven mataqalis were named in the two agreements and were included in the Yavusa Burenitu.

Members of the Yavusa Burenitu (the Respondents) filed originating summons against the Petitioner and claimed that Timbers (Fiji) breached the two concession agreements because the Petitioner failed to administer them and that Petitioner condoned and supported the continuing breaches of Timbers (Fiji). The Respondents likewise applied for mandamus to direct the Petitioner and the conservator to terminate the concession agreements because of the alleged breaches.

In December 1995, the Petitioner filed summons and sought an order to dismiss the action on the ground that the Respondents had no standing to institute the proceedings. The High Court rendered judgment in favour of the Respondents.

A notice of appeal was filed to the Court of Appeal pursuant to a leave granted by the learned primary judge. The Court of Appeal allowed the appeal, quashed the order of the High Court and ordered that the proceedings be converted into an ordinary action.

In 2002, the Petitioner was allowed by the Supreme Court to file a petition for special leave to appeal the decision of the Court of Appeal.

The Petitioner submitted that the decision appealed from was a final judgment while the Respondents pointed out that the decision of the Court of Appeal did not fully dispose of the rights of the parties which made such decision not final.

Held — (1) While the term "all final judgments" in s 122 of the Constitution of the Republic of Fiji 1997 defines the jurisdiction of the Supreme Court with respect to special leave to appeal in any civil or criminal matter, the term refers to disposition of appeals whether brought as a matter of right from final judgments or by leave from interlocutory judgments. Section 7(3) of the Supreme Court Act provides for necessary conditions for the grant of special leave but it is still subject to discretion whether the conditions mentioned under the Act were met. The Petitioner's case can involve matters of law and of great public importance as the case concerned the nature of relationship between customary land owning groups in Fiji and the lands they own and their individual interests. However, it was not appropriate to determine the important questions of law in a factual and evidentiary vacuum.

Cases referred to

Carr v Finance Co of Australia Ltd (No 1) (1981) 147 CLR 246; 34 ALR 449; *Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397; 104 ALR 621; 23 IPR 1; *Re Bucknell* (1936) 56 CLR 221; [1937] ALR 332; *Florida Investments Pty Ltd v Milstern (Holdings) Pty Ltd* [1972] WAR 148; *Hunt v Allied Bakeries Ltd* [1956] 1 WLR 1326; [1956] 3 All ER 513; *Amodu Tijani v Southern Nigeria Secretary* [1921] 2 AC 399; *Re Southern Rhodesia* [1999] AC 211; *John v Rees* [1970] 1 Ch 345; [1969] 2 All ER 274; *Johnson Tiles Pty Ltd v Esso Australia Ltd* (2000) 104 FCR 564; [2000] FCA 1572; *Little v Victoria* [1998] 4 VR 596; *Mabo v Queensland (No 2)* (1992) 175 CLR 1; 107 ALR 1; *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021; *Meli Kaliavu v Native Land Trust Board* [1956–57] 5 FLR 17; *Mickelberg v 6PR Southern Cross Radio Pty Ltd* [2001] WASC 267; *Naimisio Dikau No 1 v Native Land Board* CA No 801/1984; *Timoci Bavadra v Native Land Trust Board* [1986] FJSC 13; *Waisake Ratu No 2 v Native Land Development Corporation* [1987] 37 FLR 146, cited.

Naimisio Dikau No 1 v Native Land Trust Board Civil Action No 801 of 1984; *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, considered.

G. E. Leung for the Petitioner

Isireli Fa for the Respondent

Gault P, French, Weinberg JJ.

Introduction

[1] The Native Land Trust Board (the Board) applies for special leave to appeal from a judgment of the Court of Appeal in which it set aside an order of the High Court summarily dismissing proceedings brought against the board and others by two members of the Yavusa Burenitu. The application raises a question about the nature of the jurisdiction of this court in relation to judgments of the Court of Appeal and the discretion of this court to refuse special leave even though an important question of law may be involved in the petition. The court refused the application and now publishes its reasons.

Procedural history

[2] On 7 November 1983 the board and the Conservator of forest (the conservator) entered into an agreement under which the board granted to a company Timbers (Fiji) Ltd (Timbers (Fiji)) a licence to fell, take and sell timber growing on certain native lands described as "the concession area" located in the province of Serua. This was known as the Navua Concession Agreement. The rights granted were expressed to be subject to the Native Land Trust Act Cap 134 and the Forest Act Cap 150. The agreement provided, inter alia, for the payment of royalties and fees determined by the board or the conservator. The area covered by the agreement was 4500 hectares. On 31 January 1985 a second similar agreement was made between the same parties in respect of an area of 17,500 hectares. This was known as the Navutulevu Concession Agreement.

[3] Schedule A to each agreement contained a description of the applicable concession area by reference to named customary land-owning groups or "units" known as mataqali. Eleven mataqalis were named in the two agreements. They are the registered proprietors of the affected land. In the Court of Appeal it was said that the 11 mataqalis were comprised in the Yavusa Burenitu but it appears from Sch A to the first agreement that two of them, Tacini and Nakuraki, are actually comprised within Yavusa Tbuluga. That possible discrepancy is not material for present purposes.

[4] The proceedings which have given rise to the petition for special leave were commenced on 10 May 1995 with the filing of an originating summons in the High Court of Fiji at Suva. The Plaintiffs are members of the Yavusa Burenitu. Mesulame Narawa is a former member of parliament. The other Plaintiff, Raitube Matanabua, is the Paramount Chief of the Yavusa. Each of them sued as joint representative of the members of the Yavusa Burenitu. Their summons named as defendants the present Petitioner, the board, the Conservator of Forest, the Ministry of Agriculture Fisheries & Forests, Timbers (Fiji) and the Attorney-General of Fiji.

[5] The Plaintiffs claimed declarations that Timbers (Fiji) was in breach of the two concession agreements, that the board was not acting as required by the Native Land Trust Act in that it failed to administer them for the benefit of the Fijian owners, and that it was in breach of its fiduciary duties to the members of the Yavusa Burenitu by condoning and supporting the continuing breaches of Timbers (Fiji). They sought mandamus directing the board and the conservator to immediately terminate the concession agreements because of the breaches. They also sought a declaration that a scheme of arrangement entered into by the timber company in March 1992 was void. Injunctive relief was claimed and an order that the board and Timbers (Fiji) pay to the Yavusa Burenitu the sum of $8.5 million owing as royalty payments together with interest.

[6] On 6 December 1995 the board filed a summons seeking an order to dismiss the action on the ground that the Plaintiffs had no standing to institute the proceedings. The application was made pursuant to O 18 r 18 and O 15 r 14 of the Rules of the High Court and also invoked its inherent jurisdiction.

[7] The matter came on for hearing before the primary judge on 8 March 1996. For reasons which do not appear with any clarity from the record, judgment was not delivered until 16 December 1998. His Lordship held that the Plaintiffs had no standing to bring or continue the action. The operative part of his Lordship's order was in the following terms:

> IT IS HEREBY ORDERED that the Plaintiffs have no "locus standi" to bring or continue the present action and it is accordingly dismissed with costs to the Defendants to be taxed if not agreed.

[8] A notice of appeal was filed from this decision to the Court of Appeal on 7 April 1999 pursuant to leave granted by the learned primary judge on 26 March 1999. On 31 May 2002 the Court of Appeal made orders allowing the appeal and quashing the order made by the High Court dismissing the proceedings. It also ordered that the proceedings be converted into an ordinary action and that the Plaintiffs file a statement of claim within 21 days of the judgment. The court awarded costs to the Plaintiffs, fixed at $2000. There was no challenge to the order of the learned primary judge striking the action out as against the Ministry of Agriculture, Fisheries & Forest and as against the Attorney-General.

[9] On 29 August 2002 Gallen J, sitting as a judge of the Supreme Court, made an order extending the time within which the board could lodge a petition for special leave to appeal from the decision of the Court of Appeal. The time was extended for a period of 14 days from 29 August 2002. The petition was filed on 11 September 2002.

The basis of the claim

[10] According to an affidavit in support of the originating summons sworn by Mr Narawa, the members of Yavusa Burenitu are the Fijian owners of the land comprised in the two agreements. The board is given the control of "*native lands*" under s 4 of the Native Land Trust Act and is required to administer such lands "*for the benefit of the Fijian owners*". Section 14 of the Act provides for the distribution of "*rents and premiums received in respect of leases or licenses in respect of native land … in the manner prescribed*" after deduction of such amount as the board shall determine. Regulation 11 of the Native Land Trust (Leases and License) Regulations requires distribution of 70% of the balance to "*the proprietary unit*".

[11] It was asserted in Mr Narawa's affidavit that the board, after deductions of its statutory poundage, was required to disburse the moneys to the members of the Yavusa Burenitu. Since the agreements had been entered into, the company had failed to make the requisite payments consistently and was in arrears. The board, it was said, had neglected to compel the timber company to adhere to the concession agreement to the detriment of the Yavusa Burenitu.

[12] In March 1992 the timber company is said to have entered into a scheme of arrangement with its creditors under the provisions of the Companies Act Cap 247. It allegedly failed to disclose to the court approving the scheme that it owed royalty payments payable to the Yavusa Burenitu under the minimum and maximum cut provisions of both the concession agreements. This non-disclosure, according to the affidavit, voided the whole scheme of arrangement. It was also alleged by Mr Narawa that the board had acted negligently and in breach of its fiduciary duties to the Yavusa Burenitu in failing to advise the court and the timber company that unpaid royalties were in fact owed to members of the Yavusa.

Reasons for judgment of the primary judge

[13] In his reasons for judgment his Lordship indicated that he regarded the third and fifth defendants, namely, the Ministry of Agriculture, Fisheries & Forest and the Attorney-General, as unnecessary parties. They were struck out under O 15 r 6(2)(a).

[14] His Lordship characterised the action before him as one which purported to be representative pursuant to O 15 r 14 of the High Court Rules. It asserted "*collective rights*" belonging to the respective mataqalis as owners of the land over which the timber concessions were granted and of which, it was common ground, neither the Plaintiffs nor the Yavusa Burenitu nor the 11 mataqalis nor their individual members were parties or signatories.

[15] His Honour focused upon the requirement that parties to a representative action have a common interest. In this context he referred to the nature of a mataqali and the decision of Rooney J in *Timoci Bavadra v Native Land Trust Board* [1986] FJSC 13 where leave was sought to institute a representative action on behalf of a tokatoka of which the Plaintiff was a member. In that case Rooney J had held that the establishment of a common interest and common grievance, necessary for the institution of representative proceedings, would present formidable difficulties unless the Plaintiff could show that the constitution, management and functions of the native land holding unit met that requirement. In respect of the mataqali the learned primary judge himself had said in *Naimisio Dikau No 1 v Native Land Trust Board* (unreported, CA No 801

of 1984), that it could not be equated with any institution known and recognised by common law or by a statute of general application. He had said:

> The composition, function and management of a mataqali and the regulation of the rights of members in relation to each other and to persons and things outside it are governed by a customary law separate from and independent of the general law administered in this court.

Applying that proposition his Lordship held that it was not at all clear that the various mataqalis within the Yavusa Burenitu had either a common interest or purpose in the proceedings or that the relief sought, especially the cancellation of the concession agreements, would be beneficial to all of them. On this basis he found the Plaintiffs to have no standing to bring or continue with the action and dismissed it accordingly.

Reasons for judgment of the Court of Appeal

[16] The court considered the legal position of the mataqalis. It accepted as "*clearly established*" that an individual member of a mataqali could not sue and recover damages personally where damage had been suffered by the group — *Meli Kaliavu v Native Land Trust Board* [1956–7] 5 FLR 17; *Naimisio Dikau No 1 v Native Land Trust Board* (unreported, CA No 801/1984) (*Naimisio Dikau No 1*); and *Waisake Ratu No 2 v Native Land Development Corporation* [1987] 37 FLR 146 (*Waisake Ratu No 2*). The court referred to divergent views expressed by Rooney J in *Naimisio Dikau No 1* and Cullinan J in *Waisake Ratu No 2* on the question whether the traditional interests of a mataqali could be recognised under Fijian law. In the latter case, Cullinan J said that he did not consider that a mataqali or a tokatoka was an institution alien to the applied law of Fiji. It did not require judicial ingenuity to equate either of these bodies to an unincorporated association. Their members shared a communal proprietary interest. While land holding might be individual in places they were none the less communal proprietary rights such as those over the veiku or forest. Cullinan J had said:

> Such groups are of common agnatic descent, the individual membership and leadership and the physical location and proprietary rights of which are by statute recorded in the Register of Native Lands, preserved by the Registrar of Titles. Not only has the mataqali been recognised as a central proprietary unit by the statute law of Fiji for over a hundred years now (to the extent indeed that the law provides for the devolution of the lands of an extinct mataqali), so also have all the individual divisions of the Fijian people by the act of statutory registration. How then can any of those groups be regarded as alien to such statute law?

[17] The Court of Appeal referred to various authorities relating to the common law recognition of customary title including *Re Southern Rhodesia* [1999] AC 211; *Amodu Tijani v Southern Nigeria Secretary* [1921] 2 AC 399; and *Mabo v Queensland* (1992) 175 CLR 1; 107 ALR 1 (*Mabo*). The court then said:

> These and other authorities to which we were referred put beyond doubt the proposition that native customary rights and obligations may be recognized by the common law and enforced in the courts. More particularly, in the case of mataqali, it may, by representative action or by action brought by all those belonging to the mataqali as an unincorporated association, bring proceedings in the court seeking common law or equitable remedies for any breach of rights it is able to establish.

[18] The court took the view that, in reaching his conclusion that the Plaintiffs lacked standing to bring the proceedings, the learned primary judge had relied, at least in part, on the principles stated by Rooney J which the Court of Appeal

found to be incorrect. His Honour had thereby erred in law. As will appear from these reasons it is unnecessary in this case for the court to express any view on the matter which is of considerable importance and is best considered in the light of findings of fact after trial.

[19] The court considered the representative character of the action and whether the primary judge was right to conclude that the Plaintiffs lacked the standing necessary for them to bring the proceedings in a representative capacity. It referred to O 15 r 14 of the High Court Rules noting that the only requirement of the rule is that persons intending to be represented have "*the same interest in the proceedings*". Counsel for the board submitted to the Court of Appeal that if an individual litigant, a member of a proprietary unit, wanted to pursue an infringement of a communal right he would need the majority support of the unit which he sought to represent before he could pursue such proceedings. The Court of Appeal did not accept that submission. There was nothing in the rule to suggest that requirement. The cases made it clear that the person seeking to bring an action in a representative capacity did not have to obtain the consent of those whom he purported to represent — *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021 at 1039.

[20] Their Lordships concluded that the Plaintiffs should be permitted to bring their proceedings on a representative basis. All of the members of the mataqalis had a common interest in ensuring that their agreements are being properly administered by the board and that they receive whatever is due to them from their agreements. If the agreements had not been properly administered and Timbers (Fiji) were guilty of breaches for which damages had been payable but had not been claimed, the members would also have a common grievance. Whether that were so in fact could only be determined at trial. It was also apparent from affidavits filed that a substantial number of members of the mataqalis supported the Plaintiffs in their action. It was also apparent that a substantial number did not. But they did not appear to be advocating a different course of action, rather they favoured taking no action at all. If the action were to succeed they would share in its fruits. If it did not, they would not be liable for costs.

[21] There was, in any event, no other course open to the Plaintiffs. They could not sue personally nor bring an action as an unincorporated association because they would not obtain unanimity. In addition, the Plaintiffs were persons of standing. The court accepted that they were likely to have acted responsibly in bringing the proceedings.

The grounds of the petition

[22] There were some 12 grounds of appeal some of which were of little substance and arose out of references by the Court of Appeal to the views of members of the group, the status of the Respondents/Plaintiffs and the availability of other remedies. It may be said immediately that none of these would warrant the grant of special leave to appeal. Of the remaining grounds, 2.1–2.7 were in the following terms:

> 2.1 in reversing the judgments of Rooney, J in *Naimisio Dakai No 1 v Native Land Trust Board* (unreported, Civil Action No 801 of 1984) and *Timoci Bavadra v Native Land Trust Board* [1986] FJSC 13, by holding that a Mataqali may by representative action or by action brought by all those

belonging to the Mataqali as an unincorporated association, bring proceedings in court seeking common law or equitable remedies for any breach of rights it is able to establish;

2.2 in holding that Rooney, J was wrong in holding that a tokatoka or a Mataqali are institutions alien to and not recognised by the common law and in agreeing with the views expressed by Cullinan J in *Waisake Ratu No 2 v Native Land Development Corporation* [1987] 37 FLR 146;

2.3 finding that the proceedings instituted by the Respondents/Plaintiffs were properly constituted representative actions, contrary to Fijian custom and in dimunition of customary law when such rights, custom, laws and usages are constitutionally recognised and protected under sections 6(b) and 186 of the Constitution;

2.4 holding that the Respondents/Plaintiffs had the necessary locus standi to bring or continue the present proceedings against the Petitioner on behalf of their own and other Mataqali, when the respective Mataqali had no authority under customary law to do so;

2.5 in failing to consider that the decision making process of Mataqalis generally, and specifically in relation to the issue of whether to institute a court action or not, is according to customary law through a process of consensus, thus disregarding customary law;

2.6 in applying *John v Rees* [1970] 1 Ch 345 and *Markt & Co v Knight Steamship Co* [1910] 2 KB 1021 at 1039 to the circumstances of the present case, by holding that the person seeking to bring an action in a representative capacity including native Fijians does not have to obtain the consent of all or some of those he purports to represent;

2.7 in finding that the members of the Mataqalis had a common interest, common grievance and that if the causes of action were made out, the relief obtained would likely to be beneficial to the members or at least most of them;

The grounds for the grant of special leave

[23] According to the petition the case gives rise to far-reaching questions of law, is a matter of great general public importance and is otherwise of substantial general interest to the administration of civil justice. The questions are identified thus:

4.1 Whether a Mataqali can be equated with any institution known and recognised by common law or statute of general application;

4.2 Whether a Mataqali, by representative action or action brought by all those belonging to the Mataqali as an unincorporated association, or by any other means:

4.2.1 has legal standing/locus standi; and/or

4.2.2 has a right to sue and be sued in the courts; and/or

4.2.3 may bring proceedings in the court seeking common law or equitable remedies for any breach of rights it is able to establish;

4.3 To what or any extent are native customary rights and obligations subject to the common law if at all and to the consequent diminution of their application when such rights are protected under the Constitution;

4.4 Whether an individual litigant or member of a Mataqali requires the consent or support of the majority of the proprietary unit which he seeks to represent before he can institute proceedings.

Constitutional and statutory framework

[24] Chapter 9 of the Constitution provides for the judiciary. Section 117 vests the judicial power of the state in the High Court, the Court of Appeal and the Supreme Court and such other courts as are created by law. The Supreme Court

is designated in s 117(2) as "the final appellate court of the State". The jurisdiction of the High Court, the Court of Appeal and the Supreme Court is both constitutional and statutory as appears from s 119:

> Each of the High Court, the Court of Appeal and the Supreme Court has the jurisdiction, including the inherent jurisdiction, conferred on it (or, in the case of the Court of Appeal, conferred on the Fiji Court of Appeal) immediately before the commencement of this Constitution and any further jurisdiction conferred on it by this Constitution or by any written law.

There was provision in the 1990 Constitution relating to the jurisdiction of each of the courts. The extent, if any, to which that jurisdiction is imported into the 1997 Constitution or subsumed by all or some of its provisions, was not agitated before us and can await consideration on another occasion.

[25] Under the 1997 Constitution the jurisdiction of the High Court is "*unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law and such other original jurisdiction as is conferred on it under this Constitution*": s 120(1). It has original jurisdiction in matters arising under the Constitution or involving its interpretation: s 120(2). It also has such jurisdiction as parliament confers upon it to hear and determine appeals from all judgments of subordinate courts: s 120(3).

[26] The jurisdiction of the Court of Appeal is set out in s 121 as follows:

> (1) The Court of Appeal has jurisdiction, subject to this Constitution and to such requirements as the Parliament prescribes, to hear and determine appeals from all judgments of the High Court, and has such other jurisdiction as is conferred by law.
>
> (2) Appeals lie to the Court of Appeal as of right from a final judgment of the High Court in any matter arising under this Constitution or involving its interpretation.
>
> (3) The Parliament may provide that appeals lie to the Court of Appeal, as of right or with leave, from other judgments of the High Court in accordance with such requirements as the Parliament prescribes.

[27] Section 122 of the Constitution 1997 defines the jurisdiction of the Supreme Court in the following terms:

> (1) The Supreme Court has exclusive jurisdiction, subject to such requirements as the Parliament prescribes, to hear and determine appeals from all final judgments of the Court of Appeal.
>
> (2) An appeal may not be brought from a final judgment of the Court of Appeal unless:
>
> (a) the Court of Appeal gives leave to appeal on a question certified by it to be of significant public importance; or
>
> (b) the Supreme Court gives special leave to appeal.
>
> (3) In the exercise of its appellate jurisdiction the Supreme Court has power to review, vary, set aside or affirm decisions or orders of the Court of Appeal and may make such orders (including an order for a new trial and an order for award of costs) as are necessary for the administration of justice.
>
> (4) Decisions of the Supreme Court are, subject to subsection (5), binding on the courts of the State.
>
> (5) The Supreme Court may review any judgment, pronouncement or order made by it.

[28] The Supreme Court Act 1998 makes provision for the criteria applying to the grant of special leave. Relevantly, s 7(3) of the Act provides:

In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case raises—

(a) a far-reaching question of law;

(b) a matter of great general or public importance;

(c) a matter that is otherwise of substantial general interest to the administration of civil justice.

[29] The Court of Appeal Act 1978 provides, in s 3, that appeals to that court lie as of right from final judgment of the High Court given in the exercise of the original jurisdiction of the High Court.

The competency question — Whether there was a final judgment of the Court of Appeal

[30] The Respondents take the threshold point that the judgment of the Court of Appeal, which is the subject of the petition, was not a final judgment. They submit that the decision of the Court of Appeal did not fully dispose of the rights of the parties which had not been decided at all. The effect of the decision was to allow the rights of the parties to be determined after a trial. The construction and operation of the relevant statutes, the agreements, the law, if any, applicable in the case and the basis of the entitlements claimed by the Respondents are yet to be determined.

[31] The Petitioner submits that the decision appealed from is a final judgment. It so submits on the basis that the decision of the learned primary judge dismissing the application for want of standing on the part of the Respondents was itself a final judgment. The Petitioner relies entirely upon cases dealing with the question of leave to appeal from a single judge to an appellate court. The cases all concern the question whether the decision of a judge at first instance was final or interlocutory for the purpose of determining whether there is a need to obtain leave to appeal to an intermediate appellate court. Seeking to characterise the decision of the trial judge in this case as final, the Petitioner then submits that as a consequence the Court of Appeal decision was final.

[32] The distinction between final and interlocutory judgments has been described as a question "*productive of much difficulty*" — *Carr v Finance Co of Australia Ltd (No 1)* (1981) 147 CLR 246 at 248; 34 ALR 449 at 450. Generally speaking however, the difficulties of classification arising under rules of court regulating appeals to intermediate appellate courts can be overcome by the sensible use of the discretion to grant leave to appeal. The policy of the rules requiring leave to appeal from interlocutory decisions is that the time and resources of appellate courts should not lightly be taken up with appeals about decisions which do not fully determine the rights of the parties. The underlying policy is one of efficient case management. The interlocutory orders to which it applies may cover a range of cases from those only concerned with matters of procedure and pre-trial management to those which may have a significant impact on the scope and outcome of the proceedings. Some decisions, while technically interlocutory, may be to all intents and purposes final. In such cases "a prima facie case exists for granting leave to appeal" — *Re Bucknell* (1936) 56 CLR 221 at 275; [1937] ALR 332; *Decor Corp Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 400; 104 ALR 621 at 624. When a proceeding is dismissed for want of a reasonable cause of action the decision may be treated as interlocutory — *Hunt v Allied Bakeries Ltd* [1956] 1 WLR 1326; [1956] 3 All ER 513; compare *Mickelberg v 6PR Southern Cross Radio Pty Ltd* [2001] WASC 267; *Florida Investments Pty Ltd v Milstern (Holdings) Pty Ltd*

[1972] WAR 148. But leave will usually be granted in such a case where there is any doubt about the decision at first instance — *Little v Victoria* [1998] 4 VR 596 at 598–601. See generally the discussion in *Johnson Tiles Pty Ltd v Esso Australia Ltd* (2000) 104 FCR 564; [2000] FCA 1572 at 583–84.

[33] The arguments were directed primarily to the long-standing divergence in applicable principles between the "*application approach*" and the "*order approach*". But we are not persuaded that either is appropriate in the circumstances in which s 122 is to be applied.

[34] The term "*all final judgments*" appears in s 122 of the Constitution and defines the jurisdiction of the Supreme Court in relation to appeals from the Court of Appeal. There is no discretion available under the Constitution to allow the Supreme Court to entertain applications for leave to appeal against decisions of the Court of Appeal which are not final. The construction of the term "*all final judgments*" in s 122 is not linked to a case management regime that will mitigate the injustice or inconvenience that might otherwise be worked by the fine distinctions developed under the existing case law. Having regard to its use as a constitutional term and its functions in defining the jurisdiction of the Supreme Court, the term "*final judgment*" may require a wider interpretation than that which has evolved under rules of court in various jurisdictions.

[35] The word "*final*" qualifies the class "*judgments of the Court of Appeal*" and on that basis refers to the decisions upon proceedings in that court. That could be construed as referring to the disposition of appeals whether they have been brought as of right from final judgments of the High Court or by leave from interlocutory judgments of that court. The question would then arise what work is to be done by the word "*final*" in relation to the Court of Appeal on this construction. It would exclude from the jurisdiction of the Supreme Court a range of interlocutory decisions which may be made in the Court of Appeal including decisions granting of withholding leave to appeal, decisions extending or refusing extensions of time, decisions providing for the stay of execution or of proceedings under the judgment at first instance and decisions relating to security for costs and the grant or withholding of bail pending appeal in criminal cases. When reference is made to these matters it can be argued that there is a purpose to be served by the word "*final*" when used to refer to judgments of the Court of Appeal in relation to appellate proceedings.

[36] This construction would confer upon the Supreme Court jurisdiction that would extend to appeals from the Court of Appeal covering a whole range of interlocutory decisions of greater or lesser import in the High Court. Thus appeals heard in the Court of Appeal by leave might include appeals on questions of pleading or discovery, security for costs, bail and the like. The jurisdiction of the Supreme Court, it may be said, should not be construed as covering such a wide range of matters many of insufficient importance to warrant its attention.

[37] It is to be kept in mind, however, that the Supreme Court is able, through the special leave requirement, to ensure that only those matters which are of sufficient importance to warrant the grant of special leave come to it. Further, as has been demonstrated in other jurisdictions, there are occasions when matters of great public importance may arise out of interlocutory decisions. Issues of public interest immunity, legal professional privilege and the privilege against self-incrimination may arise in the context of discovery. An important question of law may be involved in a decision striking out a pleading and it may be appropriate and convenient to decide that question of law on the pleaded facts.

The constitutional jurisdiction of the court should not be so construed as to prevent these matters, in appropriate cases, from being heard and determined by it.

The present case

[38] The broader constructional issues were not fully argued before us, and, in any event, it is not necessary to come to a final and concluded view about the proper construction of s 122(1). That is because, for reasons that follow, this is, a case in which, even if there is jurisdiction, special leave clearly should not be granted.

[39] The criteria for the grant of special leave under s 7(3) of the Supreme Court Act establish the necessary conditions for such a grant. There remains a discretion whether to make such a grant when those conditions have been established.

[40] There is no doubt that the present case could give rise to far-reaching matters of law and matters of great public importance concerning, inter alia, the nature of the relationship between customary land-owning groups in Fiji and the land which they own, the nature of individual interests if any which arise out of customary communal entitlements and whether or not such entitlements, communal or individual can be recognised by the common law. The role of existing statutory provisions in relation to such interests is also of great significance.

[41] That much having been said, the Court of Appeal has, by its decision, set aside a judgment summarily dismissing the proceeding and remitted it to the High Court so that the action may proceed in the normal manner. The issue at the present stage of the proceeding is not really one of locus standi but rather whether the appellants and those they claim to represent have a sufficient cause of action. That is a complex factual and legal issue. The important questions of law which may arise are not able to be determined on the basis of vague and untested assertions of fact. It is best that those questions, if the proceedings continue, be ultimately considered in the light of findings of fact by a trial judge after hearing evidence. In so far as this case may give rise to questions similar to those considered by the High Court of Australia in *Mabo (No 2)*, it is important to note that in that case the High Court only made its decision after evidence had been taken and facts found by a judge of the Supreme Court of Queensland over many weeks which involved a detailed consideration of customary law and tradition, and the nature of the connection of the Mer People with their land and of individual interests arising in relation to it. In *Te Weehi v Regional Fisheries Office* (1986) 1 NZLR 680 at 691, Williamson J observed:

> … the investigation of any particular customary right claimed is a detailed process requiring evidence of a convincing nature.

It is simply not appropriate at this stage of these proceedings to determine the important questions of law, to which it is said they give rise, in a factual and evidentiary vacuum. For these reasons special leave should be refused.

Order

(1) Special leave to appeal is refused.

Petition dismissed.