IN THE SUPREME COURT OF FIJI
[CIVIL APPELLATE JURISDICTION]

Civil Petition No: CBV 0005 of 2019
[Court of Appeal No: ABU0040/16;
High Court No: HBC 204/2012]

BETWEEN : **ADI MARICA NAI DAWAI**

Petitioner

AND : **iTAUKEI LAND TRUST BOARD**

Respondent

Coram : **Hon Acting Chief Justice Salesi Temo, Acting President of the Supreme Court**
Hon Madam Justice Lowell Goddard, Judge of the Supreme Court
Hon Mr Justice Filimone Jitoko, Judge of the Supreme Court

Counsel : **Mr S. Nacolawa for the Petitioner**
Mr J. Cati for the Respondent

Date of Hearing: **15 August, 2023**

Date of Judgment: **31 August, 2023**

JUDGMENT

Temo, AP

[1] I have read the judgment of Her Ladyship Madam Justice Lowell Goddard. I agree entirely with her views, reasons and conclusions. I also agree to her proposed orders.

Goddard, J

[2] The petitioner is the daughter of the late Ratu Napolini Naulia Dawai (Ratu Napolini) of Nakavu Village and is administratrix *de bonis non* of his estate. Ratu Napolini died in October 2008.

[3] The petitioner seeks the special leave of this Court to appeal from a decision of the Court of Appeal delivered on 1 March 2018, dismissing her predecessor's appeal from a judgment of the High Court delivered on 15 April 2016.

[4] The matter has a long history dating back to 1994 and concerns the payment of statutory entitlements to the late Ratu Napolini as Tui Nadi the paramount chief of the Vanua of Nadi out of lease monies collected by the respondent. The central issue is whether those statutory entitlements and the lease monies collected pursuant to them were held in trust by the respondent for the late Ratu Napolini during a particular period of his tenure as Tui Nadi and should have formed part of his estate following his death.

[5] Both the High Court and the Court of Appeal found that the monies were not payable to the estate because of an amendment to the governing regulations. This amendment came into force three years after Ratu Napolini's death and abrogated the payment of the Tui Nadi entitlements from 1 January 2011.

[6] Four grounds of appeal are pleaded in the petition for special leave, as follows:

> *(1) That the learned Judges of Appeal erred in law in disallowing the Petitioner's Appeal from the High Court by reason of the following:-*
>
> > *(a) That the Learned Judge of Appeal erred in not considering that the purpose of funds claimed by the Appellant had already been allocated to the Tui Nadi and the new regulation namely the Native Land Trust (Leases and Licences) (Amendment) Regulation 2010 did not apply to the funds already distributed but held in Trust for the late Tui Nadi.*

(b) That the Appellants claim did not come within the ambit of the new regulation by reason of its special circumstances and the non-retrospective effect of the New Regulation.

(2) That issues arising out of this case present a far reaching question of law to be determined in respect of funds held in Trust for one party being reverted to general funds upon the demise of the same.

(3) That the prosecution of the Appeals also raises issues of substantial general importance as to the entitlement of funds held in statutory trust.

(4) That the within Appeal also raises a matter that is otherwise of substantial general interest to the administration of civil justice in regards to injunction of entitlement – where the money goes to when the injunction discontinues."

The statutory scheme

[7] Up until 1 January 2011, the statutory entitlements at issue in this appeal were payable to the Tui Nadi in his chiefly roles as Turaga ni Mataqali, Turaga ni Yavusa and Turaga iTaukei of the Vanua of Nadi. Payment of each of those chiefly entitlements was calculated in percentages under regulation 11 of section 33 of the Native Lands Trust (Lease and Licences) Amendment Regulation, as follows:

"11.-(1) After deduction of any sums in accordance with section 14 of the Act, the balance of any monies received by the Board by way of rents and premiums in respect of native land shall be distributed by the Board as follows:-

(a) to the proprietary unit, seventy per cent;
(b) to the Turaga ni Mataqali, fifteen per cent;
(c) to the Turaga ni Yavusa, ten per cent;
(d) to the Turaga iTaukei, five per cent.

(2) Where the Board has determined that any purchase monies received in respect of the sale or other disposition of native land shall be distributed, after the deduction therefrom of any expenses incurred by the Board in respect of such sale or other disposition, the balance thereof shall be distributed in accordance with paragraph (1).

(3) Where there is more than one division or subdivision of the people within the same proprietary unit, the Turaga of the same status shall

share equally the sum payable to them under paragraph (1) irrespective of whether or not any other sum is payable to any of them under that paragraph in their capacity as Turaga of any other division or subdivision within such proprietary."

[8] On 31 December 2010, an amendment to regulation 11 was passed. It came into force on 1 January 2011 and provides as follows:

iTaukei Land Trust (Leases and Licenses) Regulations 2010

(i) After deduction of any sums in accordance with section 14 of the Act, ***the balance of any moneys received*** *by the Board by way of rents and premiums in respect of Native Land including any monies received by the Board* ***but not yet distributed at date of commencement of the Native Land Trust (Leases and Licenses) (Amendment) Regulations 2010****, shall be distributed by the Board to all the living members of the proprietary unit, in equal proportion.* (emphasis added)

[9] Section 1(2) of this amended regulation provided for the new regulatory directive to become effective from 1 January 2011, as follows:

"These Regulations shall come into force on 1st January, 2011."
(emphasis added)

[10] The highlighted wording of the above regulations make it clear that the amendments were intended to be forward looking. There is no express directive rendering the amended regulations to be retrospective in effect, as per section 22 Interpretation Act 1967. The accepted rule is that, without clear words to the contrary, statutes do not apply to the past. They apply to a future state or circumstance. Therefore, if the legislative drafters of the amendment to regulation 11 had intended it to be retrospective in effect, they would have stated so in clear terms. In contrast, the wording of section 1(2) of the amended regulation makes it expressly clear that the new regulation is prospective and will not come into effect until 1 January 2011.

[11] The issue of retrospectivity assumed a degree of prominence in the judgment of the Court of Appeal and will be referred to again later.

Brief overview of events

[12] Ratu Napolini was first appointed Tui Nadi in 1994 and later confirmed in the role in 1997, following a legal challenge by a rival faction which had sought to install Ratu Isireli Rokomatu Namulo of their lineage as Tui Nadi. It is common ground that, notwithstanding this challenge, Ratu Napolini received all of the statutory entitlements due to him as Tui Nadi from November 1994 until 6 March 2000.

[13] However, dissension between the two factions over which lineage was entitled to the appointment of Tui Nadi and whether Ratu Napolioni was the rightful holder of this chiefly title, continued to fester for many years and proved very divisive. It was not until 2013, some five years after Ratu Napolioni's death in October 2008, that a final and definitive determination confirming him as the rightful Tui Nadi was made. The long and ongoing history of the dissension and the numerous rulings in relation to it were traversed by Hon Justice Tuilevuka when the matter came before him in the High Court in 2016, *Dawai v iTaukei Land Trust Board:* [1]

> *"4. For many years ...., the people of Nadi were divided over the question as to which of the two lineages had a better and a stronger claim to the Tui Nadi title.*
>
> *5. Notably, the i-Taukei Lands Commission **("i-TLC")** which is the body established under the Native Lands Act to resolve such disputes, has maintained right throughout in its many deliberations on the issue, that the lineage of which Ratu Napolioni was a descendant, and installed as Tui Nadi, is the rightful one out of which the Tui Nadi is to be appointed.*
>
> *6. Many judicial review applications were filed to challenge the decisions of the i-TLC. Some civil actions were also filed. All of these hinged one way or another on the basic question – which of the two lineages is the rightful one.*

[1] [2016] FJHC 275; HBC240.2012 (15 April 2016)

*7. Notably also, the Courts have, right through, been unwavering in their position that the i-TLC, and the i-Taukei Lands Appeals Tribunal **("i-TLAT")** which is the appellate body established under the Native Lands Act, are appropriate forums to determine and settle all such disputes.*

8. A review of the many Court decisions will show that the rival faction has been adamant and unrelenting in its position that its lineage has a better claim to the Tui Nadi title.

9. I am aware of the fact, and of which fact I take judicial notice, that in December 2011, the i-TLC ruled yet again, in favour of the same lineage out of which Ratu Napolioni had descended. That decision was appealed to the i-TLAT by the rival faction. In June 2013 the i-TLAT would affirm the i-TLC decision.

10. Suffice it to say that it is common ground between the parties that the issue, as between the two lineages, is now settled once and for all. If I may just say so at this time, by the time the i-TLC settled the issue in June 2013, Ratu Napolioni had been dead for some five years or so."

[14] As is clear from the above history traversed by Tuilevuka J, the appropriate decision-making forums (the i-Taukei Lands Commission and the i-Taukei Lands Appeals Tribunal) consistently held over a 13 year period that Ratu Napolini was of the rightful lineage to be appointed Tui Nadi, a finding that was also consistently acknowledged by the respondent.

[15] During this lengthy saga, one particular challenge in 1999 was to have a salutary effect on the history of events and its effect is at the heart of this petition for special leave. In 1999, Ratu Isireli Rokomatu Namulo commenced a judicial review proceeding in the High Court, once again challenging the appointment of Ratu Napolini and alleging breaches of the rules of natural justice by a number of respondents on a number of grounds and inter alia seeking an order in the following terms:

*"**AN ORDER** that pending the determination of this application for Judicial Review or until the Court orders otherwise the Native Land Trust Board ("the 4th Respondent") by their servants and/or agents whomsoever be restrained by*

way of an injunction from paying out lease monies payable to the Turaga Tui Nadi to the 6th Respondent(Ratu Napolini)."

[16] The proceeding came before Townsley J[2], who declined to make any order as to who should be appointed Tui Nadi. However, he issued the injunction sought against the Native Land and Fisheries Commission and the Native Land Trust Board, although not in terms specifically prohibiting Tui Nadi payments to Ratu Napolini as the 6th defendant but in the following more general terms:

> *"(2) That an injunction issue against the 2nd (Native Land Fisheries Commission) and 4th (Native Land Trust Board) Respondents their servants or agents or otherwise howsoever debarring them from paying any monies or benefits, payable to the holder of the office of Tui Nadi to any person* ***until further order of an appropriate Court."*** (emphasis added)

[17] As it happened, there was no further order of an appropriate Court for 16 years and the injunction remained in force until the High Court decision of Tuilevuka J[3] on 15 April 2016. During that period, the chiefly entitlements payable to the Tui Nadi, including those payable to Ratu Napolini as Tui Nadi during the period 6 March 2000 until his death in October 2008, remained frozen and in trust with the respondent until the amendment to regulation 11 came into force on 1 January 2011. At least, that was the situation in theory.

[18] Following the 1 January 2011 change in the regulatory directive, the respondent adopted the expedient of disbursing all monies it was holding in accordance with the new directive but without consideration of the nature of funds it was disbursing. The respondents explanation for this indiscriminate wholesale distribution, when later opposing the petitioner's claim for payment of the Tui Nadi entitlement to Ratu Napolini's estate, was that such entitlements were not part of the personal estate of an i-Taukei person and such

[2] Citation in here please
[3] supra

"..entitlement is only while you are still alive, when an i-Taukei person dies, all entitlements to lease moneys ceases at the point of death."4

[19] As a finale to his dismissing the petitioner's application in the High Court for payment to the estate of the sum of money that would have been paid to Ratu Napolini from 6 March 2000 until his death in October 2008 **but** for the injunction, Tuilevuka J made the following observation:

> *"I need to comment here though that the iTLTB should have at least had the courtesy, before distributing the monies pursuant to the 2010 Decree, to formerly apply to Court to dissolve or set-aside the Townsley-J injunction."*

[20] Although the injunction was not expunged until Tuilevuka J's judgment in 2016 and the respondent made no move to have it discharged during that period, certain sums of money were in fact paid out by the respondent to Ratu Napolini and another during 2007 and 2008 in contravention of the injunction, a matter that will be discussed further.

The decision in the High Court

[21] The ratio of the High Court decision is found in the passages set out below. The decision turned on the issue of life and death and whether a chiefly emolument paid during the lifetime of an office holder was a personal property right or simply attached to the office rather than being the entitlement of the office holder – and whether any unpaid part of the emolument as at the time of death should be regarded as money owing to the office holder or whether the debt was automatically extinguished by the event of death. Tuilevuka J found that, regardless of the 2011 change in the regulatory scheme, the entitlement was not a personal emolument and could not be accessed or be recoverable after death. His findings are as follows:

> *31. The monies that the i-TLTB was holding pursuant to the Townsley J-injunction was **"monies received by the Board"** in terms of the 2010 Decree. At the*

[4] Para 7, Court of Appeal judgment, 8 March 2018.

commencement of the Decree on 01 January 2011, those monies had not been distributed because of the Townsley J-injunction. The decree directed that the monies henceforth, be distributed ***to all of the living members of the proprietary unit in equal proportions****. This was what the i-TLTB did.*

32. Since Ratu Napolioni was, then, no longer a ***"living member of the proprietary unit"****, he was not entitled to any share at the time the 2010 Decree came into force.*

33. In my view, the same would apply even if the old section 11-scheme had not been repealed by the 2010 Decree. In other words, the issue here is not about whether the new scheme disentitled Ratu Napolioni in any way from what he would otherwise have been entitled to under the old scheme. If that had been the issue, the answer would have been the same anyhow.

34. Rather, the case is about whether monies held by the i-TLTB form part of the personal property of a member of a proprietary unit and, accordingly, whether the personal representative of a deceased member of the proprietary unit can claim for such monies from the i-TLTB."

The judgment of the Court of Appeal

[22] The case came before the Court of Appeal in February 2018 and judgment was delivered on 8 March 2018, dismissing the appeal.

[23] The following passages from the Court of Appeal's judgment explain the essential reasoning underpinning their Lordships' judgment, which essentially also turned on the fact of death as a cut-off point and the "*devolution"* of lifetime entitlements as an extraneous matter.

……..

[11] "Despite the amended legislation being in force at the time of filing the original action in 2012 and therefore could be assumed, of explicit relevance to the action, the parties have heavily relied on extraneous aspects such as whether the monies have become part of the estate, the devolution of the said entitlements, etc. However, it is imperative now for this Court to take cognizance of the amended regulations dated 31/12/2010 and to interpret the text of the said amendment which will eventually have a material bearing on the fate of the matter at hand.

[*12] As aforementioned, a ruling on the deceased Tui Nadi's entitlements and their devolution now becomes redundant in view of the new amendment. Hence, I will advert my attention only to the new amendment and its applicability to the entitlements of the deceased in responding to grounds of appeal 3-6 averred by the Appellant.*

…….

[14] The most important issue before this court is whether this amendment operates with retrospective effect the underlying assumption being that if a finding of retrospective applicability is made, the relevant grounds of appeal fail and if the converse is true, the appeal succeeds.

……

*[16] In the pursuit of such, as is indisputably accepted, the first point of departure is the primacy of the text of the statute which requires the adoption of a literal interpretation by judges. It is understood that the intention of the legislature could be found within the folds of the text itself. It is also presumed that the legislature intended every word or phrase it has used to bear particular meaning and has avoided superfluity. As held in **Income Tax Commissioners v Pemsel**, [1891] A.C 534, at 543 and **River Wear Commissioner v Adamson**, [1877] 2 App. Cas 743, at 778 stated:*

"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case best declare the intention of the law giver"

*Further, Lord Campbell in the case of **R v Finchley Surveyors, Exp Pouncey**, (1854) 2 CLR 1583 stated:*

"We have no jurisdiction to review Acts of Parliament; we sit here to construe the law, not to make it. If the words admit of only one interpretation, we are bound to give that to them".

[17] However, the meaning of the text could also be sought through the purposive approach to interpretation, which is an alternative to circumvent the rigidities of the literal rule of interpretation, in the event such strict construction leads to absurdities of the application of the law. The purposive approach thus interprets legislation in light of the purpose for which it was enacted and which promotes the purpose of legislation.

……

[21] However, the text of the amendment in question is capable of only one construction. Therefore, far be it from this court to usurp the powers of statutory interpretation vested in it by adopting a purposive approach to interpret the provisions of the amendment in a context where the intention is manifest in the text itself. Accordingly, a plain reading of the amendments of

2010, especially paragraph (2) – These Regulations shall come into force on 1st January 2011 clarifies that the amendment has no retrospective effect.
……

[23] The application of the amendment includes 'any monies received by the board but not yet distributed' at date of commencement of the amendment and does not restrict the application solely to 'monies to be received' which will have implied monies to be received in the future. With the coming into effect of this amendment, the board is bound to distribute the money that is already lying with board to all the living members of the proprietary unit in equal proportion.
…….

[25] What the amendment sought was to change the existing system of payment and introduce a new scheme of distribution to all the living members of the Mataqali. The intention is manifested in that it did not envisage the application of the amendment merely to monies to be received in the future, but also intended the application of the amendment to monies lying with the NLTB at the date of operation by the inclusion of the words "any monies received by the board but not yet distributed" (emphasis is mine) be it monies accrued merely the date before the amendment coming into operation or years previously.

[26] There were probably many expectant recipients who found themselves receiving considerably less by way of rental distribution from the Board after 1st January 2011 in respect of rental monies received by the Board on their behalf both prior to and after 1st January 2011.
……

[28] The effect of the amended Regulation 11, removing as it does the entitlements of specified persons to specified percentages of rental monies, was to render redundant the injunction granted by Townsley J in 2000. That injunction froze monies received by the Board as rental monies payable to the Tui Nadi pursuant to Regulation 11 as it then was. That injunction was to remain in force until the rightful holder of the title had been determined. The rightful holder would then be entitled to the monies held by the Board.

[29] However, before the issue was settled, the injunction was subsequently overtaken by the amendment to Regulation 11 which applied to all monies, without exception received by the Board and not yet distributed as at 1st January 2011. The distribution system was no longer dependent upon entitlement according to status but was as a result, to be based on membership of the land owning unit (mataqali membership) of the land from which the income was derived.

[30] I therefore hold that the applicability of the amendment of 31st December 2010 reaches monies received prior to the date of operation of the amendment as long as such monies had not been distributed at the time of operation, and that the non-retrospective application is only relevant to monies that have already been distributed prior to the date of operation of the amendment. Whilst agreeing with the Respondent, I hold that the learned Judge of the High Court has not erred in law and in fact. Hence in view of the above reasoning, I reject the grounds of appeal and dismiss the appeal and order no costs.

[24] As is apparent in paragraphs [4], [21] and [30] of the judgment, the Court of Appeal considered the issue of retrospectivity as of importance in the interpretative exercise but ultimately dismissed its applicability to the central issue. We agree with that conclusion. The legislative amendment is not intended to be of retrospective effect, as the wording of section 1(2) of the amended regulations makes absolutely clear.

[25] The more important and major focus of the Court of Appeal's reasoning was on the meaning of "*distributed*" in the context of "*monies received ….but not yet distributed*" in the new regulation 11. This is clear in paragraph [23], where the Court refers to the effect of the amendment as "…*the board [being] bound to distribute the money that is already lying with board to all the living members of the proprietary unit in equal proportion*'. It is also evident in paragraph 29, where the Court found the amended regulation to apply to "*to all monies, without exception received by the Board and not yet distributed as at 1st January 2011".* Again, in the final paragraph of the judgment, the Court held that the amendment "*reaches monies received prior to the date of operation of the amendment as long as such monies had not been distributed at the time of operation, and that the non-retrospective application is only relevant to monies that have already been distributed prior to the date of operation of the amendment".*

Discussion: the meaning of 'distributed'

[26] The term "*distributed*" does not however have a single meaning but has various permutations. The Merriam-Webster Dictionary[5] includes the following synonyms for

[5] The Encyclopaedia Brittanica Company

"*distribute*" as: - "*classified*" meaning arranged or assigned according to type; or "*allotted*" meaning to give as a share or portion; and "*dispensed*" as meaning to give out something to appropriate individuals. The Oxford Dictionary definition includes the definition of "*distribute"* as "*sharing something between a number of people."*

[27] Counsel for the respondent also provided some dictionary definitions

> *"63. The Stroud's Judicial Dictionary defines "distribute" as follows:*
>
> 1. *"The word 'distribute' connotes the delivery of something to several persons per Doiron, J., R. v. McNiven [1944] 1 W.W.R. 127, 128.*
> *……*
> *distributed; distributing. 1. : to divide among several or many : apportion. 2. :* ***to give out or deliver*** *especially* ***to members of group*** *see also dividend."*

[28] As is apparent, particularly in paragraph 25 of the Court of Appeal's judgment, the term was interpreted by the Court to mean general undisbursed monies that were simply lying unallocated in the coffers of the respondent at the date the amended regulation came into force: that is, monies that had not been assigned, allocated or allotted to any designated recipients under the legal directives previously in force.

[29] However, the new regulatory directive (any monies received by the board but not yet distributed) did not mean that monies collected by the respondent between 6 March 2000 and October 2008 while Ratu Napolini was the Tui Nadi but which were not physically paid out to him in accordance with the regulatory directives then in force, were unassigned or were not allocated to him as his statutory dues during the period he held office.

[30] Under the earlier repealed regulation, those sums were by its terms expressly allocated or assigned to him as Tui Nadi and were his personal entitlements while he held office. The fact that those sums of money could not be disbursed to him out of the total pool of money collected from rents and premiums during the period he held office, was simply because of the injunction which the respondent never applied to have dismissed.

[31] The funds were nevertheless funds held in trust for him by the respondent under the regulations in force at the time and were for payment out in accordance with the express directives governing the Tui Nadi entitlement during the period 6 March 2000 to October 2008. They could not be assigned or re-allocated to any other beneficiary, including after 1 January, to "…*all the living members of the proprietary unit*".

The role and fiduciary responsibilities of the respondent

[32] The respondent is a statutory body established under the iTaukei Land Trust Act 1940. Pursuant to section 4(1), its role is to control all iTaukei land which is vested in the respondent for the benefit of the iTaukei owners or the iTaukei, as follows:

> *"4(1) The control of all iTaukei land shall be vested in the Board and all such land shall be administered by the Board for the benefit of the iTaukei owners or for the benefit of the iTaukei."*

[33] The statute creates a trustee and beneficiary relationship which carries with it the fiduciary duties and responsibilities which properly attach to such a relationship. The strict nature of such a relationship does not permit of a creative approach and any ambiguity of language or any difficulty in interpreting the plain meaning of statutory directives are issues best resolved with the assistance of the courts. In the present situation, where the trustee had its hands tied by the ongoing and long-running legal challenges to Ratu Napolini as the rightful Tui Nadi, an expedient seems to have been adopted in the twilight of Ratu Napolini's life in contravention of the existing injunction order, albeit not in breach of the respondent's fiduciary relationship with Ratu Napolini as the rightful Tui Nadi.

Payments out by the respondent in 2007 and 2008 in contravention of the restraining order

[34] Notwithstanding the nature of the situation between March 2000 and November 2008 and the restraint imposed by the injunction that was in force, the Native Land Trust Board made five 'unauthorized' payments out of the sequestered Tui Nadi funds that had been

accumulating in a frozen state since 2000. By agreement these were made to Ratu Napolini and another claimant to the chiefly title, Ratu Kaliova Dawai. It appears Ratu Napolini and Ratu Kaliova Dawai were closely related and the regulation 11 in force at the time, provided for Turaga of the same status within the same proprietary unit to share equally any sum payable. The payments out were acknowledged by the respondent to be made by it as trustee pursuant to deeds of indemnity and in express acknowledgment of a pending court action by Ratu Isireli Rokomatu Namulo concerning the title of Tui Nadi. The payments out were further acknowledged to be from lease proceeds held on trust pending determination of the rightful holder of the title Tui Nadi; and a number of undertakings were entered into, as the following example of one such payment dated 31 January 2008 illustrates:

> *"a) The Claimants, jointly and/or severally, do undertake not to raise against the Trustee or its servants and/or agents any issues or questions as to the lawfulness or unlawfulness of the release of the above sums of money to them;*
>
> *b) The Claimants, jointly and/or severally, do undertake not to pursue any court claims, actions or proceedings against the Trustee regarding the release of the said sum of $180,000.00 (One Hundred & Eighty thousand dollars) as aforesaid.*
>
> *c) The Claimants, jointly and/or severally, undertake to indemnify the Trustee against any or all disputes, claims, actions, proceedings and liabilities whatsoever which may arise in connection and incidental to the release of the $180,000.00 (One Hundred & Eighty thousands dollars) above-mentioned.*
>
> *7. The Claimants and the Trustee entered into and executed this Deed on their own free will and were never in any way coerced into making and executing this Deed.*
>
> *8. This Deed contains all the terms and conditions pertaining to the release of the said sum of $180,000.00 (One Hundred & Eighty thousand dollars) and no purported terms outside this Deed will be deemed to be part of this Deed."*

[35] The five unauthorized payments made between 14 November 2007 and 14 May 2008 were in the following sums, totaling $493,000.00:

14 November 2007 - $70,000.00

10 December 2007 - $70,000.00

31 January 2008 - $180,000.00

14 March 2008 - $160,000.00

14 May 2008 - $13,000.00

Discussion: the five '*unauthorised'* payments out

[36] These payments out should not have been made without the leave of the Court. While the situation was clearly very difficult given the ongoing legal wrangle about who the rightful Tui Nadi was, the frozen funds that were steadily accumulating and were clearly able to be accounted for as payments for the chiefly entitlements, could not legitimately be disbursed without a further court order. The 2011 change in the regulation did not operate to lift the injunction and the length of time (thirteen years) that it took to finally determine the title holder was inordinate. Throughout the entire saga there seems to have been little or no doubt on the part of the respondent about Ratu Napolini's bona fides as rightful Tui Nadi. Certainly, by late 2007, when the first of the '*unauthorised'* payments was made, a Court asked to lift the injunction would have been bound to consider the trustee's unerring view about the rightfulness of the claim, along with the numerous affirmations by the i-Taukei Lands Commission that the lineage of which Ratu Napolioni was a descendant was the rightful one out of which the Tui Nadi was to be appointed. If there had been recourse to the Court in or prior to 2007, the respondent may well have received a favourable result and the comfort of the Court's sanction.

The quantum now in issue

[37] The question now arising is, what quantum of frozen entitlement monies that accumulated between 16 March 2000 until Ratu Napolini's death in October 2008, remain outstanding and were not disbursed to him and Ratu Kaliova Dawai by agreement between 14 November 2007 and 14 May 2008, pursuant to the 5 deeds of indemnity referred to above?

[38] In an affidavit sworn on behalf of the respondent and filed at the direction of a High Court Master in anticipation of the proceeding that came before Tuilevuka J in the High Court in 2016, the respondent deposed that the monies frozen by the Townsley J injunction and which had accumulated up until the new amendment in January 2011 amounted to $596,804.10. This was the sum of monies that was disbursed by the respondent on 7 March 2011 in accordance with the new regulatory direction. The affidavit did not however advert to any of the payments made to Ratu Napolini and Ratu Kaliova Dawai between December 2007 and May 2008. It simply spoke in general terms, confirming that the total Tui Nadi entitlements that had been frozen by the Board prior to the 2011 amendment amounted to $596,804.10 and that this sum of money had been paid out on 28 January 2011 in accordance with the new regulatory directive for equal rent distribution.

[39] Tuilevuka J recorded the situation in his judgment in the High Court, as it was explained to him by the respondent:

A memorandum dated 30 May 2013 by the Accountant Landowner Affairs of i-TLTB, namely Mr Luke Maya explains why the i-TLTB released the monies:

2. ...we confirm that the total Tui Nadi entitlements (TM, TQ and TT) shares that were frozen by the Board prior to the implementation of the new Rent Equal Distribution Decree on 28th January 2011 was $596, 804. 10.

3. As you might be aware, the actual decree was effective from 01 January 2011 (Refer annexure B for a copy of GM's update to the general public on the same).

4. Further note that the breakdown of the above sum ($596, 804. 10) in terms of TM, TQ and TT are as follows:

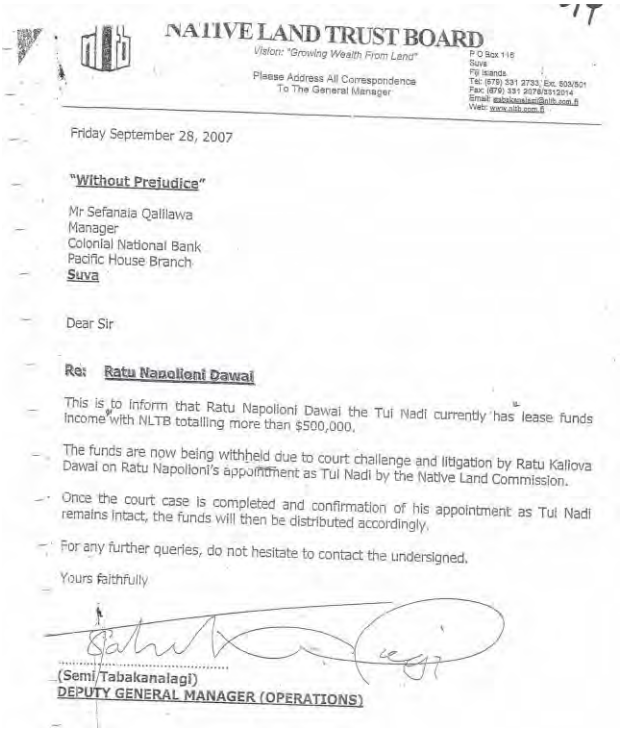
DU Title	***DU ID***	***Amount***
TM Navatulevu TK# 39-43	*1338*	*$111,391.27*
TQ Navatulevu TK# 39-50	*6725*	*$175,432.10*
TT Tui Nadi	*8010*	*$309,980.73*

24. In the last paragraph of Mr Maya's memorandum, he explains:

> *"... we believe that the main reason why the frozen funds for the (Tui Nadi) was released was because the Board was just complying with the Equal Distribution Decree as it clearly stated that any "held funds" be distributed equally to all surviving members of a landowning unit, ..."*

[40] The clear implication in the above explanation is that the figure provided encompassed all funds for the entire period from 2000 to 2011, when that was not the case. That is certainly how the memorandum was interpreted by Tuilevuka J and further accepted by the Court of Appeal.

[41] Of relevance to the accuracy of the information in that memorandum, shortly before the first of the unauthorized payments was made by the respondent to Ratu Napolini and Ratu Kaliova Dawai, the below letter was written to the manager of the Colonial Bank in Suva on 28 September 2007 by an officer of the respondent, advising that Ratu Napolini had more than $500,00.00 in lease funds owing to him at that date and which were being held in trust by the respondent pending finalization of the litigation.



NATIVE LAND TRUST BOARD

Vision: "Growing Wealth From Land"

Please Address All Correspondence To The General Manager

P O Box 116
Suva
Fiji Islands
Tel: (679) 331 2733, Ext. 500/501
Fax: (679) 331 2078/3312014
Email: tabakanalagi@nltb.com.fj
Web: www.nltb.com.fj

Friday September 28, 2007

"Without Prejudice"

Mr Sefanaia Qalilawa
Manager
Colonial National Bank
Pacific House Branch
Suva

Dear Sir

Re: Ratu Napolioni Dawai

This is to inform that Ratu Napolioni Dawai the Tui Nadi currently has lease funds income with NLTB totalling more than $500,000.

The funds are now being withheld due to court challenge and litigation by Ratu Kaliova Dawai on Ratu Napolioni's appointment as Tui Nadi by the Native Land Commission.

Once the court case is completed and confirmation of his appointment as Tui Nadi remains intact, the funds will then be distributed accordingly.

For any further queries, do not hesitate to contact the undersigned.

Yours faithfully

(Semi Tabakanalagi)
DEPUTY GENERAL MANAGER (OPERATIONS)

[42] On 17 July 2013, in an affidavit sworn by a senior litigation clerk in the law firm acting for the petitioner in the appeal before us, the following narrative of events relating to the five '*unauthorized'* payments to the late Ratu Napolini and to Ratu Kaliova Dawai (listed in paragraph [35] above) was traversed. There is also reference to a later payment of $75,000 made to cover the funeral expenses of the late Ratu Napolini. Further reference is also made to a sum of $551,351.54 having been *"**unilaterally** invested by the Board to the Vanua Development Corporation Limited (VDCL) in 2004"*. Exhibited to the affidavit is a heavily redacted single page document dated 16 May 2008, which has the sum of $551,351.54 entered on it together with the sum of $6,500.00 which is entered further down the page. The name *"Tui Nadi of Nadi"* also appears on the page. The relevant narrative in the affidavit is set out below:

> *"**10. THAT** the Applicant deposed in her last Affidavit that her late husband Ratu Napolioni Dawai received his chiefly entitlement from 1994 until March 2000 when the Kevin Townsley decision barred him from receiving his rightful due.*
>
> ***11. THAT** the late Ratu Napolioni Dawai did not receive any chiefly entitlement until his death except those payments which were unlawfully paid by the then Native Land Trust Board in 2008 to both the contesting parties namely Ratu Napolioni and Ratu Kaliova Dawai.*
>
> ***12. THAT** this payment out by the Board which amounted to about or more than $400,000.00 (Four Hundred Thousand Dollars) was never sanctioned by the Court but through the unelated decision of the Board and such payments were tantamount to contempt of Court.*
>
> ***13. THAT** our principal as Counsel for the late Ratu Napolioni Dawai in Civil Action No. HBJ No. 5 of 2005 was not aware neither was he informed of the payment out made to the two contesting chiefs.*
>
> ***14. THAT** the Board is duty bound to this Honourable Court as the arbiter of Justice to disclose everything pertaining to the entitlement of the Tui Nadi and equally to the Applicant whose rightful entitlement was unfairly denied due to the fraudulent claim of the contender.*
>
> ***15. THAT** the Board is duty bound to this court and to the Applicant to tabulate the financial statement of the late Tui Nadi from the period of March 2000 to the date of death in October 2008 in a manner it was done in 1997 to 1998 where 6 monthly balance are shown yearly.*

16. THAT *by tabulating the financial statement in this manner the court and the Applicant would then be able to know how much money was the late Tui Nadi's financial entitlement in the relevant period.*

17. THAT *this office was reliably informed by the late Tui Nadi and his administrator widow that the sum of $551,351.54 (Five Hundred and Fifty One Thousand, Three Hundred and Fifty One Dollars and Fifty Four Cents) was* ***unilaterally*** *invested by the Board to the Vanua Development Corporation Limited (VDCL) in 2004 and definitely need answers and clarification.*

18. THAT *the said VDCL Investment was indeed a controversial creation of the Qarase government involving millions of dollars purportedly for the benefit of the iTaukei Landowners was on the 10th February, 2010 announced by Alipate Qetaki, General Manager of the Board that the VDCL was going for Voluntary winding up.*

19. THAT *by reason of the said winding up of VDCL the Board is duty bound to this Honourable Court and to the Applicant to disclose how much investment taken from the late Tui Nadi's entitlement was lost or otherwise recovered from the VDCL Investment.*

20. THAT *according to reliable source that a huge sum of money pertaining to the late Tui Nadi's fund is with the Board and the Board has some answering to do with all out queries.*

21. THAT *the Board is duty bound to inform this Honourable Court other payments out or investment it may have from the late Tui Nadi's financial entitlement."*

22. THAT *our office came to know at a late date after several months of the late Tui Nadi's death that a sum of money was paid by the Board from his entitlement to cover his funeral expenses in the sum of $75,000.00 (Seventy Five Thousand Dollars).*

23. THAT *likewise it is in the interest of everyone concerned for the Board to show when, where and how much was paid and to whom the payments made.*

24. THAT *the Applicant can only show whatever information she is able to show on the payment out from the late Tui Nadi's fund – but not the complete account of payment out.*

25. THAT *by clearly showing the amount involved, the person or organization involved and how much money paid, the Applicant will be in a good*

position to know how much money was the total entitlement of the late Tui Nadi.

26. THAT *the Board is clearly misleading the Court in the manner it addressed this issue in paragraph 3 of Josefa Muana's Affidavit by saying that the sum of $596,804.10 (Five Hundred and Ninety Six Thousand, Eight Hundred and Four Dollars, and Ten Cents) was in the custody of the Board – without showing the rest of the amount from March 2000.*

27. THAT *the Board failed to take into consideration the total amount of money held by the Board under Court Order from 16th March 2000 to the 03rd October 2008."*

[43] This affidavit appears never to have been answered, so far as can be ascertained from the Court's documents on record in this proceeding. Nor has there been an accounting in the terms described in paragraph 15 of the petitioner's affidavit referred to in Paragraph [4] above.

Special leave to appeal to the Supreme Court

[44] The petitioner is seeking the special leave of this Court to appeal from the judgment of the Court of Appeal affirming the judgment of the High Court dated 15 April 2016.

[45] Civil appeals to this Court are governed by section 98(4) of the 2013 Constitution and section 7(3) of the Supreme Court Act 1998.

Section 98(4) of the Constitution of Fiji provides:

> *"(4) An appeal may not be brought to the Supreme Court from the final judgment of the Court of Appeal unless the Supreme Court grants leave to appeal."*

[46] Under Section 7(3) of the Supreme Court Act 1998 in relation to civil matters 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."

[47] In **Chand v Fiji Times Ltd** [2011] FJSC 2; CBV0005.2009 (8 April 2011), paragraph 12, the following passage is instructive:

*"In applying these provisions, the Supreme Court of Fiji has adopted in decisions such as **Bulu v Housing Authority** [2005] FJSC 1 CBV0011.2004S (8 April 2005), the criteria enunciated by the Privy Council in **Daily Telegraph Newspaper Company Limited v McLaughlin** [1904] UKLawRpAC 45; [1904] AC 776, which was the first case in which special leave to appeal from a decision of the High Court of Australia had been sought. Lord Macnaghten, at page 9 of his judgment, after observed that the same principles should apply as they did for an appeal from the Supreme Court of Canada, referred to the case of Prince v Gagnon [1882– 83] 8 AC 103, in which it was stated that appeals would not be admitted-*

> *"save where the case is of gravity involving a m of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character."*

As noted by Lord Macnaughten at pages 778 to 779, even in such cases special leave would be refused if what is canvassed is the decision on the facts of a particular case, where the judgment sought to be appealed from was plainly right, or not attended with sufficient doubt to justify the grant of special leave. In the later decision of Albright v. Hydro-Electiric Power Commission [1926] AC 167 at page 169, it was stated that a question involving the construction of a particular agreement did not warrant the grant of special leave".

Decision

[48] The consideration of special leave in this case turns on a question of statutory interpretation and in the context of a long-running case of high public interest involving

the fiduciary duties of a statutory trustee and the disposition of trust funds. This issue of statutory interpretation constitutes a far-reaching question of law. The discharge of fiduciary duties by the statutory trustee and the necessity for transparency in the handling of public funds and in disclosures to the Courts are matters of great general and public importance. They are also matters of substantial general interest to the administration of civil justice.

[49] We take judicial notice of the decision of the i-Taukei Lands Commission in 2013, confirming the late Ratu Napolini Naulia Dawai as the rightful holder of the chiefly roles of Turaga ni Mataqali, Turaga ni Yavusa and Turaga iTaukei of the Vanua of Nadi for the period 1994 until his death on 3 October 2008.

[50] As a matter of statutory interpretation, the Court is satisfied that the regulatory entitlements that were directed to be paid to the rightful holders of those chiefly roles under regulation 11 of section 33 of the Native Lands Trust (Lease and Licences) Amendment Regulation while it was in force, were personal emoluments and that any amounts outstanding on the death of an office holder became payable to his estate, exactly as an unpaid portion of a deceased persons salary would accrue to his deceased estate after death.

[51] The chiefly entitlements at issue in this case were not discretionary payments, as is clear from the directive*"the balance of any monies received…by way of rents and premiums…**shall** be distributed by the Board as follows:"* Thus the wording of the regulation is in mandatory terms and without qualification.

[52] Much turned on the meaning and application of the word "*distributed*" in both the repealed version and the current iteration of regulation 11. The mandatory nature of the direction and the precise percentages in which each statutory allocation was prescribed, as well as the clear directions as to whom these were to be paid, confirms that these particular entitlements were not discretionary and not simply part of a general pool of funds.

[53] Once the general accounting exercise was completed under section 14 and the balance of monies determined, the sums to be paid out as chiefly entitlements were at that point statutorily prescribed. Their status as such was fixed, regardless of whether the allocated funds were physically transferred out at that time or not until sometime later. Even if they were not paid out until later, the funds were not part of some general pool of money. That is further confirmed by the fact that six monthly balances were provided in respect of the chiefly entitlements to each of the appointees. We are satisfied therefore that once the required accounting exercise was completed, legal property in the calculated entitlements passed to each incumbent Turaga ni Mataqali, Turaga ni Yavusa and Turaga iTaukei.

[54] Accordingly, we find the interpretation of the word "*distributed*" by the Court of Appeal to be unduly narrow and to have overlooked the wider statutory context of these prescribed emoluments.

[55] In relation to whether the 2011 amendment to regulation 11 was retrospective in effect, we find that it was not. The Court of Appeal's reasoning is not entirely clear on the point, as is evident from paragraph [25] of the judgment in particular, although ultimately the Court appears to have determined that the issue before it turned on the meaning of "*distributed*" rather than on any issue of retrospectivity.

[56] The fact that the injunction remained in force for so many years rendered all of the decision making more difficult. There is force in the petitioner's plea that "*but for*" the injunction, this extremely vexed matter might have been resolved years earlier and well prior to the 2011 regulatory amendment. This Court has already remarked on the benefit there might have been in the respondent seeking to have the injunction lifted years earlier, whilst also acknowledging the difficulties.

[57] The fact of the injunction did not however alter the nature of the chiefly payments at issue. Once the injunction was expunged by the issuing of Tuilevuka J's judgment in the High Court in 2016, legal property in those payments (or in the residue of them) reverted to the estate of the late Ratu Napolini, as the person originally entitled to them in law.

[58] The matter of the unauthorized payments by the respondent to Ratu Napolini and Ratu Kaliova Dawai from the frozen Tui Nadi funds between 14 November 2007 and 14 May 2008 require explanation by the respondent, as does the further payment of $75,000 for Ratu Napolini's funeral expenses. The fact of the five payments was disclosed to the Court by the petitioner in an affidavit filed on her behalf pursuant to a discovery exercise but which (to the knowledge of the Court) does not appear to have yet been answered by the respondent. That is a matter which must now be attended to.

Judgment

[59] The Court is satisfied that there is a serious question of law to be determined in this case, requiring special leave to appeal, which is accordingly granted.

[60] The substantive appeal is also granted and judgment is entered in favour of the petitioner.

Jitoko J

[61] I have had the advantage of reading the painstaking and clearly reasoned judgment of Goddard J. I entirely agree with her reasoning and conclusions and with the Orders proposed.

Orders:

The following orders are made:

1. *The judgment of the Court of Appeal is set aside.*

2. *Judgment is entered in favour of the petitioner.*

3. *An accounting is to be carried out by the respondent, the i-Taukei Land Trust Board, to determine what residue of funds collected by the respondent during the period 16 March 2000 until the date of Ratu Napolini Naulia Dawai's death on 3 October 2008 remain outstanding as at the date of this judgment. Accounting*

report is to be filed into Court within 28 days. The statement of account should include the six monthly balances for each of those years.

4. *The petitioner is entitled to the residue of any undisbursed funds collected by the respondent by way of rents and premiums in respect of native land during the said period 16 March 2000 to 3 October 2008, which were not distributed to Ratu Napolini Naulia Dawai (and by agreement to Ratu Kaliova Dawai) in the prescribed percentages as the rightful holder of the chiefly roles of Turaga ni Mataqali, Turaga ni Yavusa and Turaga iTaukei of the Vanua of Nadi.*

Hon Acting Chief Justice Salesi Temo
ACTING PRESIDENT OF THE SUPREME COURT

SUPREME COURT FIJI

Hon Madam Justice Lowell Goddard
JUDGE OF THE SUPREME COURT

Hon Mr Justice Filimone Jitoko
JUDGE OF THE SUPREME COURT