IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 0040 of 2016
(High Court No. HBC 0240 of 2012)

BETWEEN	:	**LAISE KACILALA DAWAI**
		Appellant
AND	:	**I-TAUKEI LAND TRUST BOARD**
		Respondent
Coram	:	**Calanchini, P** **Lecamwasam, JA** **Jameel, JA**
Counsel	:	**Mr. S. Nacolawa for the Appellant** **Ms. L. Komaitai for the Respondent**
Date of Hearing	:	**15 February 2018**
Date of Ruling	:	**8 March 2018**

JUDGMENT

Calanchini, P

[1] I agree that the appeal should be dismissed.

Lecamwasam, JA

[2] This is an appeal against the judgment of the learned High Court Judge at Lautoka dated 15th April 2016. Before considering the grounds urged by way of appeal, it would be useful to set out in brief the factual background of the dispute at hand.

[3] The whole dispute revolves around the appointment of Tui Nadi. Immediately after the late Ratu Napolioni Dawai ascended to the position of Tui Nadi in November 1994, a rival group installed Ratu Rokomatu as the rival Tui Nadi.

[4] Despite hotly contested litigation for a number of years between Ratu Napolioni Dawai and Ratu Rokomatu over the right of succession to the position of Tui Nadi, the Native Lands Trust Board (NLTB) in 1998 (p.83) and the Taukei Land and Fisheries Commission (TLFC) as early as in 1997 and 2004 (p.33) had accepted Ratu Napolioni Dawai as the rightful holder of the position of Tui Nadi.

[5] However, it is common ground that the TLFC had made relevant payments due to Tui Nadi, to Ratu Napolioni Dawai from 1994 to 2000 until the Court issued an injunction debarring *the Native Lands and Fisheries Commission and the Native Lands Trust Board from making payments to the holder of the office of Tui Nadi until further order by court.*

[6] It is therefore undisputed that the above payments were made to Ratu Napolioni Dawai up to the time of the injunction HBJ 0021/1997 dated 16th March 2000 issued by Townsley, J. Ratu Napolioni Dawai passed away in October 2008, while the injunction was still in force. After the demise of Ratu Napolioni Dawai, his surviving spouse, being the administratrix of the estate, filed action No.240/2012 by originating summons dated 19th November 2012 against I-Taukei Lands Trust Board claiming the Tui Nadi's financial entitlements, which have been suspended as a result of the orders of court be paid to her.

[7] In view of the above, the Respondent, by way of written submissions in paragraphs four (4) and five (5) has taken up the position that the lease entitlements are not part of a personal estate of an I-Taukei person and the "*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...*"

[8] Whilst the Respondent maintains that the Appellant is not entitled to the entitlements of Tui Nadi after his death, the Appellant strongly avers that all entitlements of Tui Nadi within his lifetime should be treated as his personal income and should accrue to the estate of the late Tui Nadi. On such footing therefore, the Appellant further avers, she is

entitled to whatever money that is lying in favour of Tui Nadi which accrued to him prior to his death but remains with the Board.

[9] Although the parties contested the case against the above backdrop, these contested issues receded to the background as a new situation arose due to the amendment to regulation 11 paragraph 1 of the I-Taukei Land Trust (Leases and Licenses) Regulations which came into effect on 31st December 2010 and reads thus :

> *"(1) 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".*

[10] Having heard the case, the learned High Court Judge held with the submissions of the I-TLTB and dismissed the Plaintiff's application. The grounds of appeal are pleaded as follows:

> *(1) The Learned Trial Judge erred in law and in fact in not awarding the Adminstatrix of the late Ratu Napolioni Dawai his chiefly entitlement from the 16th day of March 2000 the date of the Court Order to the date of his death in October 2008.*
>
> *(2) The Learned Trial Judge erred in law and in fact in failing to see that the chiefly entitlement of the late Ratu Napolioni Dawai namely:*
>
> *(a) Turaga i Taukei (TT) 5%*
> *(b) Turaga ni Qali (TQ) 10%*
> *(c) Turaga ni Mataqali (TM) 15%*
>
> *are his personal entitlements in his capacity as holders of the various posts above, therefore they became his personal rights, which is not only a common law right but right by way of Regulations Under Cap 134 of the Act, therefore form part of his estate.*
>
> *(3) The Learned Trial Judge erred in law and in fact in completely ignoring the submissions of the Appellant on the first part of the Amended Regulations 2(a) (i) where it states:*
>
> *"After deduction of any sums in accordance with Section 14 of the Act, the balance of any monies received by the Board but not yet distributed at the date of Commencement of the Native Land Trust (Lease and Licenses) Amendment Regulations 2010, shall be distributed by the Board".*

(4) *The Learned Trial Judge failed and/or erred in law and in fact in considering only the last portion of the Amended Regulations 2(a) by saying in his judgment paragraph 24"... the decree directed that the monies henceforth, be distributed to all of the living members of the proprietary unit in equal proportions".*

(5) *The Learned Trial Judge failed and/or erred in law and in fact in not separating the old Regulations from the new Regulations where the present claim is governed by the old Regulations as Ratu Napolioni Dawai died in October 2008 and when the Amended Regulations was never at all in existence and the Amended Regulations is not retrospective in application.*

(6) *The learned Trial Judge erred in law and in fact in his one sided interpretation of the Amended Regulations 2(a) (ii) when stated at paragraph 23:*

"In my view, the underlined words above are quite clear. It is a directive that all monies "received by the Board but not yet distributed" as of 01 January 2011 shall be distributed by the Board to all the living members of the proprietary unit in equal proportions". – the underlined words being:

"...including any monies received by the Board but not yet distributed at the 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 propriety unit in equal proportions".

(7) *The learned Trial Judge erred in law and in fact in holding that "since Ratu Napolioni Dawai 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.*

(8) *The Learned Trial Judge failed and/or erred in law and in fact to distinguish between the Title holder as in this case that of the Tui Nadi and his entitlement and those of his children are separately entitled to payment of the balance after appropriate deductions are made by the Board.*

(9) *The Learned Trial Judge failed and/or erred in law and in fact in holding that the Board has the authority to communicate the effects – and meanings of the amendments which job can only be elaborated by the Court after consideration of the various issues involved.*

(10) *The Learned Trial Judge failed and/or erred in law and in fact in not giving weight to the Appellant's submissions and disregarded the authorities cited therein.*

(11) *The Learned Trial Judge erred in fact and in law in holding the Affidavit evidence of the Respondent as the proper fact without relying on any authorities in law to support such deposition.*

[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..

[13] I shall reproduce the relevant amendment again for ease of reference:

> *"(1) 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".*

[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.

[15] The response to the above lies in an exercise of statutory interpretation, which I shall proceed to engage in. It should be borne in mind that the only task of the judiciary in statutory interpretation is to unveil the intention of the legislature. The court will only be called upon to interpret in the event of ambiguity or possible multiple interpretations of language leading to textual uncertainty.

[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.

[18] This approach recognises that *"statutory interpretation cannot be founded on the wording of the legislation alone*".(per Lacobucci J in Re Rizzio & Rizzo Shoes Ltd., [1998] 1 S.C.R 27, at paragraph 21) and permits courts to utilise extraneous pre-enactment material such as cabinet memoranda, draft bills, Parliamentary debates, committee reports and white papers.

[19] The **purposive approach** was lucidly expounded by Kirby, J in **FC of T v Ryan**, (2000) 42 ATR 694, 715-716, in the following manner:-

> *"In this last decade, there have been numerous cases in which members of this court have insisted that the proper approach to the construction of federal legislation is that which advances and does not frustrate or defeat the ascertain purpose of the legislature...even to the point of reading words into the legislation in proper cases, to carry into effect and apparent legislative purpose...this court should not return to the dark days of literalism".*

[20] While the House of Lords (Lord Griffiths) in **Pepper v Hart** [1992] 3 WLR 1032 extolled the virtues of the purposive approach virtually to the exclusion of the literal rule of interpretation:

> *"The days have passed when the courts adopted a literal approach. The courts use a purposive of approach, which seeks to give effect to the purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."*

[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.

[22] However, interpreting the above portion of the text in isolation leads to an incongruity in so far as the application of the amendment is concerned which it could safely be presumed was not the intention of the legislature. Therefore, the said phrase should be read in context together with the rest of the amendment for the intention to be manifest.

[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.

[24] Under the old regulation, any monies received by the board by way of rents and premiums in respect of I-Taukei land were to be distributed by the board in the following manner:

(a) to the Proprietary Unit - 70%
(b) The Turaga ni Mataqali - 15%
(c) The Turaga ni Yavusa - 10%
(d) The Turaga i Taukei- 5%

[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 day 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.

[27] Reiterating the presumption that the legislature does not engage in idle surplusage of words but imbues every part thereof with deliberate meaning to achieve a specific intent, I state with conviction that the intention was to distribute all monies that were lying with the board at the time of operation, amongst the members of the proprietary unit in equal proportion, notwithstanding the non-retrospective application of the law.

[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.

Jameel, JA

[29] I have read the draft judgment of Justice Lecamwasam, and agree with the reasons, and orders.

Orders of the Court are:

1. *Appeal dismissed.*
2. *Judgment of the Court below affirmed.*
3. *No orders as to costs.*

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Hon. Mr. Justice W. Calanchini
PRESIDENT, COURT OF APPEAL

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Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Madam Justice F. Jameel
JUSTICE OF APPEAL