IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION No. HBC 105/2020

BETWEEN	**RATU TAITO NALUKUYA** of Saunaka Village, Nadi, Company Director suing in his personal capacity as a member of Tokatoka Nadarau, Mataqali Vunaivi, Nadi and in a representative capacity for and on behalf of the Tokatoka Nadarau, Mataqali Vunaivi, Nadi. **PLAINTIFF**
AND	**ITAUKEI LAND TRUST BOARD** a statutory body established under the iTaukei Land Trust Act 1940, of 431 Victoria Parade, Suva. **DEFENDANT**

APPEARANCES	:	Mr S Fa for the Plaintiff Mr J Cati for the Defendant
DATE OF HEARING	:	9 November 2020
DATE OF JUDGMENT	:	26 February 2021

DECISION

1. On 22 May 2020 the plaintiff, via his solicitors, filed an originating summons seeking the following relief against the defendant for the following declarations or orders:

   i. that the land known as Legalega (part of) Lot 1 on SO 3578 having an area of 8486m² located in the tikina of Nadi (*the land*) is iTaukei land that is owned by the land-owning unit of Tokatoka Nadrau, Mataqali Vunaivi (*the land owning unit*) and administered by the defendant for the benefit of the land owning unit.
   ii. that the land is being beneficially occupied by the land owning unit for their use, maintenance and support.
   iii. that it is unlawful and contrary to Section 8 of the iTaukei Land Trust Act 1940 for the defendant to issue a lease over the land, while it is beneficially occupied by the land owning unit, and when it is required by the land owning unit for its use, maintenance and support
   iv. restraining the defendant from issuing a lease over the land until further order of the court.
   v. such other orders as the court considers just.
   vi. costs.

2. In an affidavit in support of the originating summons the plaintiff Ratu Nalukuya provided evidence as follows:

   i. he is a member of the land owning unit, which has 'always' owned the land.

ii. the land is administered for the land owning unit by defendant, the iTaukei Land Trust Board (*ILTB*).

iii. there has been a long history of transactions relating to the land, in which the ILTB has sought to obtain a viable and reliable tenant for the land who will develop the land for tourism and other purposes, to ensure a return on the land for the land owning unit. This history includes the following:

a. In January 1998 ILTB leased the land (by registered lease No. 24345) to Enormous Investment Limited for 99 years for 'industrial purposes'.

b. in May 2000 the lease was transferred by mortgagee sale to Forum Hotel Limited.

c. In early 2005 the ILTB re-entered the land and by so doing terminated the lease. The registration of the lease was cancelled on 14 March 2005. This re-entry arose because the lessee had failed to construct a building or develop the land as it was required to do under the lease. It seems that although Forum Hotel Ltd was willing to build the proposed hotel, it was not willing to pay the additional premium required to change the purpose of the lease from 'industrial purposes' to 'tourism purposes'.

d. In the same year that the re-entry occurred, Forum Hotel Ltd initiated proceedings in the High Court against ILTB challenging that re-entry and the cancellation of the registered lease. Although that decision by ILTB was upheld in the High Court, an appeal by Forum was allowed in 2013, with the Court of Appeal holding that the absence of notice by the Registrar of Lands under s.57 Land Transfer Act 1971 meant that any cancellation was invalid, and that in any case the ILTB had not given Forum sufficient notice of its default.

e. In December 2010 (after the High Court decision in the case by Forum, but before the appeal) the defendant relet the land (by registered lease No. 29467) to Sun Beach (Nadi) Limited for 99 years for 'tourism purposes'. This lease included a term (clause 2(d)) that required the lessee

> *to commence construction on or before the 1st day of July 2012 of the Tourist Resort in accordance with the plans as approved in writing by the lessor and to complete construction of the tourist resort on or before the 30th June 2013.*

e. In December 2017 (following the Court of Appeal decision in the Foum case) the ILTB again re-entered the land and terminated the lease to Sun Beach for breach on the part of the lessee (including – as I understood it – breach of the obligation referred to above), and again the registration was cancelled soon afterwards.

f. After the decision of the Court of Appeal in 2013 in the Forum case, ILTB entered into negotiations, and attended mediation, as a result of which ILTB apparently agreed (although perhaps only provisionally – see below) on 15 May 2019 to issue a fresh tourism lease of the land to Forum, and Forum in turn agreed to abandon its claim against ILTB

3. The plaintiff blames the defendant for this unfortunate history. He says that the administration of the land by the defendant has been contrary to the best interests of the land owning unit, and says that the ILTB had failed to conduct a proper due

diligence process into the financial capability and capacity of any of the lessees before granting the leases, or approving the transfer of lease to Forum Hotel Ltd. As a result of this neglect, he says, the members of the landowning unit have had no return from their land. The plaintiff does not suggest that the land is iTaukei reserve land, nor that the ILTB is obliged to obtain the land owners' consent to lease the land. I also apprehend from counsel's submissions (I would have thought it is a sufficiently important part of the background to have been included in the evidence) that the land in question is directly opposite Nadi Airport, and therefore is likely to be attractive for a tourism-related project, as opposed to the growing of cassava.

4. Prior to the discussions referred to in paragraph 2(f) above ILTB had met with members of the land owning unit to discuss the issues relating to the land. Following those meetings Adi Tema Varo (said to be the head of the land owning unit) wrote to ILTB on 10 May 2019. Her letter included the following comments:

- *Tokatoka Nadrau LOU members must be informed on leases that are about to expire as well beforehand*
- *For expired leases, the Tokatoka Nadrau LOU members reserve the first right of usage.*
- *We have also come to an agreement that the Tokatoka Nadrau LOU will meet with ILTB every 2 months from April 2019 for consultations or when the need arises.*
- *We trust that ILTB will continue to be transparent and honest with our LOU on relation to the necessary land dealings and any malpractice whatsoever in the past must cease immediately.*

5. Subsequently, on 27 May 2019, ILTB wrote to the mataqali with a report on progress with its negotiations with Forum Hotel. The letter (a copy of which was produced to the Court) suggests that negotiations were still under way as to the terms of any lease, including whether Forum Hotels would make an additional payment to the land-owning unit to obtain their agreement and cooperation.

6. In January 2019 the plaintiff and some other members of the land owning unit built a fence/screen around the land, or part of it, and have begun planting and cultivating crops for use – the plaintiff says - by the land owning unit. The plaintiff says that this amounts to occupation of the land, and means that, in terms of section 9 of the iTaukei Land Trust Act 1940, which provides:

> *No iTaukei land shall be dealt with by way of lease or licence under the provisions of this Act unless the Board is satisfied that the land proposed to be made the subject of such lease or licence is not being beneficially occupied by the iTaukei owners, and is not likely during the currency of such lease or licence to be required by the iTaukei owners for their use, maintenance or support.*

7. On 30 May 2019 the plaintiff applied in the proceedings brought by Forum Hotel against ILTB to be joined as a plaintiff in the proceedings. An affidavit by Adi Tema Varo in opposition to this application was filed by ILTB in October 2019. In it Adi Tema says (inter alia):

- *... I vigorously deny that ... Ratu Taito Nalukuya [has] the authority of the adult members of Tokatoka Nadrau, Mataqili Vunaivi to act on their behalf including in the present joinder application.*
- *I am advised ... that the Applicant [Ratu Nalakuya] is applying to be a Plaintiff together with Forum Hotels Limited which is quite improper. Given that Forum Hotels Limited is in*

negotiations with the Board for the issuance of a lease back to Forum, it would be at odds with what the Applicant is seeking i.e. occupation and use of the subject land.

- *... I deny that the Applicant is already in occupation of the subject land. Except for some fencing, the land is vacant.*

8. By a decision dated 21 February 2020 the High Court dismissed the application by Ratu Nalukuya to be joined as a plaintiff in the proceedings commenced by Forum Hotel Ltd. The reasons given by the court for that decision make it clear that the application was dismissed because of a preliminary issue relating to a conflict of interest by counsel for Ratu Nalukuya, rather than on the merits of the application itself.

9. In January 2020 the plaintiff and the Tokatoka Nadrau Development Trust (said to be a trust established to look after the interests of members of Tokatoka Nadrau) filed a writ of summons in the High Court at Lautoka (HBC 14/2020), claiming against ILTB declarations as follows:

   i. A declaration that the plaintiff's occupation and use of the subject land is lawful under s.9 iTaukei Land Trust Act.
   ii. A declaration that the attempt by the defendant to evict the plaintiff is unlawful.
   iii. Alternatively, a declaration that the defendant is legally obliged to consult with and obtain the consent of the plaintiff on any dealing over the subject land including any court settlement.

   In other words, relief to the same effect as that claimed in these proceedings. The plaintiff also makes clear in the statement of claim in HBC 14/2020 that his particular interest regarding this land is because he wants to see it leased to a company called Pacific Land Development Limited, rather than to Forum Hotel Ltd as presently proposed. He does not disclose why he has this preference, or in what way he and the land owners will benefit more from the project he supports than the one promoted by Forum and (indirectly) ILTB. Nor does the plaintiff explain what has become of those earlier proceedings, or why he is wasting the court's and the other party's time with (now) two sets of proceedings seeking essentially the same outcome.

10. In response to the plaintiff's evidence the ILTB says, in an affidavit by Mr Asaeli Moce, (a senior estate officer (tourism) at ILTB) that reads more like a statement of defence than an affidavit, that:

   - The plaintiff does not have the support of 'a majority' of the land owning unit, and accordingly does not have sufficient standing to seek the relief sought in the present proceedings.
   - The land owning unit has been consulted over the proposed tourism lease of the land to Forum Hotel Ltd, and has given its 'full support' to that proposal, but the plaintiff is trying to frustrate that objective. Some evidence is provided showing the level of that support and 'blessing' by 'the majority of the adult members' of the land owning unit to the ongoing negotiations being engaged in by ILTB and Forum Hotel Ltd regarding the proposed lease for the land.

- ILTB has not acted contrary to the best interest of the land owning unit.
- ILTB denies and puts the plaintiff to strict proof (whatever this means) of the allegation that the members of the land owning unit have not benefitted in terms of receiving lease monies for the land from 1998 to the present, but the affidavit does not go on to say what benefits the owners have received from the land for the period. In submissions counsel for ILTB says that this proposition by the plaintiff is 'simply untrue' and complains that the plaintiff has provided no evidence to support this assertion. I would have thought that if anyone could – and should - have provided this information it would be the ILTB, which is administering the land on behalf of the land owning unit, and presumably received, and paid out, any rent that the lessees paid.
- ILTB denies that in the absence of a lease of the land the plaintiff is entitled to plant on the land *for our daily survival*.

11. On Friday 6 November 2020, with the hearing of this proceeding scheduled to start on the following Monday, the plaintiff sought to file an affidavit in reply to that filed by ILTB. Counsel for ILTB objected to the late filing (I had on 14 September given the plaintiff leave to file the affidavit within 14 days), and I directed that the affidavit in reply would not be read in the proceeding. In any case what was said in the affidavit was largely repetitive of what had been said in previous affidavits, or consisted of submissions and pleadings rather than evidence, and would not have assisted either the court or the plaintiff.

The law

12. The starting point is section 3 iTaukei Lands Act 1905 setting out how iTaukei land is held:

> *Tenure of native lands by Fijians*
>
> ***3*** *iTaukei lands shall be held by iTaukei according to iTaukei custom as evidenced by usage and tradition. Subject to the provisions hereinafter contained such lands may be cultivated, allotted and dealt with by iTaukei as amongst themselves according to their iTaukei customs and subject to any regulations made by the iTaukei Affairs Board, and in the event of any dispute arising for legal decision in which the question of the tenure of land amongst iTaukei is relevant all courts of law shall decide such disputes according to such regulations or iTaukei custom and usage which shall be ascertained as a matter of fact by the examination of witnesses capable of throwing light thereupon*

Sections 4-9 (where relevant) of the iTaukei Land Trust Act 1940 provide:

> ***PART II - CONTROL OF NATIVE LAND***
>
> ***Control of native land vested in Board***
>
> ***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.*
>
> ***iTaukei land alienable only to State***
>
> ***5****(1)* *iTaukei land shall not be alienated by iTaukei owners whether by sale, grant, transfer or exchange except to the State, and shall not be charged or encumbered by iTaukei owners, and any iTaukei to whom any land has been transferred heretofore by virtue of an iTaukei grant shall not transfer*

such land or any estate or interest therein or charge or encumber the same without the consent of the Board.

(2) All instruments purporting to transfer, charge or encumber any iTaukei land or any estate or interest therein to which the consent of the Board has not been first given shall be null and void.

iTaukei land not to be alienated save in accordance with Act

7 Subject to the provisions of the State Acquisition of Lands Ac 1940, the Forest Act 1992, the Petroleum (Exploration and Exploitation) Act 1978 and the Mining Act 1965, no iTaukei land shall be sold, leased or otherwise disposed of and no licence in respect of iTaukei land shall be granted save under and in accordance with the provisions of this Act.

Alienation of iTaukei land by lease or licence

8(1) Subject to the provisions of section 9, it shall be lawful for the Board to grant leases or licences of portions of iTaukei land not included in an iTaukei reserve for such purposes and subject to such terms and conditions as to renewals or otherwise as may be prescribed.

(2) Any lease of or licence in respect of land under the provisions of this Act shall be made out from and in the name of the Board and such lease or licence shall be executed under the seal of the Board. (Substituted by Ordinance 30 of 1945, s. 6.)

Conditions to be observed prior to land being dealt with by way of lease or licence

9 No iTaukei land shall be dealt with by way of lease or licence under the provisions of this Act unless the Board is satisfied that the land proposed to be made the subject of such lease or licence is not being beneficially occupied by the iTaukei owners, and is not likely during the currency of such lease or licence to be required by the iTaukei owners for their use, maintenance or support.

13. The plaintiff's argument in this case is that the fencing of the land by him and some of his fellow members of the land owning unit, and their cultivation of the land in cassava, means that the land is being 'beneficially occupied by the iTaukei owners' in terms of section 9 of the Act. This – the plaintiff says – means that the ILTB is prohibited by section 9 from granting a lease or licence in respect of the land. Because this seemed to me to be the critical issue in these proceedings I invited counsel to address it in additional submissions, which they did, including helpful references to other cases in which the same question has been considered.

14. As Brito-Mutunayagam J pointed out in **Ratabua v iTaukei Land Trust Board** [2015] FJHC 7, there are actually two limbs to the section:

i is the land currently beneficially occupied by the iTaukei owners

ii. is the land likely to be required by the owners for their use, maintenance or support.

However, the main issue in that case was whether the ILTB was obliged under s.9 to obtain the consent of the land owners to the lease, and the evidence about alternate uses of the land was given in the context of what various members of the land owning unit planned, wished or thought that they might do with the land, or part of it, if it had not been leased by ILTB for a substantial chicken-farming operation. While the decision establishes that ILTB must consult the land owners before

granting a lease, but is not obliged to obtain their consent – an argument that does not arise in this proceeding, it does not assist me in deciding what constitutes 'beneficial occupation' by the iTaukei owners.

15. In **Ralulu v iTaukei Land Trust Board** [2016] FJHC 535 the court made the following observations:

> *57. Section 9 has been read as applying only to native land within a native reserve[1]. In other words, before a piece of i-taukei land within a native reserve can be leased out, i-TLTB must be satisfied first that the land is not beneficially being occupied by the i-taukei landowners and/or is not likely during the currency of such lease or licence, to be required by i-taukei landowners for their use, maintenance or support.*
>
> *58. Accordingly, i-TLTB will require of any applicant wishing to lease a portion of native reserve land to first obtain the consent of the majority of the landowners. If consent is granted, i-TLTB will then begin the de-reservation process before it will issue a lease over the land.*
>
> *59. A fortiori, a piece of native land which was originally within a native reserve but which has already been de-reserved, or, a piece of native land which has never been within any reserve boundary, could not be under any beneficial occupation by the native owners. In that regard, it would be superfluous to have to consult with the i-taukei landowners*

and in reliance on this passage, the defendant argues in its submissions that, since the land we are dealing with here is not reserve land, the restriction in s.9 does not apply, and ILTB is therefore not precluded from leasing the land, even if it is being 'beneficially occupied' by the land owners. I neither understand, or accept, this proposition. Section 9 is in Part 2 of the iTaukei Land Trust Act 1940, consisting of sections 4 – 14 and deals with Control of iTaukei land, and includes the sections quoted above in paragraph 12. ITaukei reserves are dealt with in Part 3 of the Act (ss 15-18) which applies to reserve land set aside either by the ILTB (s. 15) or the Minister responsible for iTaukei affairs (s.18). Part 3 establishes special protection for reserve land. It cannot be *'leased or otherwise disposed of'* (s.16(1)), except that under s.16(2) the ILTB can grant leases or licences (i.e. not otherwise dispose of) reserve land if the owners give the Board their consent to doing so. Similarly, section 17 allows land to be excluded from an iTaukei reserve either permanently or for a specified period *'upon good cause being shown and with the consent of the iTaukei owners'*. Given this level of protection I don't understand how it might be argued that section 9 (which applies a much lower level of protection for the land owners) can be regarded as applying to reserve land at all, much less 'only' to reserve land. If this argument were correct it would remove a constraint on the ILTB in its management of all non-reserve iTaukei land, and would mean that in making decisions about the leasing or licensing of such land ILTB need not pay any regard to the land owners' existing or likely future use of the land. The presence of section 9 in Part 2 of the Act (applying to all iTaukei land), rather than in Part 3 also to my mind shows that it does not apply to reserve land at all, but instead establishes a degree of protection to all iTaukei land consistent with the philosophy underpinning the Act itself, as expressed by the Court of Appeal in **Dakai No.1 v NLDC** (1983) 29 FLR 92 as follows:

> *The control of all native land is vested in the Trust Board (section 4) and is administered in accordance with the traditional Fijian concept - namely that such land cannot be owned in fee*

simple by an individual, available for alienation - it is owned collectively by and on behalf of mataqali or divisions or subdivisions of the natives on a perpetual basis for their use and occupation, and in due course for the use and occupation of their descendants.

16. Section 9 does not require the ILTB to obtain the consent of the land owners before leasing land. In **Dakai** (supra), dealing with the submission that individual land owners are entitled to be consulted by the ILTB before it exercises its statutory powers of control, particularly in granting leases of native land, the Court of Appeal remarked:

> *This is clearly not so - the Board alone has the power, and any consultations prior to authorising leases may have been merely a public relations exercise and have lead, as Kermode J. believes, to a mistaken belief by individual members that they are entitled to be consulted. Whether in a properly constituted action the mataqali as a whole could challenge the actions of the Board under Section 90 of the Trustee Act (Cap. 65) is altogether another question and again does not call for consideration.*

All that is necessary, in terms of the section, is for the ILTB to be 'satisfied' that the land is not beneficially occupied by the land owners, and is not 'likely' to be required by them for their use, maintenance and support during the term of the proposed lease. How the ILTB might come to be so satisfied is dealt with by Cullinan J in **Ratu No.2 & anor v Native Land Development Corporation & anor** (1987) 37 FLR 146, in which the learned judge thoroughly explored and discussed the tenure of indigenous land in Fiji, including an historical analysis of how land rights can be acquired by groupls and by individuals for residential and agricultural purposes. I have relied heavily on the learned judge's decision in that case – even where I have not directly quoted from the decision – in coming to the decision I have in this case.

17. In **Ratu No.2** the land in question had previously been leased for many years (so that no beneficial occupation by the owners would have arisen during the term of the leases), and the question was whether, after the leases had expired, the land owners had in some manner taken up beneficial occupation. Cullinan J said, on this issue:

> *In the present case the land in question was under lease for 50 years up to 1958, and thereafter under sixteen tenancies-at-will, that is, over the area of the Marlow lease. It will be seen that the second limb of section 9 refers to "the currency of such lease". It seems to me therefore that the duty of consultation on the part of the Board arose in 1958, when the original lease terminated, and thereafter a number of tenancies-at-will were granted. There is no evidence before me either way as to whether the Board ever considered the provisions of section 9 in 1958, and in particular whether its satisfaction in the matter was reasonably formed. As I see it, the presumption of regularity must operate in favour of the Board therefore.*
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> *It is important to note that between the years 1908 add late 1978, the land in question was occupied initially under a statutory lease and subsequently under sixteen common law tenancies. I do not see that it is necessary for me to decide upon whether the particular tenancies-at-will, extending over 20 years, were within the powers of the Board under regulation 12 of the Native Lands (Leases & Licences) Regulations (which have since been replaced by Legal Notice No. 98 of 1984), nor as to whether regulation 12 was intra vires the provisions of section 9 in particular. The point is that the land in question was thus occupied by a number of tenants-at-will. That being the case, it could not have been beneficially occupied by native Fijians for the purposes of section 3 of the Native Lands Act. There was no power therefore in the native owners to allot lands according to custom, up until the*

termination of the various tenancies-at-will. Again, there was similarly no power to so allot any of the lands in question during the currency of the NLDC Lease.

More importantly, the learned judge also set out as follows his views on what might constitute 'beneficial occupation' by the iTaukei owners (the passage is lengthy, for which I apologise, but it is necessary to set out the whole section to illustrate the judge's approach):

When the sixteen tenancies-at-will terminated, it is possible that some persons were traditionally allotted an area to cultivate within the area of a particular Mataqali's kanakana. It is possible that some had already, before the determination of the tenancies-at-will, been so allocated lands. It seems to me that any such latter allocation, lacking in validity during the continuation of a particular tenancy-at-will, would, on the basis of continued sanction of the, say, Turaga Ni Mataqali (assuming that he had such authority, for the moment) after the termination of the tenancy-at-will, then have become perfectly valid. The evidence is that altogether nineteen persons were found to be cultivating and/or residing on the land when NLDC commenced levelling thereof. The evidence indicates that some of those had come on the land before the granting of the NLDC lease, having been traditionally allocated land. That being the case, the question arose in 1979, that is, after the termination of the tenancies at-will .and before the grant of the NLDC lease, as to whether the land was "being beneficially occupied by the Fijian owners".

Here I wish to stress the use by the Legislature of the word "owners", as the statement of claim alleges, inter alia, as earlier indicated, (at paragraph 22(a)) that the Board failed to comply with section 9, and did not ascertain whether the particular parcels of land were being "beneficially occupied and cultivated by the Plaintiffs". But a native Fijian holding land under native custom cannot be described as an "owner", or indeed a number of them as "owners", that is, unless they together constitute the particular proprietary unit, say, a Mataqali. It would be an odd state of affairs if, say, it could be said that where the particular land was beneficially occupied by one member of the three Yavusa, it was then "beneficially occupied by the Fijian owners". I cannot imagine that Parliament ever intended that result.

Instead, I consider that Parliament intended that where there was any occupation of the land the Board must approach the native owners, conscientiously placing all the advantages and disadvantages of the proposed lease or licence before them, and pointing out to the native owners the current occupation of the land by some members of the proprietary unit. Thereafter it seems to me that is a matter for the proprietary unit to decide whether their members in occupation of the particular lands could be accommodated elsewhere, perhaps seeking the assistance of the Board in the matter, should the proprietary unit decide to so accommodate their members. If the proprietary unit however decides that it does not wish to disturb any member of the unit on the particular land, then it seems to me that its wishes in the matter must be final. I wish to stress again as I did earlier, that the tenure of the lands is vested in the native owners, and not in the Board. Where the proprietary unit has indicated that it does not wish to move its people from the subject lands, then I do not see how it could be said that the Board was, objectively speaking, "satisfied that the land ... is not being beneficially occupied by the Fijian owners". It seems that inherent in this situation is the aspect of agreement by the native owners.

I am fortified in my view by the provisions of the second limb of the section. I cannot see how the Board could reasonably form any view in the matter without consultation with the proprietary unit. I consider that the phrase "is not likely", lends strength to the independence of the Board's function in the matter. Nonetheless it must surely be only the proprietary unit itself which could indicate the particular plans which they may have for their land during the next, say, 99 years, for example, whether they wish to build a school or co-operative store etc., in a particular place, or indeed even to move a particular village to, say, higher ground, as was the case for example in the case of ***Meli Kaliavu & Ors v. Native Land Trust Board*** *(1956) 5 FLR 17, to which Sir John Falvey has referred on another point. It is here again that the aspect of agreement by the proprietary unit is quite obviously a necessity.*

I speak of course of agreement by the proprietary unit, and not by the individual members thereof. I cannot imagine that Parliament ever intended that the Board would seek the

agreement of each and every member of the proprietary unit in the matter: in the present case where the land is owned by three Yavusa in common, the realities involved are all the more apparent. In my view, the only reasonable approach in the matter is for the Board to publicise the holding of a meeting of the members of the proprietary unit beforehand, stating the particular purpose thereof. It might be that more than one meeting would be necessary, but in any event I imagine that the circumstances would be very rare indeed where the agreement of the members of the proprietary unit would not be necessary to the formulation of the Board' s satisfaction in the matter.

Further on in his decision Cullinan J drew a distinction between permission for use of the land by the proprietary unit as a whole, and that given by individuals (e.g. Turaga ni mataqali). The latter may not amount to beneficial occupation by the land owners, presumably depending on the nature of the arrangement, while the former arrangement probably would. It seems from the thoughtful submissions made by counsel for the plaintiff that he accepts that this is a valid distinction.

18. I note that while the specific comments by Callinan J that I have just quoted have not apparently been referred to in subsequent decisions of the Court of Appeal or Supreme Court, these courts have adopted and approved other aspects of the judge's decision in **Ratu No.2 v NLDC**, and I gratefully accept the learned judge's analysis of what is required by section 9 of the Act. There is a clear distinction to be drawn between those casual and/or temporary uses by individuals for their own benefit, which do not fall within the description of beneficial occupation, and those uses that can be taken to be approved and acquiesced in by the land owners together. As the judge points out, probably the only way for the ILTB to establish (to its 'satisfaction' as the section requires) what type of use applies in a particular case is to conduct some sort of investigative/consultative process with the land owners to find out more about the type and purpose of any occupation of the land, and whether it is communal in the sense described so as to qualify as beneficial occupation by the iTaukei owners as required by section 9.

19. Also relevant under this heading is the status of the plaintiff to bring this claim. He claims to be doing so both in his personal capacity, and as representative for Tokatoka Nadarau, Mataqali Vunaivi of Nadi. The distinction between these two roles is important. In its decision in **Narawa v Native Land Trust Board** [2002] FLR 273 the Court of Appeal said (p.275/30):

> *It is now clearly established that where land is owned by a mataqali, an individual member cannot sue and recover damages personally where damage has been suffered by the mataqali. In **Meli Kaliavu & ors v Native Land Trust Board** (1956) 5 FLR 17 Hammet J said:*
>
> > *The plaintiffs are not the owners of the land in question. They are merely five members out of some 150 members who own the land If any damage has been suffered by the mataqali as a result of any action by the Native Land Trust board for which they are liable in law to pay damages, the mataqali could undoubtedly recover them.*
> >
> > *It is not, however, open to this member or that member to sue and recover such damages in their own personal capacity. It would be quite out of the question for this court to award damages personally to these five plaintiffs in respect of a cause of action (if there is one) open to the mataqali of which they are members."*
>
> *This approach has been adopted in later cases, see, for example, **Naimisio Dikau No 1 & ors v Native Land Board & anor** CA No 801/1984 and **Waisake Ratu No 2 v Native Land***

Development Corporation & anor *(1987) Civil action no 580 of 1984. We agree with those observations.*
Where, however, the personal rights of an owner, as distinct from the rights of the mataqali, have been directly infringed, that person can bring an action for a remedy resulting from such infringement: see ***Serupepeli Dakai No1 & ors v Native Land Development Corporation & ors*** *Civ App No 30/1982 FCA: CA 543/1979 and* ***Waisake*** *(above).*

20. The remedies sought by the plaintiff in these proceedings are not in any sense personal to him, and – in spite of the fact that he claims to be acting in his personal capacity as well as in a representative capacity – the remedies he seeks do not relate to any personal rights he might be entitled to enjoy in respect of the land. Instead he seeks declarations as to the status and rights of the mataqali. The status of a person to bring representative proceedings is covered by Order 15, rule 14 High Court rule, which states:

Representative proceedings (O.15, r.14)

14(1) *Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 15, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.*

(2) *At any stage of proceedings under this rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this paragraph, the Court appoints a person not named as a defendant, it shall make an order under rule 6 adding that person as a defendant.*

(3) *A judgment or order given in proceedings under this rule shall be binding on all the persons as representing whom the plaintif's sue or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.*

(4) *An application for the grant of leave under paragraph (3) must be made by summons which must be served personally on the person against whom it is sought to enforce the judgment or order.*

(5) *Notwithstanding that a judgment or order to which any such application relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability.*

(6) *The Court hearing an application for the grant of leave under paragraph (3) may order the question whether the judgment or order is enforceable against the person whom the application is made to be tried and determined in any manner in which any issue or question in an action may be tried and determined.*

21. The commentary to the rule in the High Court Rules explains the purpose of the rule as follows:

The language of the rule is unmistakably clear. A representative action is designed to simplify litigation, render administration of justice more convenient for parties and the tribunal, to eliminate multiplicity of suits where the rights and liabilities of numerous and similarly interested litigants may be fairly adjudicated in a single action. Numerous parties related by a common interest or community of interest in a controverted question constitutes them a class of litigants, and one may sue or defend the class. Conditions: i) common interest; ii) common grievance; and iii) secure relief which, in its nature, would be beneficial to all.

In the High Court in England in **Johns v Rees** [1969] 2 All ER 274 Megarry J made the following observations about the purpose and application of the rule (in that case Order 15, rule 12 of the English Rules, which is all but identical terms to Fiji's rule 14):

> *The rule as to representative actions is an old Chancery rule which the Rules of the Supreme Court later made statutory. The present provision is RSC, Ord 15, r 12. The classic statement is that made by Lord Macnaghten in* ***Duke of Bedford v Ellis*** *[1901] AC 1 at p8. He said there:*
>
> > *The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could 'come at justice,' to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.*
>
> *From the time the rule as to representative suits was first established, he said ([1901] AC at pp 10, 11)*
>
> > *... it has been recognised as a simple rule resting merely upon convenience. It is impossible, I think, to read such judgments as those delivered by LORD ELDON in* ***Adair v New River Co.****, in 1805, and in* ***Cockburn v Thompson*** *[(1809), 16 Ves 321 at pp 325, 329] in 1809, without seeing that LORD ELDON took as broad and liberal a view on this subject as anybody could desire. 'The strict rule,' he said, 'was that all persons materially interested in the subject of the suit, however numerous, ought to be parties ... but that being a general rule established for the convenient administration of justice must not be adhered to in cases to which consistently with practical convenience it is incapable of application.' 'It was better,' he added, 'to go as far as possible towards justice than to deny it altogether.' He laid out of consideration the case of persons suing on behalf of themselves and all others, 'for in a sense,' he said, 'they are before the Court.' As regards defendants, if you cannot make everybody interested a party, you must bring so many that it can be said they will fairly and honestly try the right. I do not think, my Lords, that we have advanced much beyond that in the last hundred years, and I do not think that it is necessary to go further, at any rate for the purposes of this suit'.*
>
> *This seems to me to make it plain that the rule is to be treated as being not a rigid matter of principle but a flexible tool of convenience in the administration of justice.*

Analysis

22. Taking the plaintiff's status as a starting point, there is no doubt in my view that the plaintiff was entitled to issue the proceedings claiming to be a representative of the land owning unit of which he is a member. Although in the entituling the plaintiff says that he is also acting in his personal capacity as a member of the land owning unit, in fact none of the remedies he seeks are personal – all relate to the status of the mataqali, the impact on the mataqali of the plaintiff's use of the land, and the obligations of the ILTB to the mataqali in its administration of the land. So while the motivation of the plaintiff may be different from that of the mataqali, I see no reason for the court to refuse any remedies that the mataqali is entitled to, simply because the claim was made by the plaintiff rather than someone else. However, to the extent that any remedies are discretionary, as they are here, the fact that the plaintiff does not appear to have the support of the mataqali in making this application, may be a reason not to make the declarations sought.

23. The real issue though, is whether the plaintiff's use of the land for planting cassava, commencing as it apparently did in mid-2019, and apparently motivated by the plaintiff's desire (for reasons that have not been fully explained) to frustrate the negotiations with Forum Hotel Ltd, means that the ILTB cannot be satisfied that the land:

> *is not being beneficially occupied by the iTaukei owners, and is not likely during the currency of such lease or licence to be required by the iTaukei owners for their use, maintenance or support.*

Framing the issue in this way is different from the remedies sought by the plaintiff in paragraphs 2 and 3 of his originating summons of 25 May 2020, but I think reflects the true question that the court needs to answer. It is for the ILTB to be satisfied as to the matters specified in s.9 of the iTaukei Land Trust Act 1940, and while the court may be entitled to rule on the reasonableness and lawfulness of any decision the ILTB comes to, it is not the court's role to usurp that decision.

24. The evidence of the steps followed by ILTB in coming to any decision, is by no means complete. This may be because the process of consultation is still in train, and the ILTB has not yet come to a conclusion on that issue. When it does come to do so the support of the mataqali of the negotiations with Forum Hotels Ltd, its dismissal (see paragraph 7 above) of the plaintiff's use of the land, and the existence or absence of any proposal or project by the mataqali for the land during the proposed term of the lease, will no doubt be important factors. As a member of the mataqali the plaintiff will have the opportunity to have input into any consultation process engaged in by ILTB with the mataqali, and also to seek the support of the mataqali for any alternative proposal that he supports.

25. Also important though, is the current status of the lease granted in 1998 to Enormous Investment Ltd and later transferred to Forum Hotel Ltd. In its March 2013 decision in **Forum Hotels Ltd v NLTB** [2013] FJCA 24 the Court of Appeal concluded that the Registrar of Land's cancellation of the registered lease in March 2005 was *not valid and [was] bad in law,* and that the notice of default issued by ILTB in February 2005 gave too short a period to remedy the breaches, and so did not provide a sufficient basis for cancellation of the 99 year lease by the ILTB. The lease therefore has not been validly terminated, and presumably (this issue was not addressed in the parties' submissions) remains in existence, albeit apparently subject to some renegotiation. Even if Forum Hotels is not currently exercising any right to possession (there is no evidence on this), it clearly has not relinquished the lease, and instead is seeking to reinstate its occupation and use of the land. This then has implications for the plaintiff's use of the land. If Forum Hotels Ltd has been still entitled to the use and occupation of the land after 2005, applying the analysis of Cullinan J in **Ratu No.2,** any use of the land by the plaintiff without the consent of Forum Hotels Ltd cannot reasonably be regarded by ILTB as beneficial occupation by the iTaukei owners.

Conclusion & orders

26. Addressing each of the orders sought by the plaintiff:

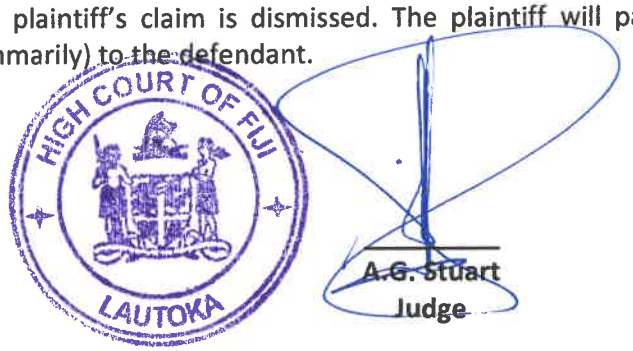
i. It is not contested that the land in question is owned by the land owning unit, and is administered by the ILTB for the benefit of the land owning unit. But the Court of Appeal has held that the purported termination and cancellation of the lease by ILTB and the Registrar of Lands was null and void. Accordingly the lease granted in 1998 remains in existence, and the land is not unleased land.

ii. Even if it were, the evidence is that the ILTB is not satisfied that the land is currently beneficially occupied by the iTaukei owners, or that it is likely to be required by the owners for their use, maintenance and support during the term of the lease. While counsel for the plaintiff argued that the evidence as to the consultation process filed in this proceeding is insufficient to 'prove' to the court that a proper consultation has taken place, that is not a decision that these proceedings call on the court to make. When it comes to make the decision, it will be ILTB that has to decide, after consultation (generally in the manner recommended by Cullinan J in the passages quoted above – see paragraph 17), whether it is satisfied that the land owners are not beneficially occupying the land, or will not require the land for their use, maintenance and support during the term of any lease.

iii. Accordingly, I am not persuaded that it would be unlawful and contrary to s.8 iTaukei Land Trust Act 1940 for the ILTB to issue a lease of the land to Forum Hotels Limited, should the Board decide to do so.

iv. There is therefore no justification for an injunction restraining ILTB in the manner sought.

27. The plaintiff's claim is dismissed. The plaintiff will pay costs of $2,000 (assessed summarily) to the defendant.



A.G. Stuart
Judge

At Lautoka this 26th day of February, 2021

SOLICITORS:
Law Solutions, Suva for the plaintiff
Legal Department, iTaukei Land Trust Board, Suva, for the defendant