**1. SERUPEPELI DAKAI NO. 1**
**2. TUBANAMASI MATIA**
**3. KEVUELI KUNAMOMO**
**4. JOSEVATA SOROWALE NO. 1**
**5. JOSEVATA SOROWALE NO. 2**
**6. ATUNAISA MOCELUTU NO. 1**
**7. WAISAKE RATU NO. 1**
**8. WATISONI DAKAI**
**9. SERUPEPELI DAKAI**
**10. PONIPATE KOKADI RATULEVU**
**11. VILIAME VATALESAU**
**12. AKEAI BOKADI**

*v.*

**1. NATIVE LAND DEVELPOMENT CORPORATION**
**2. NATIVE LAND TRUST BOARD**
**3. NATIVE LAND COMMISSION**

[COURT OF APPEAL—Gould, V.P., Speight, J.A.]

Civil Jurisdiction

Date of Hearing: 10th March 1983.
Delivery of Judgment: 23rd March 1983.

*(Native Lands—Ownership thereof vested in the Mataqali on perpetual basis—Control residing in the Native Land Trust Board—individual members may be but need not be consulted.)*

*K. C. Ramrakha with A. K. Singh* for Appellants
*A. M. Rabo* for 1st Respondent
*A. Qetaki* for 2nd Respondent
*S. Matawalu* for 3rd Respondent

Appeal against a decision of the Supreme Court in an action whereby the 12 appellants as plaintiffs challenged the actions of the Native Land Trust Board (the Board) in granting a lease to the Native Land Development Corporation Limited (1st Respondent) over some 36 acres of land at Navesi being part of 388 acres comprised in 4 separate registers issued over the hand of the Native Lands Commission on 11 September 1936.

The Plaintiffs alleged that the said land was owned by them (1) by virtue of their membership of the Nayavumata Mataqali; alternatively (2) by virtue of a certain letter written in 1905 by the Commissioner of Lands whereby the land was allocated individually to members of the Mataqali as occupied.

A

The Court said:—

"In the ordinary course of dealing the control of such native land (as this was) is vested in the Board (S.4 of Native Land Trust Act); and in accordance with common practice was in this instance being leased by the Board to the Development Corporation for development purposes."

B

In the Supreme Court the learned judge held the plaintiffs had purported to bring a representative action but had not obtained leave of the court therefor. Further, there was no production of any letter nor any record of it.

The Judge rejected the claims. He held that it was based on a misconception of the nature of ownership of native land control of all of which was vested in the second defendant, administered in accordance with the traditional Fijian concept i.e. it could not be owned in fee simple by an individual available for alienation but was owned collectively by and on behalf of the Mataqali perpetually for their descendants' use and occupation. Having rejected any suggestion of an individual granting in 1905 or at any other time he held the Registers of Native Land were conclusive.

C

D

Grounds of appeal argued were:—

1. The learned trial judge erred in law and in fact in holding that the appellants had no status to bring this action, when the facts clearly showed the land had been specifically allocated to them and others as part of an exchange scheme.
2. The learned trial judge. erred in law and in fact in not holding that the first defendant as an entity was ultra vires the powers of the second defendant. and therefore had no power to deal with Native Land.
3. In any event the appellants as beneficiaries of a trust were entitled to have a say in the terms of the trust.

E

The Court traced the history of the land in question in detail back to 1880 and how the existing ownership came into being, with full reference to contemporary records.

F

*Held:* The tenure of this land was not some unusal form. removed from the statutory concept of Native Land ownership. Accordingly the provisions of the Native Land Trust Act applied.

G

As to the 2nd ground the Corporation was a limited liability company formed pursuant to the Companies Act the majority of its shares being held by the Board. a power open to it pursuant to the Native Land Trust Act S.3(6) there being no prohibition in the Board being the owners of the shares.

The 3rd ground advanced apparently was due to a mistaken belief by persons that they were entitled to be consulted whereas the Board alone had the relevant power. consultation being within its discretion.

H

Appeal dismissed.

SPEIGHT, J. A.

Judgment of the Court

A This appeal is against a judgment of Mr Justice Kermode in the Supreme Court in an action where the abovenamed 12 appellants as Plaintiffs challenged the actions of the Native Land Trust Board in granting a lease to the Native Land Development Corporation Limited over some 36 acres of land at Navesi near Suva.

The Plaintiffs alleged in their Statement of Claim that the said land is owned by
B them, either "by virtue of their membership of the Nayavumata Mataqali" or alternatively by virtue of "a letter dated 27th December 1905 written by one Mr T. Wilkinson the Commissioner of lands, whereby the land was allocated individually to members of the Mataqali as occupied."

It is not easy to understand exactly what is meant by this pleading, but Kermode J. took it to mean, and we similarly apprehend that the Plaintiffs were claiming
C individual ownership of the land by themselves and their fellows—or as Mr Ramrakha said in his submissions—that they owned it "in propria persona" and that this land and the Plaintiffs' interests in it was quite different from the ordinary situation of native land, where native owners derive their rights from customary use and occupany. Based on this assertion the claim in both Courts was that the individuals as members of a group retained personal ownership and the land was free from the
D control which is in all other cases vested in the Native Land Trust Board.

If one looks at the recent history of this land it will be seen that it is part of an area of 388 acres which is comprised in 4 separate Registers issued over the hand of the Native Lands Commission on 11th September 1936. In those Registers the Yavusa Nauluvatu, Nayavumata and Vatuwaqa "are recorded as owners in common" of the subject lands. In the ordinary course of dealing the control of such native land is vested in the Board (Section 4 Native Land Trust Act) and in accordance with common
E practice was in this instance being leased by the Board to the Development Corporation for development purposes.

In the Supreme Court Kermode J. rejected the Plaintiffs' claims.

First he held that the Plaintiffs were purporting to act on behalf of fellow members of the Nayavumata Mataqali in respect of individual ownership but had not
F obtained leave of the Court to bring a representative action.

More importantly he rejected the claim to individual ownership. This had first been based on an alleged letter from the Commissioner of Lands in 1905 to the Plaintiffs but no such letter had ever been produced, nor did the Native Land Commission have any record or knowledge of it. Further the learned judge held that the claim was based on a misconception of the nature of ownership of native land—for
G as Mr Ramrakha conceded—this is of course native land. 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. Having rejected the suggestion that there had been an individual grant in
H 1905 or at any other time the learned Judge held that the Registers of Native Land issued in 1931 were conclusive.

At a later stage in this judgment we propose to examine the history of the Native Lands Act to show the origin of the Nayavumata Mataqali's claim to this land, but

for present purposes it should be noted that the function of a Register of Native Land is to record the conclusions reached by the Native Lands Commission (or its antecedent body) as to the ownership of Native Land.

Under the Native Lands Act (and prior Ordinances) the Commission is required to institute enquiries into the title to and boundaries of all lands claimed by mataqali or other groups of people (Section 6(1)).

Disputes as to ownership and boundaries shall be determined by the Commission and its decisions recorded (Section 6(5)) and the record of the finding of the Commission, or the Appeal Tribunal shall be final (Section 7).

Section 8 then provides that:

> "The Commission shall cause the description of the boundaries and situation of land recorded and settled in the manner aforesaid to be entered in a register denominated the "Register of Native Lands"....."

Section 10 provides for the registers to be transmitted to the Registrar of Titles and preserved with the same care as Crown Grants. There was ample statutory authority therefore to treat the Registers as conclusive proof of the final determination by the body authorised to decide ownership.

Finally the learned Judge rejected the contention that the ownership in common by more than one mataqali was unknown in Fijian law. The evidence was all against such a claim and it was later specifically abandoned by Counsel for the appellants.

The following grounds of appeal were submitted to this Court.

1. The learned trial judge erred in law and in fact in holding that the appellants had no status to bring this action, when the facts clearly showed the land had been specifically allocated to them and others as part of an exchange scheme.
2. The learned trial judge erred in law and in fact in not holding that the first defendant as an entity was ultra vires the powers of the second defendant, and therefore had no power to deal with Native Land.
3. In any event the appellants as beneficiaries of a trust were entitled to have a say in the terms of the trust.

The matter requiring principal attention is *Ground 1.* Appellants' submission was that the learned Judge had failed to appreciate that this was not a case of native owners relying on customary occupation and use. The land in question, as the case shows had not been occupied or used by the Plaintiffs' Mataqali prior to some date between 1880 and 1890. When the capital of Fiji was moved to Suva towards the end of last century it was necessary for some of the existing owners to be moved elsewhere, and negotiations took place over a number of years as a result of which many people, including the Plaintiffs' forebears were moved to the land now in question which had previously been held by the people of Lami—the present land to be developed appears to be close to Lami township.

A When this move took place is not quite clear. At pp. 79—82 of the case on appeal there is a lengthy summary of early land tenure contained in a letter by the Acting Colonial Secretary in 1963. Concerning the Suva move he says:

> "At some time prior to 1882 and in connection with the proposal to move the Capital from Levuka to Suva it is apparent that an approach was made to the Fijians of Suva to sell to Government their 300 acre block and in January 1882
B an agreement was concluded between the Crown and Ratu Ambrose (Buli Suva) and the nine mataqali having an interest in the land whereby the land was purchased for a payment of a perpetual annuity of £200. The *authority* for this purchase *is contained in Section 16 of Ordinance* 21 of *1880.*
>
> The Fijians living on the land then moved from this ORANGE coloured area and settled at Suvavou in accordance with an arrangement made by Sir
C Arthur Gordon *(MP.4469/07).*
>
> *Subsequently the Lami people gave to the Suva people a large area of land stretching from Tamavua river to Lami river and the gift was recorded in Na Mata of February* 1894. (See area coloured YELLOW on plan at "A"). (See also extract from Namata at Appendix "B")."

D It appears therefore that the move was sometime after January 1882 but there must have been some uncertainty and dispute concerning the area to be occupied and there is a report made in 1893 by two special commissioners who had been appointed to look into the matter.

"Rewa Province

Disputed claim No. 27.

E Lands occupied by the Kai Suva

Claimed by the Kai Lami

Report

When the Capital was moved to Suva, the lands of the Kai Suva were rented by the Government for an annual payment of £200, the the people were moved over to
F the lands of the Kai Lami under the misapprehension perhaps that they were closely allied in blood and sympathies. This, however, it not the case. The Kai Lami, once a very numerous tribe, had a far lower social rank that the Kai Suva, and they therefore accepted the situation, but not without a good deal of grumbling.

No arrangement seems to have been made as to boundaries, and the Kai Suva have consequently been gradually extending their gardens farther and farther
G inland. Last year the Lami people tried to check these encroachments by planting *saus* (reeds), and great ill feeling between the two Mataqalis resulted. The Kai Lami, knowing that the Kai Suva were receiving £200 a year from the Government, and were making use of their lands for nothing, not unnaturally demanded that a part of the rent should be given to them for their lands.

The matter was exhaustively discussed by the Provincial Council, and both par-
H ties agreed to leave the matter in the hands of the Council. It was decided to appoint a Commission to go over the boundaries of land of suitable extent to be registered to the Kai Suva absolutely, who should buy it by a payment of not exceeding £100 as might be decided by the Governor. One of the Commissioners accompanied the Commission and a survey of the proposed grant was subsequently made by the Sur-

veyor. The land set apart includes some 1500 acres, most of which is excellent planting land, and more than sufficient for the needs of the Kai Suva. A plan is enclosed.

We therefore recommend that the boundaries be registered in the name of the Kai Suva, and that £100 be deducted from the next payment of the Suva rent and paid over to the Kai Lami.

(Sgd)Thomson
"Marika Toroca
Commissioners"

From the reference to "Last year the Lami people tried to check these encroachment....." it would seem that the move was prior to 1892 and the ascertainment of the time as being after 1882 and before 1892 is of some importance when one examines the statutes.

As far as the Court can ascertain the first Native Lands Ordinance was No. 21 of 1880. The Commissioners were charged with the duty of ascertaining the ownership of native lands although cases of dispute were referred for determination to the Bose-Turaga (Council of Chiefs) subject to appeal to the Governor-in-Council whose decision was final.

It is interesting to note that Section III of the 1880 Ordinance provided:

> "All native lands shall be inalienable from the native owners to any person not a native Fijian except through the Crown ....."

This provision which remained until the Native Lands Ordinance (No. 21) of 1892 indicates that alienation to other Natives was lawful, and needs consideration against a submission made by Mr Ramrakha that this was "a commercial transaction" and that the land concerned was thereby freed from all restraints which apply to other lands held by custom.

There is no evidence to support that contention and an examination of the 1880 and 1892 Ordinances and the records of this transaction demonstrate that the Lami land is to be treated as the property of the various mataqali from Suva in the same way as other native land.

As has been seen the move to Lami area occurred in the 1880s but the final determination of exactly what land was thereby acquired did not occur until 1893.

The 1892 Ordinance changed the procedure for the resolution of disputed matters.

By Section 7 the Commissioners were authorised to inquire into the title claimed by mataqali and others and to prescribe boundaries.

Section 8 then provided:

> "8. The Commissioner or Commissioners aforesaid shall after due inquiry as provided in the preceding section lay the minutes of the inquiry before the Provincial Council or Councils of the Provinces concerned especially convened by the Governor with that object. The Commissioner or Commissioners shall be considered a member or members of every such Council or Councils for the purpose of discussion and of assisting in the decision of all

A claims brought before it for settlement but shall not join in any of its resolutions or recommendations. And such Provincial Council or Councils shall confirm or adjust the boundaries submitted to them. And if such confirmation or adjustment is accepted by the parties concerned the boundaries and situation so settled shall thereupon be registered by the Commissioner or Commissioners in the manner hereinafter provided for. If such confirmation or adjustment is not so accepted the finding of the Provincial Council or B Councils in the case if any be arrived at together with the report of the Commissioner or Commissioners and a copy of all evidence taken shall be transmitted by the Commissioner or Commissioners to the Governor in Council whose decision upon the case shall be final."

This section was replaced by somewhat similar provisions in 1896 and by a quite C new section in 1905.

The report of the Commissioners in 1893 was referred to the Provincial Council which approved the recommendations of the Commissioners and this in turn was ratified by the Governor in Council on the 21st December 1893.

Thereafter the matter was gazetted in the Na Mata of February 1894, a translation of which entry is as follows:

D *"Lami and Suva*

Gift by the Lami people of a piece of their land to the Suva people to be theirs for all time.

On the unanimous representation of the people of Lami, Suva district, the Provincial Council approved that a piece of the Lami lands should be given to E the Suva people to be their sole property for all time. The piece of land given lies on the same side of the river as Suvavou.

On the matter being reported the Governor in Council ratified the action of the Lami people and ordered that the following should be the boundaries of the Suva people's land:

(hereafter follows the boundaries)

F Translated from "Na Mata" of February, 1894, page 18."

This then is sufficient proof of the holding of this land by the Mataqali concerned. It was by virtue of the statutory provision contained in all the Ordinances from 1892 down to the present day that such determination by the appropriate authority shall be final and recorded in the Register, and all such land "shall be held G by Native Fijians according to native custom as evidenced by usage and tradition" (Section 3).

The Court does not accept that this was some unusual form of tenure removed from the statutory concept of natve land ownership. Accordingly the provisions of the Native Land Trust Act apply.

*Ground No. 2* claims that the first defendant, the Native Land Development Cor- H poration Limited is "an entity ultra vires" the powers of the Native Land Trust Board and therefore had no power to deal with Native Land.

The submission developed under this head was that it was illegal for the Board to have set up the Corporation and therefore the Corporation is a nullity. As to this all

we need say is that the Corporation is a Limited Liability Company with a certificate of incorporation under the Companies Act albeit the majority of its shares are held by the Board. Under section 3(6) of the Native Land Trust Act the Board may "enter into contracts and may acquire, purchase, take, hold and enjoy real and personal property of every description"—a power clearly wide enough to include the taking of shares in an incorporated company.

On this point Kermode J. said:

> ".... There is no evidence in any event before me to indicate what funds have been invested by the Board in the company or the source of such funds and if they are trust funds which have been involved whether those beneficially entitled to such funds have approved such investment by the Board.
>
> The Board, while it is given wide powers under the provisions of the Native Land Trust Act, is a trustee charged with specific duties. From the rent and purchase moneys it collects from native land it can legally deduct only up to 25% of rent and premia "for the expenses of collection and administration". The balance has to be distributed in the manner provided to those entitled to it.
>
> The Act does not specifically provide that the Board is empowered to invest any trust moneys. The wide powers given to the Board in subsection 5 of section 3 do not mention lending or investing any money. If there be power to invest, as to which I make no finding, the Board as a trustee would still be bound by section 12 of the Trustee Act which deals with authorised investments."

We agree with those remarks and point out that the challenge is made merely to the creation and existence of the First Defendant, which is answered by the effect of the Companies Act, and we see no prohibition in the Board being the owners of share certificates. Whether or not such ownership is as the result of the investment of funds in a way not authorised is another question altogether, not raised in these pleadings, and like the learned trial judge we refrain from expressing any opinion.

*Ground 3* raises the plea that the appellants were entitled to have a say in the terms of the trust. No argument was advanced in support of this ground but we take it to mean that individuals are entitled to be consulted by the Board before it exercises its statutory powers of control, particularly in granting leases of native land. 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.

The grounds advanced all fail and consequently the appeal is dismissed with costs to the respondents.

*Appeal dismissed.*