

v

**NATIVE LAND DEVELOPMENT CORPORATION  
& NATIVE LAND TRUST BOARD**

[SUPREME COURT, 1987 (Cullinan J) 27 February]

Civil Jurisdiction

[Editor's note: This Judgment which was not included in 33 FLR is reproduced in this volume because of its importance to the law of native land in Fiji]

*Native Land- nature and rights of customary ownership- limited powers of the Native Land Trust Board- duty to consult native owners- rights and legal status of individuals and land holding units- whether representative action available- Native Lands Act (Cap 133) Section 3, 18- Native Land Trust Act (Cap 134) Sections 4, 8, 9 & 12. - High Court Rules 1988 O 15 r 14.*

The Plaintiffs sought damages arising from their eviction from native land following the grant by the NLTB of a development lease over the land. In the course of finding in favour of the 1st Plaintiff the Supreme Court discussed the nature of customary ownership of native land, the history of the legislation affecting it and the extent to which members of a mataqali retained the right to deal with and litigate in respect of the land either individually or collectively.

Cases cited:

*Ame Gavidi v The Police* 4 FLR 14

*Commissioners of Sewers v Gellatly* (1876) 3 Ch. D. 610

*Hayward v Pullinger* [1950] 1 All ER 581

*Iliaseri Waqamate v Director of Lands & Attorney-General* Suva Civ 156/83

*John v Rees, Martin v Davis, Rees v John* [1969] 2 All ER 274

*Meli Kaliavi & Ors v Native Land Trust Board* 5 FLR 17

*Monk v Redwing Aircraft Co. Ltd* [1942] 1 KB 182

*Naimisio Dikau No. 1 & Ors v NLTB & Anor* (Suva Civ. 801/84)

*Offshore Oil N.L. v Investment Corporation of Fiji Ltd* 30 FLR 90

*Rauzia Mohammed v ANZ Banking Group* FCA Reps 85/398

*Re Cuno* (1889) 43 Ch. D. 12

*Rodgers & Ors v NBF & ANZ* (Suva Civ. 880/95)

*Serupepeli Dakai No. 1 & Ors v NLDC & Ors* 29 FLR 92

*Smith & Ors v Cardiff Corporation* [1954] 1 QB 210

*The Sennar (No. 2)* [1985] 1 WLR 490

*Thoday v Thoday* [1964] All ER 341

*Timoci Bavadra v NLTB* (Suva Civ. 421/86)

**Cullinan J:**

Background to the Writ:

The yavusa Nauluvatu, Nayavumata and Vatuwaqa are the owners in common

- A of over 388 acres of native land at Navesi, Suva. One lot in particular, that, is Lot No. 15 on plan M/13,3, registered on Folio 1245 of Volume 7 of the Register of Native Lands, consists of 274 acres, with its western and eastern borders adjacent to Waikalou Creek and Tamavua River respectively, bounded on the south by Suva Harbour. On the 1st August, 1908 over 30 acres thereof was leased to Margaret Hilda Wall for a period of 50 years. On the 20th October, 1938 over 28 acres of that lease was assigned to Alfred Henry Marlow: it is convenient to refer to the latter lease and the area involved as the "Marlow lease." The Marlow lease expired on the 31st July, 1958. On the 7th April, 1959 Mr. B Marlow was informed by the second defendant, the Native Land Trust Board ("the Board"), that he could stay on on part of the land, that is, over 10 acres, as a tenant-at-will, with effect from 1st August, 1958: apparently fifteen others were also given similar tenancies-at-will on the remainder of the Marlow lease. On the 22nd February, 1978 the Board gave Mr. Marlow six months notice to quit. It would seem therefore that Mr. Marlow's tenancy-at-will terminated on C the 31st August, 1978.

- Meanwhile the first defendant the Native Land Development Corporation ("NLDC") had applied for a lease of over 36 acres, and on 19th October, 1979 the Board issued an approval notice in the matter, stipulating a lease for 10 years from the 1st October, 1979 at the half yearly rent of \$100 per acre. The proposed D lease included the area of the Marlow lease. NLDC proceeded to develop the area, when they came across a number of people on the land, including the plaintiffs, whom they considered to be in unlawful occupation and threatened legal eviction against them. Meanwhile the plaintiffs filed the present writ.

- E The writ indicates that both plaintiffs are farmers. The first plaintiff is a member of the Mataqali Nayavumata of the Yavusa Nayavumata and the second plaintiff is a member of the Mataqali Naceva of Yavusa Vatuwaqa. The writ claims that the first and second plaintiffs in their capacity as native Fijians, have beneficially occupied and cultivated each one acre approximately of the land at Navesi since the 1960's and mid-1970's respectively, by virtue of native custom usage and tradition. The statement of claim is very lengthy indeed, covering six pages, but as I see it, the plaintiffs' claims can be reduced as follows :

- F (1) By virtue of the provisions of section 3 of the Native Lands Act (Cap133) both plaintiffs have an estate for life in the land which they occupy.
- (2) The development lease issued by the Board to NLDC is void because
- G (a) the Board failed to comply with the provisions of section 9 of the Native Land Trust Act (Cap. 134);
- (b) the Board has no statutory power to sub-divide or develop native lands and cannot therefore issue a lease for that purpose:
- (c) the Board had no power to delegate the authority of approval of the development lease to its General Manager.

- (3) Any attempt to remove the plaintiffs from their land would be a violation of their rights under sections 3 (c) and 8 of the Constitution (1970).

The prayer then seeks seven consequential declarations, a permanent injunction against NLDC, damages and costs.

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#### Native Land Tenure:

Much of the court's time was taken up with evidence concerning native land tenure, as this aspect affected the plaintiff's traditional rights, if any, to the land occupied by them. In approaching this subject I confess to a feeling of great inadequacy on my part, in attempting within a few pages to cover that to which many have devoted a lifetime of research and scholarship, and I hope I will be forgiven if I at any point strike a note of alien discord. Learned Counsel have all given me great assistance in referring me to the following works in the matter, namely "*The Three Legged Stool*", a compilation of selected writings of Ratu Sir Lala Sukuna edited by Dr Deryck Scarr (Macmillan Education, 1983), "*The Charter of the Land*" by Dr. Peter France (Oxford University Press, 1969) and "*Under the Ivi Tree*" by Professor Cyril Belshaw (Routledge & Kegan Paul, 1964): I wish to express my thanks indeed to Miss Regan, who placed her personal copy of Dr. France's work at my disposal.

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Dr. France observed (at pp. 14/15) that the Native Lands Commission recorded certain "tendencies" in the distribution of land rights. There were apparently three exclusive rights, that is, in the 'yavu' or house site, the 'qe'le' or cultivated area and in the 'veikau' or forest area. Rights to the yavu were vested in the occupant of the house: rights to the veikau were vested in the community, which rights were distributed by the Chief, apparently on an individual basis on the annual presentation of 'sevu' or first fruits. "The qe'le was held by extended families subject to the payment of sev'u or the rendering of services to the tribe, or both", Peter France observes. Component Mataqali were each allotted particular services in the community, for example that of the 'gonedau' or fishermen, receiving land rights and protection from the community in return for specialised services. Dr. France observes at p.17 that

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"The communal preparation of land did not destroy the rights of the individual in its subsequent planting. It was analogous to the rights of occupation of a house, which was built by the community and then passed to the family for its occupation. Similarly the land might be prepared by the community but the family would take on the cultivation of a particular area over which the usufructory rights were reserved to it. If fruit trees were planted, they were acknowledged as belonging to the planter and his descendants"

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Professor Belshaw had this to say on the matter (at p. 185),

"Land use was highly individualistic, based entirely upon decisions and pre-eminent rights of individuals. Naturally enough families typically work

together and often blend their particular rights and operations. But even here husbands, wife and adult sons and daughters frequently take responsibility for separate garden areas, either contiguous to each other, or situated in differentiated blocks. Where actual use is contiguous, the garden area is thought of as being administered by the family head, but in other cases unless permission had been sought from a former user, the actual user is the administrator or 'owner' of the land. Where a piece of land has been used for a garden, no other person may use that land without permission. If the user has died or if the land has been used by his ancestors the incoming user must propitiate the ancestors. No person may be ejected from a garden allotment once he has begun to use it, and the mataqali cannot interfere with right of succession provided appropriate rituals of acknowledgment have been performed, even when the users are members of other mataqali or yavusa. In terms of use, and inheritance, the rights of the individual take precedence over the interests of any social group."

In dealing with personal rights Dr. France had this to say at p.17 :

"Personal rights to land were created either by initial cultivation or by gift. Grants of land rights were made in series of ceremonies which have different names and different meanings in different parts of the group. On the birth of a child it was the custom in some areas to carry the baby into a relative's house, the occupants of which would set aside a piece of land for it. This was known as 'curucuru ni gone'."

Dr. France goes on to describe a number of other ceremonies or occasions leading to a grant of land. He states that the evidence before the Native Lands Commission however varied as to whether such grants were absolute, or conveyed but a life estate, the descendants of the donors and donees adopting opposing positions, even where, say, fruit trees had been planted. Dr. France observes (at p.18) that with regard to usufruct "perhaps the most common practice" was to grant the equivalent of an estate in tail male. The learned author's observations are, he says,

"no more than an outline of tendencies which were followed to varying degrees in different parts of Fiji .... It is important to stress that no rigid system of rules for the disposal of land rights is in evidence at the earliest stages of Fijian society."

With the advent of the settlers seeking land, deeds (in Levuka) and leases began to appear. Dr. France observes at p.52 :

"It is misleading to suggest ... that in selling land without the consent of the commoners, (the Chiefs) were infringing customary law. Since there were no Fijian traditions governing the sale of land to Europeans, no customary 'law' existed which was relevant to the situation. There were certainly no precedents for seeking the opinion of every member of a social



unit to ratify the decision of its chief. When dispossessed Fijian tribes sought land they would approach the chief, with a presentation of 'yau' (i-e. 'treasured goods', usually yaqona and tabua); and the decision as to whether or not they were accommodated was the chief's alone. Power to alienate land in return for customary services or presentations had traditionally belonged to the chiefs and, in the sales to white men, they were continuing to exercise those powers towards a different race, and for different considerations."

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Indeed the illustrious Ratu Sir Lala Sukuna in an annual report for 1939 as District Commissioner for Lau (see pp.246/248 of *The Three-Legged Stool*) observes that

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"The greatest obstacle to mataqali proprietorship was undoubtedly the system of individual ownership introduced by Ma'afu in 1869. Its main object was to ensure the full collection of a poll tax. Taxpayers were each granted a strip of coastal coconut-bearing land of more or less equal size, carved where possible-from the family group holdings of the donees. As regards Tongans (who belonged of course to no local tokatoka), to even the burden on the Native owners their parcels were scattered over the countryside. To each of these later allotments a piece of hill land was added for growing food crops. The method of division was wise. As to the Tongan settlement according to its means, complaints were silenced. Charges of iconoclasm and dangers of resistance were dissipated by using the old idea of ownership as the basis and the complement of the new."

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As to the proprietary units in Fiji Ratu Sir Lala Sukuna observed (at p.246) :

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"The proprietary unit in Lau, as elsewhere in Fiji, was originally the family group occupying normally a definite piece of land and known in Bau as 'tokatoka'. Cession found these groups organised for governmental purposes into units called 'mataqali', two or more forming a unit based on blood relationship, propinquity and convenience. With the headmen of these units the chiefs were of course in constant contact."

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In 1876 the Governor Sir Arthur Gordon (subsequently Lord Stanmore) requested the Great Council of Chiefs to outline the traditionally recognized rights to land, so that they could be incorporated in new legislation and duly registered. The Great Council of Chiefs complied with the request, but their discussions in 1876, 1877 and 1878, according to Dr. France (at pp 110/113), indicate a wide diversity of opinion, both as to the names of social divisions and units holding land rights. Indeed in 1876 the Council proposed that

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“ . . . the land be divided among the occupants of it according to the families of the landholders ... and then let the land be divided in portions to the people individually, or in large blocks to families or tribes.”

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The proposal incidentally was supported by Ma'afu, no doubt relying on the system in operation in Lau. No action was taken on the proposal. In 1877 the Council was again undecided. In 1878, Dr. France observes, there were again completely diverse views in the matter, but the Council nonetheless proposed “the registration of landowners in mataqali and for the definition of mataqali lands ... (which) should then be subdivided into family land to be held according to hereditary succession, and that registration of these lands should convey legal ownership”. Sir Arthur Gordon was in England at the time and the recommendation was not implemented. Finally the Great Council of Chiefs met again in December 187'9. After five days of discussions as to customary land tenure, the Chiefs considered it desirable “that there shall be but one general custom for all Fiji” and affirmed their unanimity thus :

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“ The beginning and the end of the matter is this: we repeat and with one voice solemnly declare the true and real ownership of land with us is vested in the mataqali alone, nor is it possible or lawful for any mataqali to alienate its land”

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Ratu Sir Lala Sukuna observed (at pp.246/247) that the Chiefs in making the declaration were -

“not distinguishing between a convenient and familiar unit of Government and a small and unknown unit of ownership countless in number.... The dictum became law.

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In Lau, however, law and practice differed. The mataqali was never everywhere accepted as the proprietary unit and rents were frequently paid in whole to individual owners of leases, including shares due in law to Headmen.”

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Over the ensuing years there was some pressure to record the holdings of Tokatoka. In 1903 the Great Council of Chiefs recommended that the law be amended to allow for the recording of the holdings of Mataqali subdivisions. This was not adopted. Indeed, with the arrival of Sir Everard im Thurn as Governor in 1904, legislation was introduced in 1905 which had the effect of terminating the work of the Native Land Commission in recording the holdings of any proprietary unit. Dr. France (at p.165) refers to “the unqualified failure of earlier Native Lands Commissioners to arrive at a satisfactory notion of traditional Fijian social structure and land tenure.”

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A new attempt was made with fresh legislation in 1912 and a new Chairman of the Native Lands Commission G.V. Maxwell was appointed, assisted by Ratu Savenaca Seniloli. The Commission made slow but very positive progress. In 1914 the Great Council of Chiefs resolved that:

"We are of the opinion that the proper way to deal with the matter is for our Chiefs to divide the land amongst us, either by 'vanua', by 'yavusa', by 'mataqali' by 'tokatoka', or by individuals in accordance with the wishes of the owners ....

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The general view of the Council was that the Chiefs alone are the owners of the lands and that the inferior members of the tribes only hold the land with their permission."

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The Native Lands Commission declined to accede to this approach, and continued with its work, recording what they considered to be the true proprietary unit, and even individual ownership where it existed. Dr. France observes at p.170 that

"Maxwell reported that, in most areas, the traditional unit of ownership was a sub-division of the division of the 'mataqali', variously known as the 'tokatoka', 'bito', or 'bati-ni-lovo'. In order to secure a complete record of ownership, it was necessary that the boundaries claimed by these subdivisions be recorded."

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Maxwell indeed proposed that the word "mataqali" in the legislation be replaced with the words "proprietary unit" but this was not adopted. Maxwell was continually pressed to speed up registration by recording only the Mataqali boundaries but he insisted that the Tokatoka or its equivalent was "in most cases the proprietary unit", and that he did not wish, as he put it, "to spoil the ship for a ha' porth of tar". Finally in 1918 the work of the Commission was the subject of much opposition in the Budget Session of the Legislative Council, due to the expenditure involved, and Maxwell had to bow to pressure. Dr. France comments at p. 173 that

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"The final capitulation of Maxwell ended a thirty year struggle on the part of different Native Lands Commissioners to discover and record the traditional system of land tenure in Fiji .... It no longer concerned itself with establishing the unit of ownership but confined its work to the recording of mataqali boundaries."

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It would seem therefore that the basic proprietary unit is the Tokatoka rather than the Mataqali, but that financial stringencies did not allow of the further recording of such subdivision. It may well be indeed that the recording of the Yavusa as a proprietary unit was again dictated by such financial stringency, but one cannot be sure of this. In the present case, I imagine that title was recorded, as will be seen, as being owned by the three Yavusa in common, as their move to the lands at Navesi was comparatively recent (in the 1880's) and they had moved there *en bloc* from land previously occupied by them in Suva, on the request of Government. Nevertheless, a study of the relevant provisions of the Native Land Ordinances No. 21 of 1880, No. 11 of 1905 and No. 21 of

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A 1892, the Crown Acquisition of Lands Ordinance No. 1 of 1878, the Native Land Trust Ordinance No. 12 of 1940, and the present day edition of such legislation, all indicate that the Mataqali is the central proprietary unit. That aspect is qualified, as the learned Counsel for the Board Sir John Falvey submits, by the very preamble to the Native Lands Ordinance No 21 of 1880, which reads :

B “Whereas it has been ascertained by careful enquiry that the lands of the Native Fijians are for the most part held by Mataqalis or family communities as the proprietary unit according to ancient customs.”

C No doubt today some native lands are registered in the name of a Yavusa (see e.g. Iliaseri Waqamate v. Director of Lands & Attorney-General (Suva Civ. 156/1983) or a Tokatoka (see e.g. Ame Gavidi v. The Police 4 FLR 14). In any event, as late as 1959, as Dr. France observes at p.174, when reforms were suggested the Great Council of Chiefs responded very positively thus :

D “After a very full debate of this subject and a thorough consideration of the history of the system and its possible ramifications in the foreseeable future, the Council of Chiefs is of the unanimous opinion that the ‘Mataqali’ should continue to be the landowning social unit .... It is recommended that the present system of Fijian land tenure, ownership, administration and reservation be rigidly maintained.”

E The Mataqali is thus legally entrenched as the central proprietary unit. More importantly, for our purposes, it seems to play a dominant role in the hierarchy of proprietary units, as is illustrated in the extract from Professor Belshaw’s work above. Again, Professor Belshaw at pp. 183/184 speaks of the special responsibilities for, and emotive attitude towards land within the patrilineal descent group. He observes

F “ Thus it is conceived that the members of a mataqali have an interest in what a tokatoka does with its land, and that a yavusa through its leader, or turaga ni qali, has an interest in what a mataqali does with its land. The interest does not apply to interference with agricultural practice, which is a matter of individual concern, nor the use of particular areas of land. It does apply to actions which make land available to persons who are not lineally members of the appropriate social unit, or when disputes may arise between members of the unit. The interest is expressed through ceremonial action designed to affirm the paramountcy of ancestral ties with the land and to give contractual significance to non-lineal elements in its administration. Thus if a man from another lineal group wishes to make use of lineal land, he will make yaqona and present tabua and other gifts to a mataqali

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head who will have prime say, and to a yavusa head if he has an interest, and in so doing he will recognize the position of the ancestors in relation to the land. The matter will have received considerable discussion, at least in the mataqali beforehand."

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As for the present case the traditional rights, if any, of the plaintiffs to stay on the lands in question, and the nature of their tenure thereof, will have to be determined. It proves convenient to defer consideration of the relevant evidence. Meanwhile, as earlier indicated, there is conclusive evidence of title before the court of the ownership by the three above-named Yavusa in common, that is, on Folio 1245 of Volume 7 of the Native Lands Register.

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Section 3 of the Native Lands Act:

I turn to consider the first issue raised by the plaintiffs, that is, the applicability and interpretation of section 3 of the Native Lands Act Cap. 133. The section was first introduced in the Native Lands Ordinance No. 21 of 1880, in the provisions of section IV thereof. There were other relevant provisions however, all of which read as follows :

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"I. The tenure of the lands belonging to the native Fijians as derived from their ancestors and evidenced by tradition and usage shall be the legal tenure thereof.

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II. In all question of ownership trespass or other matters arising out of or connected with the land all Courts of justice shall give effect to native rights in as full and ample a manner as if the lands were held by such native owners in fee simple upon Grant from the Crown.

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III. All native lands shall be inalienable from the native owners to any person not a native Fijian except through the Crown and the said lands shall be alienable to the Crown only in the cases and under the restrictions hereinafter set forth.

IV. The said lands may be cultivated allotted and dealt with by the native owners as among themselves according to their ancient customs and subject to any Regulations made by the Native Regulation Board and approved by the Legislative Council and in the event of any disputes arising for legal decision all Magistrates and Courts of law shall decide such dispute according to such Regulations or native customs and usage which shall be ascertained as a matter of fact by the examination of witnesses capable of throwing light thereupon.

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V. The Governor shall nominate one or more Commissioners who shall be charged with the duty of ascertaining what lands in each province of the colony are the rightful and hereditary property of native owners whether of Mataqalis or in whatever manner or way and by whatever divisions or subdivisions of the people the same may have been held.



A XVII. Any Mataqali or other division or subdivision of the natives may lease such portion of the lands as may have been set apart for their use to persons of European descent or others but no such lease shall be valid without the consent of the Governor in Council on a report of the Bose-vaka-Yasana."

B Thereafter the Ordinance provided in the main for the delineation, recording and registration by Commissioners of the boundaries of all holdings in native ownership in a Register of Native Lands, to be transmitted to and preserved by the Registrar of Titles. The 1880 Ordinance was repealed by the Native Lands Ordinance No. 21 of 1892. The 1880 legislation reproduced above was unaffected, that is, apart from sections III and XVII, which were replaced by sections 4 & 19 of the 1892 Ordinance, which read as follows :

C "4. All native lands shall be inalienable from the native owners to any person and such lands shall be alienable to the Crown only in the cases and under the restrictions hereinafter set forth."

D "19. Any mataqali or other division or sub-division of the natives may lease such portion of the lands as may have been set apart for their use to persons of European descent or others but no such lease shall be valid without the consent of the Governor in Council on a report of the Bose Vakatikina transmitted through the Roko of the province who shall in writing state his opinion thereupon. Provided that pending the specific setting apart of lands for native uses as referred to in this section nothing in this Ordinance shall be held to prohibit or prevent the Governor in Council from consenting to a native lease on the report of the Bose Vakatikina transmitted in the manner aforesaid."

E Again, the 1892 legislation provided for the appointment of Commissioners charged with the duty of settling boundaries of native lands and thereafter for the registration of same. There was quite a deal amending legislation from 1892 to 1904 inclusive, which need not concern us. In 1905 the 1892 legislation was repealed by the Native Lands Ordinance, No. 11 of 1905. The provisions of section 3 of the 1892 Ordinance (repeating those of section II of the 1880 Ordinance) were repealed. The provisions of sections 2 & 5 of the 1892 (I & IV of the 1880) legislation were largely incorporated in the one section, that is, a new section 3; section 4, reproduced above, was also amended. Those sections in the 1905 legislation then read as follows :

F "3. Native lands shall be held by the native owners thereof according to native customs as evidenced by usage and tradition. The said lands may be cultivated allotted and dealt with by the native owners as among themselves according to their native customs and subject to any regulations made by the Native Regulation Board and approved by the Legislative Council, and

in the event of any dispute arising for legal decision all magistrates and Courts of law shall decide such disputes according to such regulations or native customs and usage, which shall be ascertained as a matter of fact by the examination of witnesses capable of throwing light thereupon .....

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4. Native lands shall only be alienable from the native owners to persons other than natives with the consent of the Governor in Council and subject to the restrictions hereinafter set forth."

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Section 8 of the 1905 Ordinance enabled native owners to "sell or lease portions of their native lands" to anyone with the consent of the Governor in Council; on a report of the District Council transmitted through the Roko of the province. The ensuing provisions of the Ordinance dealt mainly with such sale and leasing. Section 16 provided for the appointment of a Native Lands Commissioner to inquire into and settle "any question arising as to ownership of any native lands". The legislation of 1880 and 1892 dealing with the appointment of Commissioners to settle the boundaries of native lands and with the registration of same was not, as indicated earlier, repeated in the 1905 legislation.

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An amending Ordinance was passed in 1907 (No. 9 of 1907) which but extended the 1905 provisions concerning the Native Lands Commissioner (there might be more than one) "for the purpose of settling any disputes" as to ownership of native land. The 1907 legislation did however amend section 3 and 4 by adding a proviso to section 3, as follows :

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"3. Native lands shall be held by native Fijians according to native customs as evidenced by usage and tradition. Such lands may be cultivated allotted and dealt with by native Fijians as among themselves according to their native customs and subject to any regulations made by the Native Regulation Board and approved by the Legislative Council and in the event of any dispute arising for legal decision in which the question of the tenure of land among native Fijians is relevant all magistrates and Courts of law shall decide such disputes according to such regulations or native customs and usage which shall be ascertained as a matter of fact by the examination of witnesses capable of throwing light thereupon. Provided always that it shall be lawful for Native owners to sell or lease lands to native Fijians under the provisions of this Ordinance and any lands so sold or leased shall be held subject to all the provisions hereinafter contained relating to grants or leases of Native lands.

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4. Native lands shall only be alienable otherwise than by native customs with the consent of the Governor in Council and subject

to the restrictions herein-after set forth."

A In 1912 Ordinance No. 3 of that year provided for the establishment of the Native Lands Commission consisting of one or more Commissioners charged with exactly the same duty as that contained in section V of the 1880 legislation, the provision for registration of boundaries being also repeated. Without repealing section 4 of the 1905 legislation (as amended in 1907) however, section 3 of the 1912 Ordinance provided that

B "Native lands shall not be alienated by native owners whether by sale grant or exchange except to the Government of the Colony."

C In 1916 it was made an offence for a native owner or agent and any contracting party to enter into a lease of native lands without the consent of the Governor in Council. In 1919 the provisions dealing with the allocation of land to dependants, now found in sections 2 & 18 of the Native Lands Act Cap. 133 were introduced. Ordinance No. 3 of 1919, which was not a piece of amending legislation as such, had the effect of adding two subsections to section 3 of the 1905 Ordinance. In any event, in the second (1924) Revised Edition of the Ordinances, Vol. 1, section 3 of the 1905 Ordinance read as follows :

D "3.-(1) Native lands shall be held by native Fijians according to native customs as evidenced by usage and tradition. Subject to the provisions hereinafter contained such lands may be cultivated allotted and dealt with by native Fijians as amongst themselves according to their native customs and subject to any regulations made by the Native Regulation Board and approved by the Legislative Council and in the event of any dispute arising for legal decision in which the question of the tenure of land amongst native Fijians is relevant all courts of law shall decide such disputes according to such regulations or native customs and usage which shall be ascertained as a matter of fact by the examination of witnesses capable of throwing light thereupon. Provided always

E that it shall be lawful for native owners to lease lands to native Fijians under the provisions of this Ordinance and any lands so leased shall be held subject to all the provisions hereinafter contained relating to leases of native lands.

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G (2) When any lands have been leased by native owners to a native Fijian under the provisions of the preceding subsection it shall not be lawful for the lessee to convey any estate or interest therein nor to charge or encumber the same unless the consent of the Governor in Council to the conveyance charge or encumbrance has been first given.

(3) All instruments purporting to charge or encumber the lands or any estate or interest therein to which the consent of the Governor

in Council has not been first given shall be null and void."

In 1940 the Native Land Trust Ordinance was introduced (No 12 of 1940). Section 35 and the Schedule thereto repealed the proviso to subsection (1) of section 3 of the 1905 Ordinance and also subsections (2) and (3) of that section, not to mention all of the provisions dealing with the sale and leasing of native lands, and miscellaneous provisions some of which were transported into the Native Land Trust Act.

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The 1940 Ordinance has since been amended a number of times and today the relevant provisions of the Native Land Trust Act, Cap. 134, read as follows :

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"4.-(1) The control of all native land shall be vested in the Board and all such land shall be administered by the Board for the benefit of the Fijian owners.

5.-(1) Native land shall not be alienated by Fijian owners whether by sale, grant, transfer or exchange except to the Crown, and shall not be charged or encumbered by native owners, and any native Fijian to whom any land has been transferred heretofore by virtue of a native grant shall not transfer such land or any estate or interest therein or charge or encumber the same without the consent of the Board.

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

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

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

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(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.

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9. No native land shall be dealt with by way of lease or licence under the provisions of this Act unless the Board is satisfied that

A the land proposed to be made the subject of such lease or licence is not being beneficially occupied by the Fijian owners, and is not likely during the currency of such lease or licence to be required by the Fijian owners for their use, maintenance or support.

B 12.-(1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void."

C There are then more restrictive provisions concerning Native Reserves which need not concern us for the moment. The learned Counsel for NLDC Mr. Maharaj submits that the control of and administration of native lands was thus imported from the Native Lands Ordinance into the Native Land Trust Ordinance, and that the Native Lands Act now deals mainly with the workings of the Native Lands Commission, in the settlement, recording and registration of native land boundaries, in the settlement of disputes between native owners with regard to such boundaries and again in the settlement of disputes, by a special Lands Commissioner, in connection with native land where the boundaries have already been determined.

E Section 3 of the Native Lands Ordinance underwent some minor amendments, no doubt by the Commissioner for the Revised Edition of the Laws, since 1940. Today section 3 and section 18 of the Native Lands Act, Cap. 133 read as follows :

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

G 18.-(1) Notwithstanding anything contained in this Act it shall be lawful for the Commission with the consent of the Fijian owners to allot at its discretion to any dependents either individually or



collectively a sufficient portion of land for their use and occupation:

Provided that any dependant to whom such portion of land has been allotted and who thereafter ceases to reside with the mataqali from whose lands the said portion was allotted shall thereupon lose his interest in the said portion.

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(2) Whenever through any cause such portion of land ceases to be used and occupied by the dependant or dependants to whom it was allotted it shall revert to the Fijian owners from whose lands the allotment was made.

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(3) No allotment of land shall be made, to any dependent who may be found to be already an owner of land by operation of any Fijian custom."

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The word "dependants" is defined under section 2 of the Act as meaning

"native Fijians who at the time of the erection of the Fiji Islands into a British Colony had become separated from the tribes to which they respectively belonged by descent and had by native custom lost their rights in the tribal lands and were living in a state of dependence with other tribes; and includes their legitimate issue;"

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Mr. Maharaj submits that the fact that section 3 was "left behind" in the Native Land Act, rather than imported into the Native Land Trust Act, is of some significance. He submits that the provisions of section 3 are only of assistance to the Commission in the exercise of their functions under the Native Lands Act, and that such provisions cannot affect the control and administration of native lands by the Board. The learned Counsel for the plaintiffs Mr. Sharma and Mr. Fa in effect submit that the fact that the provisions of section 3 throughout the years, over one hundred years, have not been repealed, speaks for itself, and that the section must be given its full operative effect. I am obliged to all Counsel for referring me to the decision of Carew A.C.J. in Ame Gavidi v. The Police (supra), earlier mentioned. There the Acting Chief justice observed at p.15 that when section 3 first appeared in 1905 "it then contained a proviso and sub-sections which were not re-enacted." Carew A.C.J. therefore concluded that the words "subject, the provisions hereinafter contained" bore reference to the subsequent provisions of the 1905 Ordinance dealing with leases. I must respectfully observe however that when section 3 was first introduced in 1905 it did not contain words "subject to the provisions hereinafter contained", indeed any proviso or sub-sections. It seems to me in brief that when subsections (2) and (3) were repealed in 1940, the Parliamentary Draughtsmen omitted to delete the subject to the provisions hereinafter contained", which were apparently introduced by the Commissioner for the Revised Edition of the Laws under his powers, when subsections (2) and (3)

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A were imported from Ordinance No. 3 of 1919 into the 1924 Revised Edition, and which therefore presumably referred to the provisions of subsections (2) and (3). I may not be correct in this, but it is of no consequence, as in any event quite clearly the provisions of section 3 today must be construed with reference to the provisions of the Native Land Trust Act. Carew A.C-J. went on to consider some authorities in the matter and came to the decision:

B I do not think that the provisions of the Native Land Trust Ordinance (Cap. 86) ought to be read into section of the Native Lands Ordinance (Cap. 85) so as to take away the customary rights of the natives to deal with land amongst themselves. Nor do I think that the provisions of this section concerning the customary rights of the natives to deal with land amongst themselves can be regarded as being repealed by implication by the Native Land Trust Ordinance (Cap. 86). The provisions creating these rights were, it would seem, deliberately left unrepealed by the Native Land Trust Ordinance and they can, I think, be reasonably construed."

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D With that conclusion I respectfully agree and I am fortified in my view by consideration of the proviso and subsections which had been deleted from section 3. The addition of the proviso quite clearly established a distinction between leasing the land as such, and the aspect of the land being "allotted and dealt with by native Fijians as amongst themselves according to the native customs". It must be remembered that under section 8 of the Native Lands Ordinance, 1905 as amended, native owners could lease lands to anyone, but only with the consent of the Governor in Council. When such power of leasing was safeguarded by the measures adopted in 1940 in the Native Land Trust Ordinance, the need for the proviso and subsections in section 3 fell away.

E Nonetheless the Legislature saw fit to leave the section otherwise undisturbed, thus, in my view, imparting emphasis to the present day provisions thereof.

F It seems to me that it is important to observe that the tenure of native lands was not vested in the Board, but merely the control thereof, the Board being charged with their administration "for the benefit of the Fijian owners". Section 3 does not speak of any grant, or transfer, or acquisition, or any lease of the land or any licence thereof. Quite clearly the aspect of a lease or licence as such are not necessarily creatures of customary law, though of course they may exist therein clothed in different forms or under different names. As I see it, whether or not the particular boundaries of native land have been settled in any particular area, section 3 nonetheless operates. Once the boundaries are settled of course and thereafter registered, then the operation of customary law must be confined within the particular boundaries. While the Native Land Trust Act speaks of "control of all native lands" by the Board, nonetheless the specific functions of the Board in the matter are clearly delineated under that Act.

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For example, careful reading of section 5 of the Act indicates that the discretion lies with the native owners and not with the Board in the matter of a transfer of land to the Crown under that section: section 6 provides for a certificate of transfer and in this respect the prescribed certificate (Form 2 of the Native Land (Miscellaneous Forms) Regulations) specifies the consent of the Tikina Council. The control of the Board obviously arises in the matter of leases and licences, but then only subject to section 9 of the Act. Again, the Board has the power to set aside native lands as a Native Reserve, in respect of which leases or licences may be granted to Fijian owners, but only with consent of the native owners.

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In particular, native land which has been leased may not be dealt with by the lessee without the consent of the Board, but it seems to me that such control does not extend to native land which has not been thus leased, or made the subject of a licence. Within the boundaries established by the Native Lands Commission therefore, native Fijian owners are free to cultivate, allocate and deal with such land according to their native custom, no regulations apparently ever having been made by the Fijian Affairs Board or its predecessor.

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Mr. Maharaj submits that one Mataqali could not allocate land within its own Mataqali lands to a member of another Mataqali, or rather belonging to a separate tribe. He point out that the power to allot land to "dependants" lies only in the Commission under section 18 of the Native Lands Act. I observe firstly that the power of such allocation in the Commission is subject to the consent of the native owners: the last-quoted extract from Professor Belshaw's work clearly indicates why such consent is necessary. Secondly, I observe that subsection (3) of section 18 reads:

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"3. No allotment of land shall be made to any dependant who may be found to be already an owner of land by operation of any Fijian custom.

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But the definition of "dependants" in section 2 of the Act quite clearly indicates that the particular individuals have "lost their rights in the tribal lands and were living in a state of dependence with other tribes". As I see it therefore, if a dependant has become an "owner of land by operation of any Fijian custom", then such land can only have come to him from the tribe with whom he was living in a state of dependence and that "by operation of any Fijian custom". It seems to me therefore that apart from the evidence before the Court in the matter, which I accept, and the learned authorities earlier considered, the legislation itself recognises the customary right of allocation of land to members of other tribal groups.

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I cannot imagine that the Legislature ever intended that the native owners should abrogate all of their rights to the Board who would then control the land in every possible sense. Is the Board then going to allocate every garden to every working member of every family? Is the Board going to decide on the crops in

each garden, the location of new yavus, the repair of ancestral yavus, to mention but a fraction of the problems arising? The mind boggles at the difficulties involved in such a course. Clearly the Legislature never intended to give absolute control to the Board. The consent of the native owners is a necessity under sections 16 and 17 of the Act and, as will be seen, there is a duty of at least consultation under section 9. In my judgment control by the Board only arises under the specific instances and subject to the specific conditions contained in the Act; meanwhile native Fijians continue to hold their lands according to native custom and to enjoy and deal with such lands in the traditional manner.

The Requirements of Section 9 of the Native Land Trust Act:

Mr. Sharma and Mr. Fa refer to the provisions of section 9 of the Native Land Trust Act reproduced above. The Board's power to grant a lease or licence is clearly expressed under section 8 to be "subject to the provisions of section 9". That section has two limbs thereto, namely the Board must be satisfied that, the land proposed to be made the subject of such lease or licence is not being beneficially occupied by the Fijian owners; and

(i) the land proposed to be made the subject of such lease or licence is not being beneficially occupied by the Fijian owners; and

(ii) is not likely during the currency of such lease or licence to be required by the Fijian owners for their use, maintenance or support.

The satisfaction referred to in the section must I consider be viewed objectively, that is, as with the exercise of all statutory powers such satisfaction must be formed on reasonable grounds. The section quite clearly imposes a duty upon the Board of at least consultation in the matter certainly with respect to the second limb of the section. Indeed, it seems to me that even with the first limb, in order to ensure that the land is not being beneficially occupied, the Board would need to consult with the native owners in the matter.

The question arises, with regard to the first limb of the section, as to whether the Board could thus only lease land which, on first approach to the native owners, is unoccupied, or whether it may lease land where initially it is beneficially occupied, but the native owners consent to give up, so to speak, "vacant possession". Mr. Sharma concedes that the Board may lease land in the latter situation, where however there was consent in writing: he likens the situation to a trust where the beneficiaries consent in writing to a particular action-by the Trustee.

The issue of consent or agreement has been raised here and I pause to consider whether any issue estoppel *per rem judicatam* arises, in view of the decisions by the Court of Appeal and the Supreme Court in the case of Serupepeli Dakai

No. 1 & Ors. v. N.L.D.C. & Ors. 29 FLR 92. The particular estoppel however (perhaps an issue estoppel rather than a cause of action estoppel) only arises where the same parties are involved - see the dicta of Diplock L.J in Thoday v. Thoday [1964] All ER 341 at p.352 and of Lord Brandon of Oakbrook in The Sennar (No-2) [1985] 1 WLR 490 at p. 499, considered in Offshore Oil N. L. v Investment Corporation of Fiji Ltd 30 FLR 90. As to the present case, the Board and NLDC were both defendants in the prior action, as also was the Native Lands Commission. But neither plaintiff in the present case was a plaintiff in the first action, and as I see it no estoppel arises.

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In the earlier action Kermode J. had this to say at p.9 :

“The consent of any mataqali as a unit is not legally required to any Act that the Board can legally do under the Act unless the Act specifies that consent of the native owners i.e. the land owning mataqali is required. Individual members are not owners and their consent is not required.”

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With that statement I respectfully agree. I observe however that the learned Judge used the words “any Act that the Board can legally do under the Act unless the Act specifies, ... consent....” Quite clearly the learned Judge was not there referring to, for example, the Board’s power to grant a lease of native reserve land, as such leases may under section 16 of the Act be granted only with the consent of the native owners. Kermode J. did set out the provisions of section 9 in his judgment, observing “there is no evidence before me to indicate that the Board has not carried out the duties imposed by section 9”. The learned judge was there clearly dealing with the Board’s duty of consultation under the section, but not necessarily with the aspect of consent, as such issue need not necessarily arise in each and every case: for example the land might have been unoccupied for a very long time and be incapable of beneficial (residential or agricultural) occupation. Again, I respectfully agree with Kermode J. that the consent of individual members of a proprietary unit is not required.

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In the Court of Appeal in Serupepeli Dakai No 1 (supra), in dealing with a ground of appeal that “the appellants as beneficiaries of a trust were entitled to have a say in the terms of the trust” the Court, at page 13, had this to say:

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“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.”

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A There, as I see it, the Court of Appeal was dealing with the aspect of consultation with individual members of a proprietary unit. Again I respectfully agree that no such duty is cast on the Board. In the present case however, while it is contended that the plaintiffs never consented to the lease, there is nonetheless a general allegation that the Board failed to comply with section 9, and there is also a prayer for a declaration that the Board did not consider or failed to satisfy itself as to such requirements, that is, in respect of "the Fijian owners"

B 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.

D It is important to note that between the years 1908 and 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. The question arises therefore as to whether such lease was regularly issued.

G 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, Turaqa 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".

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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.

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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.

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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 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

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unit is quite obviously a necessity.

- A 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.

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- C In the present case a retired NLTB officer, Mr. Savenaca Railoa, who was employed by the Board as a Land Agent for Suva, at the time, met representatives of the three Yavusa, accompanied by representatives of the NLDC, as early as 26th March, 1979 at Suvavou, when printed forms of consent in the matter were distributed. Those forms were subsequently signed on or before 30th April and were returned to the Board, containing 98 signatures, including two Turaga ni Yavusa (including the Tui Suva) and six Turaga ni Mataqali. The form indicated that the signatories consented to the leasing to NLDC of "the Marlow lease", "for development by the (NLDC) to subdivide and issue leases for residential and commercial purposes".

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- E In a report dated 8th May, 1979 Mr. Railoa indicated that at the meeting on 26th March the majority of the members of the three Yavusa had been anxious to have the area developed by NLDC, in view of the fact that the land had by then come under the purview of the Lami Town Council, and was subject to the payment of rates (\$14,000 was then due and payable for rates). Mr. Railoa recommended approval of the development lease, and on 25th May the General Manager of the Board in the exercise of a delegated authority gave his approval to the proposed lease.

- F Nonetheless, another meeting was held with the representatives of the Yavusa and also NLDC representatives at the Tui Suva's residence at Suvavou on 21st September, 1979. This was apparently due to the fact that it was desired to incorporate an extra area "behind the Isa Lei (now the President Hotel)". One aspect discussed at the meeting was the removal of "Marlow's houses" from Navesi to Suvavou, where it was apparently agreed to resettle those who had occupied the houses, referred to as "Marlow's tenants". It was agreed that NLDC engineers would supervise the dismantling of such houses. The inclusion of the extra area near the President Hotel caused some anxiety among the Fijian owners, Mr. Railoa said, as "they would lose their teitei and would therefore be buying food crops from other Fijians squatting on their land at Navesi". In this respect it was Mr. Railoa's evidence that the proprietary unit
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as a whole objected to the presence of some Fijians who had recently come on the land, as their presence had been sanctioned by individuals (presumably the various Turaga ni Mataqali) rather than the proprietary unit as a whole.

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Apparently a prime motive in the consensus reached at the meeting, was the aspect of the payment of rates. Indeed, the Tui Suva himself testified that he would not have agreed to the NLDC lease in the absence of such factor. He said that the aspect of the 99-year tenure of the proposed residential lease thereafter was explained at the meeting, where, he said, "all the three Yavusas were together".

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There were it seems some dissenting voices at the latter meeting - for example that of Serupepeli Dakai, the Turaga ni Mataqali Nayavumata, who indeed gave evidence as to his dissent. But as I said earlier, the will of the majority must prevail. The plaintiffs called two other witnesses who testified that they did not agree to the NLDC lease. The Manager in Land Acquisition at NLDC, Ratu Josateki Nawalowalo testified that ten of the nineteen persons found residing or cultivating on the Marlow lease, had signed agreements with NLDC, and had been accommodated elsewhere. I calculate that leaves another six persons who apparently did not agree to the NLDC lease. There is evidence before me therefore that, including both plaintiffs, at least eleven people dissented in the matter. Meanwhile the evidence is that the members of the proprietary unit have already commenced receiving their share of the rents from the development lease. As I see it, the onus is on the plaintiffs in the matter and the evidence falls far short of establishing that the majority dissented. In all the circumstances it seems me that the requirements of section 9 were, observed, that the members of the proprietary unit were fully aware of the advantages and disadvantages in the matter and that the majority expressed their agreement.

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The Board's Power to Grant Development Lease:

Mr. Sharma and Mr. Fa submitted that the Board has no power to subdivide or develop native lands and therefore has no power to issue a development lease to NLDC. The learned Counsel referred to Parliamentary Paper No. 25/77 by T.L. Davey where it is stated at paragraph 2.13 :

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"The Act was drafted in a manner which in fact was very strict in its defining of the Board's powers. Although S.4 (1) appears to confer very wide powers, it would seem that such was not the intention of the Legislative Council, or they would not have felt it necessary specifically to confer the power to lease native land, but only to specify the general conditions upon which such land might be leased. Similarly, if it had wished to grant the power to develop land on a commercial basis, it would have been specifically stated."

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I repeat that merely the control of native lands was vested in the Board, and in

A order to streamline the process of leasing and licensing the land, it was very necessary for the Legislature to enact section 8. Again, by conferring wide powers upon the Board under section 4(1), there would then be no need to "specify the general conditions upon which such land might be leased". In any event, such power was conferred upon the Minister under section 33, that is to make the necessary regulations. The fact is that the powers conferred under section 4 are wide, that is, wide only as to control and administration of the land, but not to the exclusion of the native owners' rights of tenure. If the Board were, for example to decide that to have land subdivided, so as to acquire better rents, would be "for the benefit of the Fijian owners", then I consider that it would be fully empowered to do so under its powers of control and administration of the land. Secondly, as a body corporate it may for example "enter into contracts". I must confess that I do not see anything in the Act which would then prevent the Board from, say, putting out tenders for the development of a particular plot of native land.

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In any event, there is no question of the Board "delegating" its powers in the matter to the NLDC, as has been submitted. The pleadings raise the issue of the Board's holding of the majority shares in the NLDC and Mr. Sharma and Mr. Fa submit that this is a breach of section 12 of the Trustees Act, which prohibits unauthorised investments by trustees. They submit that such investment is outside the scope of section 14 (dealing with the distribution of rents) and section 3 (6) of the Native Land Trust Act, and in this respect they refer to the earlier case of Serupepeli Dakai No. 1 (supra). But as in that case, there is no evidence before me that the purchase of shares by the Board in NLDC was made from trust funds. While once again the parties here are not the same as in the earlier case, and no issue estoppel arises, nonetheless I am obviously with regard to a point of law decided by the Court of Appeal, bound in the matter. Indeed I would very respectfully agree with what the Court of Appeal had to say in the matter at pp. 98/99:

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"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.

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G ... 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....."

Likewise in this case the latter question was not raised in the pleadings but by



way of submission in the trial. I observe there is no evidence of any unauthorised investment of funds before me and this submission must fail.

The Delegated Authority of the Board's Officers:

Mr. Sharma and Mr. Fa state that the lease was approved and signed by the Manager of the Board under a delegated authority. They submit that as the function of the Board under section 9 of the Act is quasi-judicial in nature, the Board then had no power to delegate such function. As I see it, the particular function is exercised in the daily administration by the Board of native lands. The function is then largely administrative in nature. Clearly a duty of consultation is involved. I suppose that there is always the possibility that the Board might ignore the wishes of the native owners in the matter, thus leading to a breach of natural justice, affecting their rights to their lands in this respect the function becomes quasi-judicial (see e-g. *Administrative Law* by Professor Wade 5 Ed. at p.45 & p. 463). Nonetheless the suggestion that the Board itself should hold meetings throughout Fiji with the native owners in the case of every proposed lease or licence would involve insuperable inherent difficulties. As I see it, the process of ascertaining the views of the native owners in the matter must be delegated to the field staff. Section 3 (5) of the Act provides that

"The Board may from time to time make rules as to its own proceedings under this Act and the carrying out of the powers vested in the Board by this Act."

Section 30 provides that:

"The Board may appoint a Manager, a Secretary and such other officers, inspectors, clerks and servants as may be necessary to carry out the provisions of this Act. The Manager shall be the senior executive officer of the Board and shall be responsible to the Board for carrying out of the Board's policy and instructions."

Indeed, section 21 of the Act provides in effect that the Board may give directions to any person who shall then for any purpose relating to the Act "have power at all times to enter upon any native land or to enter any premises or place on such land and there to make such inspection, examination and inquiry and to call for such information as may be necessary for carrying into effect any of the provisions of this Act."

Those provisions in my view clearly establish the Board's power to delegate at least the function of consultation under section 9 to any officer of the Board. Thereafter it is a matter for the Board to form its own satisfaction, based on the reports of its officers. In this respect the evidence before the Court is that the Board subsequently had a meeting in December, 1979 and confirmed the actions of the Board's officers in the matter. In this respect Mr. Sharma and

A Mr. Fa submit that the lease did not, pursuant to section 8(2) of the Act, bear the seal of the Board. But there is no lease at all before the Court. The only documents before the court is firstly an internal form of "Precis & Recommendation", wherein Mr. Railoa recommended the grant of the lease, and the General Manager on 20th May, 1979, approved of such grant, "subject to the provisions of the Native Land Trust Ordinance (sic)", and secondly, an external form of provisional approval of the lease (for ten years from 1st October, 1979), apparently named an "Approval Notice", signed by the Assistant Secretary of the Board on 19th October, 1979: that document states that NLDC would "not receive final notice of approval nor might it occupy the land provisionally approved for lease, until the first six months rent and the estimated survey fee (had) been paid", failing which payment the Board would "consider the provisional approval of the lease cancelled without further notice": further, the document is expressed to be subject to the cancellation of 15 existing tenancies-at-will. The formal lease (see Form 2 in the First Schedule to the Native Land (Leases and Licences) Regulations) is not before the Court however, so that there is no evidence that the lease ultimately drawn up was not sealed.

D As to the Board's action of confirmation in the matter, there is again nothing to show that the Board was confirming anything more than actions taken by the General Manager, and the Assistant Secretary which were clearly expressed to be provisional in nature. In particular, considering the papers before the Court, which were available to the Board, there is nothing to show that the Board delegated the formulation of satisfaction as to the requirements of section 9, nor indeed that the Board's satisfaction was not reasonable in the circumstances.

E Miscellaneous Submissions:

F Mr. Sharma and Mr. Fa have raised a number of matters which are not contained in the plaintiffs' pleadings which in justice I think nonetheless should be considered. Firstly, they submit that the form of Approval Notice indicates that the proposed lease would be a Class I - Special Lease, and that under regulation 33 of the Native Land (Leases & Licences) Regulations, then in existence, such a lease must specify "the nature and value of the improvements required to be effected thereon". I observe that regulation 33 refers to a lease, and not to an approval of an application for a lease. Further, the Approval Notice reads: "the lease will be subject to the conditions set out in the Native Land (Leases & Licences) Regulations". Again, the Approval Notice is expressed to be "subject to usual conditions of a Development lease" The Notice in its "Additional Conditions" quite clearly stipulates the nature of the improvements required to be effected on the land. As to whether or not the value thereof was expressed on the lease, I cannot say. Even if such was not the case I would consider that the particular provisions of regulation 33 are merely directory rather than mandatory, and I cannot see that such omission would invalidate the lease.

Mr. Sharma and Mr. Fa refer to paragraph (d) of the Additional Conditions on the Approval Notice which reads:

“The lessee shall continue to pay rent for all those areas covered by road accesses, drains, open spaces and other public amenities until such amenities have been transferred to the appropriate authorities.”

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It is then submitted that the Approval Notice was issued in breach of section 68 of the Constitution in that it involves “the transfer of native land in fee simple to the appropriate authorities”. I cannot possibly see how section 68 of the Constitution applies in any way. Mr. Sharma and Mr. Fa point to the fact that section 5 of the Native Land Trust Act “prohibits the transfer of native land to anyone else except the Crown”. The section in fact prohibits the alienation by way of transfer to anyone except the Crown. The word ‘transfer’ simpliciter has a variety of meanings however.

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I observe that General Condition No. 2 on the Approval Notice provides that

“The lessor may resume for public purposes, without compensation, any part not exceeding one-twentieth of the whole of the leased land, provided that the part required is not built upon or under cultivation”

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I presume then that the Board intended transferring areas of the lease covered by public amenities. There is no evidence to indicate whether such transfer was ultimately effected by way of lease or purchase. I observe that local authorities may under section 91 of the Local Government Act Cap. 125 purchase or lease lands for the purpose of any of their functions. Regulation 20 of the Native Lands (Leases & Licences) Regulations then provided for a maximum period of 99 years in respect of “leases in properly designed areas in which due provision has been made for roading commercial areas, school sites, cemetery and recreation reserves, etc.” It seems to me that such an extended period would suffice for a local authority’s needs. If necessary, alienation could be effected, initially to the Crown. As to what actually transpired, I cannot say. There is no evidence one way or the other, as the matter was not raised in the pleadings. The presumption of regularity must therefore operate in favour of the Board and the submission must fail.

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The Approval Notice is contested even as to the stamp duty paid thereon. It is submitted that it is insufficiently stamped in the amount of \$1.00. The photostat document before me shows that it was stamped in the amount of \$72.50. The annual rental was \$7,233.75: under section 3 of and the Schedule to the Stamp Duties Act Cap. 205, stamp duty was payable at 50 cents for every \$50, or part of \$50, of the yearly rental. As I see it, the document was therefore correctly stamped. In any event, insufficient stamping does not invalidate the document, and is a matter which can be subsequently rectified (see the cases of Rauzia

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Mohammed v. ANZ Banking Group FCA Reps 85/398 per Kermode J. at p. 3 and Rodger & Ors. v. NBF & ANZ (Suva Civ. 880/1985) pp. 25/26).

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The Plaintiffs' Constitutional Proprietary Rights:

Many of the submissions made by Mr. Sharma and Mr. Fa are taken up with the provisions of section 3 (6) and 4(1) of the Native Land Trust Act. Section 3 (6) and 4 (1) (which latter I repeat for ease of reference) read as follows :

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"3.-(6) The Board shall be a body corporate with perpetual succession and a common seal and may, in such name, sue and be sued, borrow money and enter into contracts, and may acquire, purchase, take, hold and enjoy real and personal property of every description and may convey, assign, surrender and yield up, charge, mortgage, transfer or otherwise dispose of or deal with or in real or personal property vested in the Board on such terms as the Board thinks fit.

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4.-(1) The control of all native land shall be vested in the Board and all such land shall be administered by the Board for the benefit of the Fijian owners."

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Seemingly Mr. Sharma and Mr. Fa interpret the words in section 3(6), "The Board ... may ... deal with or in real ... property vested in the Board on such terms as the Board thinks fit", as referring to the native land referred to in section 4 (1). They submit that the Board would governed by all the tenets of administrative law, in the matter and that it would be unconstitutional for the Board to deal with native land "as it thinks fit" that is, without reference to

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"the benefit of the Fijian owners."

While I quite agree with the latter submissions in the matter I do not agree with the interpretation of the particular provisions. As I see it, the words in section 3(6), "real property vested in the Board", refer to the real property which, under the subsection, the Board may acquire, purchase, take, hold and enjoy etc. For example, the Board may acquire to purchase or lease property on which to build its administrative offices etc. Native land however is not "vested in the Board", but in the native owners thereof which is clearly exemplified by the opening provisions of section 3 of the Native Lands Act.

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I do not see that it could be said, for that matter, that the Board holds native land even to the use of or on trust for the native owners, while it does of course, subject to section 14 of the Act, hold a proportion of the proceeds of the land on trust: the terms of section 3 of the Native Lands Act and section 4 (1) of the Native Land Trust Act are quite specific. In this respect I consider there is a distinction between the provisions of sections 3 (6) and 35 of the Native Land Trust Act which latter section provides that

"The Board may hold in its name as trustee any property, real or

personal, for the benefit of Fijian owners whether such property shall have been acquired by purchase, lease or exchange."

That section was introduced as late as 1968 under Ordinance No. 19 of that year. Its very position in the Act indicates its ancillary nature. As I see it, the section merely made provision for the Board to act as trustee of real property, that is, any type of land (and the proceeds thereof), acquired by Fijians, when so requested by those Fijians. The section as I see it, in no way qualifies the provisions of section 3(6) or section 4(1) for that matter.

As I said earlier, it is but the control of native land which is vested in the Board, and not the land itself, a matter which is emphasised by the provisions of section 8 of the Act. In my view therefore section 3 (6) bears no reference to the provisions of sub-section 4(1). In other words the Board may not deal with native lands as it "thinks fit", but may only deal or administer it "for the benefit of the Fijian owners".

Mr. Sharma and Mr. Fa refer to the provisions of sections 3 (c) and 8 of the Constitution 1970. Those sections deal with the "deprivation of property without compensation" and the compulsory acquisition or possession of property or any "interest in or right over" such property. The latter section contains derogations from the fundamental right, which clearly refer, for example, to legislation of the nature of the Crown Acquisition of Lands Act, Cap.135. I observe that no question of compulsory acquisition arises. The owners of the land in the present case are the three Yavusa in common. They voluntarily vacated the lands, for their own benefit, after the matter was publicly aired and debated and when indeed any dissent was fully voiced. That is a matter for the traditional owners. For the moment I simply hold that there can be no question of compulsory acquisition by either defendant.

#### The Case for the Second Plaintiff:

The evidence for the second plaintiff, of the Mataqali Naceva and Yavusa Vatuwaqa, indicates that he was allocated land by the Turaga ni Mataqali Nayavumata, namely Serupepele Dakai, of the Yavusa Nayavumata. The question arises therefore as to whether land could thus be traditionally allocated to members of another Mataqali. Sir John Falvey points out that the oldest witness before the Court, Eliesa Tikinibati, Turaga ni Yavusa Nauluvatu, aged 70, testified that a Turaga ni Mataqali can allocate land within the Mataqali's kanakana to members of that Mataqali only, but not to members of any other Mataqali. The evidence of all the other witnesses was to the contrary however. The Tui Suva, who was called by the defendants, testified that such allocation could take place to outsiders, but that such practice had only existed for the, last 30 years. All the other witnesses testified that allocation to "vulagi" or visitors, was possible. This evidence was given in particular by Ratu Mosese Tuisawau, who was called as an expert witness by the plaintiffs and whom I readily accept as an expert in such matters. Indeed, whatever about customs



A on a national basis, I must observe that I find it difficult to accept that any mature Fijian would not be sufficiently expert in the customs pertaining at least to his own district. In any event, there are the provisions of section 2 and section 18 of the Native Lands Act dealing with dependants which appear to confirm the evidence in the matter, that is apart from the identity of the allocating authority.

B Mr. Shama and Mr. Fa point to the case of Ame Gavidi 4 FLR 14 where the complainant in respect of whose native holding a criminal trespass had been committed, was in fact a vulagi who was not a member of the particular Tokatoka, but by agreement with members of the Tokatoka, the Turaga ni Mataqali, and the Roko Tui, she was allowed to plant on the land. In the present case the second plaintiff was a member of the native owners, a grouping of three Yavusa, with the Tui Suva as their traditional head, no doubt constituting a Vanua with a common ancestor. On the basis of Professor Belshaw's exposition, it would seem that the Yavusa would not necessarily be involved in the allocation to the second plaintiff. In all the circumstances, I am satisfied in the present case that Serupepeli Dakai, as Turaga ni Mataqali Nayavumata, would have been entitled in the normal course of events to allocate land to the second plaintiff within the Kanakana of the Mataqali Nayavumata.

D I say "in the normal course of events", because the evidence before me raises issues of credibility. The pleadings indicate that the second plaintiff came on the land in the 1960's. It was his evidence that he took up occupation of Mr. Marlow's house in 1974. He stated that he went into occupation of Mr. Marlow's house as such, in respect of which he paid \$250, and his brother Samisoni Koroitamudu paid another \$250, by way of deposit. In this respect a letter dated 28th June, 1978 addressed to his brother Samisoni by Mr. Marlow was put in evidence. It reads in part as follows :

F "I confirm herein that the building occupied by you and Mr. Raddock, is offered to you for the sum of \$3,500.00 (THREE THOUSAND FIVE HUNDRED DOLLARS) of which you have paid a deposit of \$500.00 (FIVE HUNDRED DOLLARS) and you can assume full ownership on payment of the balance owing, viz:- \$3,000.00 (THREE THOUSAND DOLLARS)."

G A receipt in respect of the payment of \$500 is dated 19th June, 1978, but is made out to "Mr/Mrs Samisoni Koro'i ... deposit for Lot 15 Two Flats occupied by Epele Koro'i & Raddock. Balance 3,000. Sold as is without lease" The receipt of course indicates that the second plaintiff was in occupation of Mr. Marlow's house, but indicates nonetheless that he did not pay Mr. Marlow any money in the matter. Indeed a letter addressed by Mr. Marlow to Mrs. Samisoni Koro'i on the 12th March, 1980 which reads in part as follows :

"Dear Mrs. Koroi,

I refer to your visit in connection with the purchase of the house you are occupying at Delainavesi and on which you have paid \$500.00 against the purchase price of \$3,500.00.

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You have expressed concern that you are unable to occupy the land upon which the building stands.

At no time did I or my Agents negotiate a transfer of land. You openly bought the house only for \$3,500.00 ..... "

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That letter of course indicates that the second plaintiff played no part in the purchase, or part-purchase of the house in question. In any event while Mr. Marlow could possibly have sold the house as it stood, that is for removal elsewhere, he had no estate in the land as a tenant-in-will and therefore could not pass any estate to the second plaintiff.

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In this respect the second plaintiff initially testified that he approached the Turaga ni Mataqali Naceva, Joji Nakou, but the latter did not allocate any land to him. Subsequently he approached Serupepeli Dakai, making a presentation to him of yaqona. He explained that Serupepeli and he were cousins, and he requested an allocation of land within the Kanakana of the Mataqali Nayavumata. Serupepeli duly consented for him to use the land and soon after moving there in 1974 he started planting the land. In cross-examination however he said that he came there in 1978. The plaintiff's own witness however, Serupepeli Dakai, testified under cross-examination that to his recollection the second plaintiff had come on the land approximately two years before that, that is, in 1983. In the Tui Suva's memory, the second plaintiff had come on the land approximately three or four years earlier, putting it as early as 1981. Serupepeli's memory in the matter was apparently very keen, as he testified that he had maintained a list of those he had allowed to come on the land to cultivate it, a total of 42 he said, at different times over the last four or five years, that is as far back as 1980.

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The second plaintiff's evidence is clearly contradictory. He did not impress as a witness. The evidence of his own witness is that he came on the land in 1983, and that of the Tui Suva no earlier than 1981. The NLDC lease had of course been granted with effect from 1st October, 1979, so that Serupepeli Dakai had no authority in 1981 or 1983 to allocate the particular land in the traditional manner. As I see it therefore, the second plaintiff was a trespasser on the land and his action must be dismissed.

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#### The Case for the First Plaintiff:

As for the first plaintiff, it was his evidence that he came on the land as a young child. He testified that he had been cultivating the land for about 10 years, that is, since 1975, having been given the land by his father and his

A brothers, the land being kanakana within the lands of the Mataqali Nayavumata, of which he is a member. This evidence was corroborated by the second plaintiff's father, Kemueli Kunamomo, who testified that he built the house in which the second plaintiff now lives in 1962: he built it specifically to give to the first plaintiff, his eldest son. The latter took up occupation in 1974, he said, and commenced cultivating the land.

B It was Kemueli Kunamomo's evidence that the land on which the first plaintiff's house stands is in his Mataqali's kanakana, which he acquired traditionally in 1962. There is no evidence to the contrary. Further, it is acknowledged by the defendants that the first plaintiff's house, along with three other houses, is immediately outside the area of the NLDC lease.

C With regard to the land cultivated by the first plaintiff however, which is at a little distance from the house, Kemueli Kunamomo originally testified that such land was not part of the Marlow lease. Eventually under cross-examination, however, he admitted that it was, and stated indeed that the first plaintiff "started cultivating when Marlow's lease expired in 1970's - 74/75 onwards".

D When it was pointed out to him that the Marlow tenancy-at-will expired in 1978 he replied, "Yes, that could be true." The balance of the evidence, including Kemueli Kunamomo's admission in the matter, therefore establishes that the particular area was within "the Marlow lease". While Kemueli Kunamomo testified that he had traditionally been allocated the yavu, or house site, he gave no evidence of ever having been so allocated the specific area cultivated by the first plaintiff. Indeed Kemueli Kunamomo was born in 1930 approximately, when the land had for 22 years previously been under lease, E and the land could not therefore have been traditionally allocated to him, or subsequently to his son, that is, before the expiry of the Marlow tenancy-at-will.

The first plaintiff testified that the land which he cultivated

F "belonged to my father and they gave it to me - my father and his brothers gave it to me to do farming".

G The area was within the kanakana of the Mataqali Nayavumata. Even accepting however that the specific land under cultivation by the first plaintiff had been within the kanakana of his Mataqali before 1908, and that his grandfather and forebears had tilled the particular piece of land, and that therefore the first plaintiff was entitled on the expiry of the Marlow tenancy-at-will in 1978 to enter upon the land, there was nonetheless the decision of the Fijian land owners in 1979 to vacate the land, so that the NLDC could be given a development lease. As I see it, once the native owners make such a decision, it is a matter for the particular proprietary unit, no doubt assisted by the Board, and the Native Lands Commission to make alternative arrangements for any of its members displaced.

In this respect there is the evidence that a number of people were reallocated land, or at least yavus in Suvavou, and that some others entered into agreements with NLDC in respect of developed plots, in respect of which the Board ultimately issued leases. The evidence indicates that the first plaintiff was given some six months in which to remove his crops, which notice I consider to be perfectly reasonable. There is evidence indeed that some of his crops (excluding trees) had in fact been removed when levelling commenced, but I do not need to determine this. As I see it, once the decision was made by the native owners to vacate the land and reasonable notice in the matter was given, the first plaintiff, as a member of the native owners, ceased to have any rights over the land cultivated by him on the expiry of such notice. That being the case his claim for damages in respect of the land cultivated by him must be dismissed.

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There is nonetheless the claim for damages in respect of the land surrounding the first plaintiff's house. He claims that an out-house near the house was bulldozed, but not re-erected, NLDC leaving timber without any corrugated iron behind; some steps leading to his house were destroyed, and again mango, orange and coconut trees uprooted. Any such claim of course could only lie against NLDC. The critical question is whether it lies at all.

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The First Plaintiff's Locus Standi:

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Sir John Falvey refers to the case of Meli Kaliavu (supra) decided by Hammet J. (as he then was) in 1956. In that case five members of a Mataqali of some 150 members sued in their personal capacity, seeking to prevent the grant by the Board of a lease of half an acre, for the purpose of the construction of a retail store and bakery. The plaintiffs and others had claimed that the land was needed by them for the purpose of erecting a village store, in respect of which they had already raised the necessary funds. It seems that at one stage the Mataqali collectively had agreed to the proposed lease, but that thereafter there was a change of heart in the matter. In any event, the plaintiffs issued the writ, ultimately seeking an injunction restraining the Board from granting the lease, and claiming £500 damages. They based their action on the equivalent provisions of section 9 of the Native Land Trust Act. Hammet J. observed at p.19 that

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"It is the contention of the plaintiffs that the land is being beneficially occupied by the native owners for purposes of cultivation and is required for their use as the site of their new village."

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He continued at p. 20 :

"The plaintiffs are not the owners of the land in question. They are merely five members out of some 150 members of the Matanivuga Mataqali 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.

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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. Their claim to damages, therefore, cannot possibly succeed.

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As regards the claim to an injunction, this is an equitable remedy. As a general rule, equitable remedies are only granted to a plaintiff who has established a right at law, where the legal remedy of damages is not an adequate remedy. In this case the plaintiffs have failed to establish their personal claim in law to damages. They cannot, therefore, succeed in their personal claim to the equitable remedy of an injunction."

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I respectfully agree with those observations. The learned judge, in my view, did not however state that a member of a Mataqali could not sue in person, but that he could not sue in person in respect of what was really a collective right. Again he did not say that a single member of a proprietary unit could not sue for an injunction: as I see it, he simply said that, in the circumstances of that case, as the plaintiffs had no personal rights in the matter and were not therefore entitled to damages, no personal rights had been infringed and therefore an injunction could not be granted. That is a far cry however from saying that, in a proper case, a member of a proprietary unit constituting the native owners cannot sue in his own right in respect of a personal right and succeed in his claim for damages and an injunction.

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There followed the case of Serupepeli Dakai No 1 (supra) where the twelve plaintiffs sue *in propria persona*, and not as representing the proprietary unit. As Kermode J. observed at p.2, their grievance in the matter was their own, and not that of the landowning unit. In that case the particular plaintiffs sought to have the same lease granted to NLDC as in this case declared invalid, and sought an injunction to restrain NLDC's development of the land. In the course of his judgment Kermode J. observed as follows at pp.5/6 :

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"Native Owners' in both the Native Land Act and the Native Land Trust Act is defined as :- 'native owners' means the mataqali or other division or subdivision of the natives having the customary right to occupy and use any native land.' Members can enjoy two rights usually associated with ownership namely the right to occupy and use the land but they cannot sell or charge the land.

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No member of a land owning mataqali can legally object to any



other person coming onto his mataqali's land with the authority or permission of the Native Land Trust Board. He cannot personally bring an action for trespass to the land or claim damages for a trespass which does not directly infringe his personal rights."

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With those observations I most respectfully agree. As I see it, the learned Judge did not simply say that a single member of a proprietary unit could not bring an action for trespass. In my view the above dicta indicate that the member could bring such an action where his personal rights have been directly infringed.

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The dicta of Hammet J. and Kermode J. were considered by Rooney J. in the case of Naimisio Dikau No. 1 & Ors. v. Native Land Trust Board & Anor. (Suva Civ. 801/1984). In that case an action was brought by five plaintiffs representing 27 out of a total of 72 members of the proprietary Mataqali, seeking a declaration that a licence issued by the Board to the second defendant company to cut and take away timber, the property of the Mataqali as native owners, was invalid, and also an injunction and damages in the matter. In the result Rooney J. held that the plaintiffs had no *locus standi* and dismissed the action, a decision with which I respectfully agree.

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There followed another case decided by Rooney. J., Timoci Bavadra v. Native Land Trust Board (Suva Civ. 421/1986) wherein the plaintiff sought leave to institute a representative action on behalf of the Tokatoka Werekakaca, a land owning unit. The learned Judge observed that there was no evidence before him to indicate that the plaintiff represented a majority of the Tokatoka. He refused leave in the matter, again a decision with which I respectfully agree. It will be seen however that the learned Judge refused leave for a further reason.

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I have read the judgments in Dikau and Bavadra with great interest. Nonetheless I find myself in the unenviable position of having to respectfully disagree with certain dicta of my learned brother. In Dikau he said at p.8 :

"It was established by Meli Kaliavu and Others (5 FLR 17) that individual members of a mataqali have no *locus standi* to sue and recover damages in their own personal capacity or to obtain an injunction. Their right to obtain a declaration must similarly be circumscribed. Such rights as they may have as members of a mataqali are not founded on the common law or any statute."

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I certainly agree with the latter sentence, but for reasons indicated earlier I must respectfully disagree with the remainder of the above extract, as with the following extract, at p.7,

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"The common law and the rules of equity cannot be applied to a system of land holding which is alien to and independent of the law of England as the received law of this Dominion. In the result

there is in existence a system of legal dualism.”

- A In the case of Bavadra (Supra) Rooney J. referred at p.4 to the following extract at p.7 of Dikau (Supra).

B “A mataqali cannot be equated with any institution known and recognised by common law or statute of general application. The composition, function and management of a mataqali and the regulation of the rights of members in relation to each other and to persons and things outside it are governed by a customary law separate from and independent of the general law administered in this Court.”

The learned Judge took matters further, when he said at pp. 6/7 :

- C “If the plaintiff wishes to pursue this case further he has to establish, within the framework of the common law, that a tokatoka or mataqali has a right to sue and be sued in the courts. It is, as far as the applied law is concerned, an alien institution, which is neither a corporation nor an unincorporated association.”

- D The learned Judge went on to dismiss the action, expressing the view at p.8 that in effect Fijian land owners had no “right to access to the Courts, which is enjoyed by the owners of land held under freehold and leasehold.”

- E The application in Bavadra was brought under Order 15 Rule 13, which deals with the representation of interested persons who cannot be ascertained. Clearly that rule was inapplicable to a Tokatoka. The learned Judge did observe that the plaintiff and his associates might be permitted to proceed under Order 15 Rule 12,

- F “if they can establish a common interest and a common grievance and. if the relief sought is in its nature beneficial to all whom the plaintiff proposes to represent. I take the view that the establishment of such a premise presents formidable difficulties, unless the plaintiff can show that the constitution, management and function of the Tokatoka Werecakaca are such that it meets that requirement.”

- G The quotation above I believe is based on a dictum of Lord Macnaghten uttered in 1901, applied subsequently by Evershed M.R. in the case of Smith & Ors. v. Cardiff Corporation [1954] 1 QB 210 at pp. 220/221. In that case the four plaintiffs represented 13,000 tenants. They failed to establish the second and third qualifications above, but apparently the aspect of the numbers involved was not a criterion.

I do not consider that a Mataqali or a Tokatoka is an institution which is alien to the applied law of Fiji. I cannot see why the Courts, without any ingenuity

on their part, could not equate either of those bodies to an unincorporated association. The original coming together to form the group was no doubt the action of the present members' ancestors. Nonetheless they remain in free, communal association, the members thereof sharing a communal proprietary interest: while landholding may be individual in places, there are nonetheless communal proprietary rights, such as those over the veikau, or forest. Such groups are of common agnatic descent, the individual membership and leadership and the physical location and proprietary rights of which are by statute recorded in the Register of Native Lands, preserved by the Registrar of Titles. Not alone has the Mataqali been recognized as a central proprietary unit by the statute law of Fiji for over 100 years now (to the extent indeed that the law provides for the devolution of the lands of an extinct Mataqali), so also have all the individual divisions of the Fijian people by the act of statutory registration. How then can any of those groups be regarded as alien to such statute law?

It will be seen from the legislation which I have set out earlier in this judgment, that native owners have set out earlier in this judgment, that native owners had the power of alienation over their lands to other than the Crown at various times, that is, up to 1912. They retained the power to lease their lands up to 1940. Indeed the legislation of 1880, 1892, 1905 and 1912 all contain scheduled forms of lease in the name of the native owners, to be signed on their behalf by the Buli of the District or, in the 1912 form, the Commissioner of Lands. The 1905 Ordinance contains a scheduled form of sale and grant. All of those powers of alienation and lease were exercised with the consent of the Governor in Council. Even to day there is a scheduled form of certificate of transfer to the Director of Lands: it is in the name of the Board but is expressed to be on behalf of the native owners. I do not see then that it can be said that any native lands proprietary unit is in any way alien, when such units have entered into statutory grants ("otherwise than by native customs" (1907 Ordinance)) and leases of their lands, required to be registered by the Registrar of Titles, since the late 19th Century.

When it comes to a representative action, I consider that whether a proprietary unit is an unincorporated association or not is not the test. The test is simply whether Order 15 Rule 12 can be applied. I appreciate that the problem of representation is all the greater, for example, in the present case where the native owners are three Yavusa. It may be that in a particular case, the common interest, the common grievance and the common benefit involved might be difficult to establish. But that is not to say that there can be any general rule to that effect. As Jessel M.R. observed in Commissioners of Sewers v. Gellatly (1876) 3 Ch. D. 610 at p.615 paraphrased thus in para. 15/12/1, Supreme Court Practice (1988 Edn):

"Where one multitude of persons are interested in right, and another multitude of persons are interested in contesting that right, and

the right is a general right, some individuals may be selected from each multitude to represent the rest, so that the right might be finally decided as between all parties in a suit so constituted."

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Again, as Megarry J. observed in John v. Rees, Martin v. Davis, Rees v. John [1969] 2 All ER 274, at p. 283 :

"... 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."

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Representative actions are frequently brought before this Court on behalf of a variety of bodies, such as village co-operative societies. I do not see why the members, for example, of a Mataqali in a particular case might not satisfy the requirements of Order 15 Rule 12. Having said that, I agree entirely that a single member or non-representative members of a Mataqali, may not bring an action in respect of which communal rather than personal rights are involved.

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In the present case the first plaintiff occupied a yavu or house site. Dr. France observes (at p.15) that

"Rights to the yavu were vested in the occupant of the house erected on it and these were often not regarded as being extinguished by death. Many of the house sites were left vacant on the death of the occupant and the houses remained to fall slowly into ruins until a decent interval had elapsed, when one of his descendants went into occupation and built a new house."

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All of the evidence before me indicates that the plaintiff's interest in the particular house site and precincts was in the least a life interest. Even if that were not the case he certainly had a proprietary interest in the actual dwelling and out-house on the site itself not to mention the right to usufruct in the surrounding house area, in which case his right to the fruit trees thereon was a personal right.

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Rooney J. was of the view that there is but little statutory provision in respect of Fijian custom and usage. But to some extent this might amount to begging the question. The law involved is customary and so is unrecorded, that is uncodified. Once codified and enacted it ceases to be customary, but becomes statutory. The provisions of the Native Lands Act and the Native Land Trust Act, not to mention the provisions of section 15 (3)(d) of the Constitution and section 66 of the Interpretation Act, to all of which Rooney J. referred, all expressly and in places impliedly recognize the existence, effect of, and the groupings and organs created by "customary law" (the expression used in section 15 (3) (d) of the Constitution). Indeed, section 5(2) of the Agricultural Landlord and Tenant Act Cap. 270 provides that an Agricultural Tribunal may declare a tenancy under that Act in respect of "an agricultural holding ... held by a Fijian according to native custom". More importantly, section 68 of

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the Constitution, one of the entrenched provisions thereof, provides that any, bill proposing to alter any provision of any of nine Acts, including the Native Lands Act and the Native Land Trust Act, "that is a provision that affects Fijian land, customs or customary rights", shall not be passed by either House of Parliament unless finally supported by no less than three-quarters of the members of each House, including, in the case of the Senate, not less than six of the eight members appointed by the Governor-General on the advice of the Great Council of Chiefs. It will be seen therefore how the Constitution has entrenched and protected "Fijian land, customs or customary rights" While such aspects may be alien to the law of England as applied to Fiji, it cannot in any way be said that they are alien to the Constitution or the written law of this country.

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It will be seen that section I of the 1880 legislation and section 2 of the 1892 legislation recognized Fijian customary tenure, as the "legal tenure" of native lands. Customary tenure is thus 'legal' tenure, as even today it is still recognized in section 3 of the Native Lands Act and is thus 'legal'. Furthermore such tenure is subject to any statutory regulations which may be made by the Fijian Affairs Board, which but enhances the statutory recognition given to customary tenure. In particular, section II of the 1880 legislation and section 3 of the 1892 legislation contained the following provision:

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"In all questions of ownership trespass or other matters arising out of or connected with the land all Courts of Justice shall give effect to native rights in as full and ample a manner as if the lands were held by such native owners in fee simple upon Grant from the Crown."

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That section remained on the statute books for 25 years up to 1905, when the power of alienation to other than the Crown was introduced. I cannot be sure why the provision was not repeated in 1905. Perhaps it had been misunderstood by some in its reference to a "Grant from the Crown" Perhaps it was considered unnecessary, as being but explanatory in nature. Perhaps it was considered that the provisions of section 3 were sufficient. In any event, the section clearly recognized the rights of the native owners to bring a common law action in trespass, and perhaps other suits, and enjoined the Court in this respect, as I see it, to apply the same common law remedies as they would grant, not just to a tenant, but to a free-holder. In my view, the proprietary rights of the native owners were independent of the 1880 provision, which served but to confirm or explain them. In my judgment even though the provision was not repeated in 1905, the intention of the Legislature cannot be said to have changed in the matter, as there was and is no specific provision derogating from what I consider to be the native owners' implied, if not in places express rights.

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Section 3 of the Native Lands Act empowers all the Courts of Fiji to decide upon "any dispute arising for legal decision in which the question of the tenure



of land amongst native Fijians is relevant ... according

- A           to ... native custom and usage which shall be ascertained as a matter of fact by the examination of witnesses capable of throwing light thereon."

In this respect I observe that section 31(2) of the Supreme Court Act Cap. 13 enables the Court in "any civil cause" to sit with "one or more assessors specially qualified, and try and hear the cause or matter wholly or partly with their assistance". That provision as I see it enables the Court to seek the further assistance of assessors, experienced in Fijian custom and usage, with regard to that aspect only, if need be. Section 3 speaks of "any dispute" which may include, as I see it, a dispute with a person or body outside the proprietary unit, as in this case.

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- C           But the Fijian does not depend upon the provisions of section 3 of the Native Lands Act for his right of access to the courts in respect of the land which he occupies. He has the same right as anyone else: section 3 but states how and by whom native land is held and empowers the Court to determine the particular custom and usage, and to determine the case thereby. I would thus be slow to hold that Fijians could not seek a remedy in this Court in respect of an infringement of a customary right. Once the Court by reception of expert evidence, and possibly assisted by expert assessors, determines such right, I cannot then see how such right could be regarded as in any way alien to the general law practised before the Courts. It must be remembered that the litigant seeks not a customary but a common law or equitable remedy. All that it is necessary for the litigant to do is to establish the right. Once the right is established as part of the customary law of Fiji, and therefore as part of the law of Fiji, how then can the right be regarded as other than a legal right? Again, once it is established that a legal right has been unlawfully or unjustifiably infringed, I cannot then see why, in an appropriate case, even a declaration or an injunction, much less damages, would not follow.
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There is but one provision in our laws which gives me any anxiety in the matter, and that is section 23 of the Native Lands Trust Ordinance which reads as follows :

"23.-(1) All actions, suits and proceedings respecting native land or respecting any lease, licence or permit relating thereto, or respecting the breach of any covenant contained in any such lease, licence or permit or respecting any trespass on such land, or any damages accruing by reason of such trespass or for the recovery of any rents or fees, or relating to any damage or wrong whatsoever in respect of such land, may be commenced, prosecuted and carried on in the name and title of the Board.

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(2) In any such action, suit or proceeding the Board may be represented by any barrister and solicitor or by any officer or servant of the Board duly authorised in that behalf."

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The following references to those provisions appear in the judgment of Rooney J. in Dikau (supra):

"Mr. Lateef for the second defendant submitted that this was an action in trespass. Section 23 of the Native Land Trust Act, Cap. 134 confers upon the Board the right to take such actions and that this excludes by implication the rights of the Fijian owners and occupiers of the land to institute such proceedings.

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In reply Mr. Koya contended that the plaintiffs are not precluded from seeking a declaration as they have a right to use the land owned by their mataqali..... He argued further that section 23 of the Act does not exclude the right of interested parties to seek relief by way of trespass."

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It will be seen that the word "may" is used in the penultimate line of section 23 (1). The authorities on the use of the word "may" in a permissive or mandatory sense are legion (see *Craies on Statute Law* 6 Ed. at pp. 284/287 and *Maxwell on The Interpretation of Statutes* 12 Ed. at pp.234/235, 280/281 and 284). As I see it, two interpretations arise in the present case. Firstly the legislature intended that the Board might, if it wished, conduct an action on behalf of the native owners, with their consent (probably at their request), as this clearly would be a more convenient way of dealing with an essentially representative action: if the native owners wished to litigate themselves then the Board would have to respect their wishes in the matter; in any event, as the lands were not vested in the Board, it was necessary to introduce section 23 so as to enable the Board to litigate, where the native owners so desired. The second interpretation is that the section was introduced to prevent the native owners or a member or members of the proprietary unit from litigating, and to enable the Board, where it so wishes to litigate on their behalf, in other words that the word "may" is not permissive but mandatory and must be read as "shall". Clearly Counsel for the Plaintiff in Dikau was not of the latter view. Seemingly neither was Counsel for the second defendant, as he submitted that the section but impliedly

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excluded "the rights of the Fijian owners and occupiers of the land to institute such proceedings".

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As Bowen L.J. said in the case of Re Cuno (1889) 43 Ch. D. 12 at p. 17:

"In the construction of statutes you must not construe the words so as to take away, rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the legislature."

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I would be slow to interpret the section as meaning thereby that the Legislature intended that the native owners, comprising 50% of the population, holding 85% of the lands of Fiji should be excluded in person from the Courts of Fiji. Further, I observe that the section but deals with causes "commenced prosecuted and carried on" by the Board. That cannot mean that the Board cannot be sued by the native owners, or a member of a proprietary unit, in a proper case. What if, for example the Board were to completely ignore the provisions of section 9 and were to grant a lease? In such a case, deprived of the use of their land without agreement, say, for 99 years, it would obviously be grossly unjust that the native owners could not sue the Board in its capacity as trustee. In all the circumstances therefore I adopt the submission of the learned Counsel for the plaintiff in Dikau. In my judgment the provisions of section 23 are but enabling in character, that is, they enable the Board, though not vested with native lands, nonetheless to conduct suits in respect thereof: the provisions provide for a convenient statutory form of representative action; the aspect of convenience being emphasised by the latter provisions of subsection (2) of the section. Section 23 in my view merely confers a discretion upon the Board, if so requested by the native owners, nor in a proper case a member or members of the proprietary unit, from initiating and conducting any such action. That being the case, I find that the first plaintiff's claim is properly before me.

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#### The First Plaintiff's Damages:

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Mr. Maharaj submits that the statement of claim is defective, as special damages were not pleaded, and refers to the case of Hayward v. Pullinger [1950] 1 All ER 581 where Devlin J. followed the case of Monk v. Redwing Aircraft Co. Ltd. [1942] 1 KB 182. The line between special and general damages is at times difficult to discern. Hayward v. Pullinger was a case of wrongful dismissal where wages unpaid were readily calculable. Here the first plaintiff's own assessment in the matter would inevitably, before the trial, have been not so much a matter of calculation, as of opinion of the value of various items. In my view no special damages could then have been pleaded. Further, Devlin J. in Hayward at p.582 expressed himself to be dealing "purely with the technical position" and indeed indicated, his willingness at least to entertain an application for amendment. In this respect I observe that pleadings can be amended at any stage of the proceedings, even after judgment (see The Duke of Buccleuch (1892) p. 201.

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I turn then to the evidence in respect of the particular portion of the first plaintiff's claim. He was not, I must observe, an impressive witness. His attitude was somewhat truculent I considered, but that is not the test. He was clearly evasive under cross-examination by Miss Rogan in the matter of his temporary alleged employment near Lautoka, far removed from his home and garden. His statement of claim refers to one acre: his evidence indicates that his garden was about two acres. Mikaele Tupupa, a Technical Officer employed by NLDC testified that the plot was half an acre in area. I found the latter to be an impartial witness and I would prefer his evidence in the matter. In respect of such an area the first plaintiff testified that altogether he had there growing 814 trees (including 800 cassava) and 1000 dalo plants, all adding up to a value of \$7,300. I can only regard that figure as greatly exaggerated.

He testified in particular that the following trees were lost:

3 Mango Trees valued .....	\$200	
11 Coconut Trees @ \$50 .....	550	
5 Orange Trees @ \$100 .....	500	
..... Total	\$1250	

The first plaintiff gave no basis whatever for the valuation of the above trees. Josefami Bola an Engineer employed by NLDC tendered, without objection, a schedule of values of growing crops and trees, emanating from the Ministry of Primary Industries, utilised by NLDC in cases of claims for compensation arising out of development. The document serves as an informed basis for the calculation of damages. The maximum figures under the schedule are much less than those supplied by the first plaintiff, namely \$10.60 per coconut tree and \$15.50 per citrus tree. No figures are supplied in respect of mango trees, but they can hardly, on those figures, exceed \$20 per tree.

I am satisfied that the first plaintiff completely exaggerated his claim throughout. He has given me no basis whatever for calculation of the value of each tree in the precincts of his house. Doing the best I can in the matter, I assess his damages under this head at \$500. I do not see incidentally that the Board is in any way liable for such damages, which lie only against NLDC.

There is the aspect of the damages in respect of the out-house and the steps. The evidence for the defendants in the matter is negative. A photograph of the house, taken after the surrounding area had been bulldozed, was tendered in evidence: no out-house is visible thereon. There is no evidence to the contrary and I accept the first plaintiff's evidence on the point. I received no evidence however as to quantum, but rather than dismiss this part of the claim, and in default of any agreement by the parties, I grant liberty to apply in chambers.

I see no need to grant the first declaration as to status in respect of the first plaintiff. As to the other declarations, the applications therefor are either unnecessary, inappropriate, or more importantly, they involve the communal

A rights of the native owners and for the reasons earlier stated, must be dismissed, as also the claim for an injunction. On the issue of damages I give judgment to the first plaintiff in the amount of \$500 against the first defendant.

The Court adjourned briefly to enable Counsel to consider the issue in respect of which, the Court had granted liberty to apply. Submissions were made as to costs.

B Learned Counsel for the first plaintiff and the first defendant having agreed damages at \$300 for the first plaintiff's out-house, I give judgment in that amount. There shall be judgment therefore for the first plaintiff in the total amount of \$800 and costs against the first defendant.

*(Judgment for the first Plaintiff against the first Defendant).*

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