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

CIVIL ACTION No. HBC 100/2012
CIVIL ACTION No HBC 27/2016

BETWEEN **KENTO (FIJI) LIMITED** a limited liability company having its registered office at PO Box 124, Nadi.

PLAINTIFF

AND **NAOBEKA INVESTMENT LIMITED** a limited liability company having its registered office at PO Box 1719, Nadi.

FIRST DEFENDANT

AND **SOUTH SEAS LIMITED** a limited liability company having its registered office at PO Box 718, Nadi.

SECOND DEFENDANT

AND **ITAUKEI LAND TRUST BOARD** a statutory body under the provisions of the iTaukei Land Trust Act having its head office at Suva, Fiji.

THIRD DEFENDANT

AND **MATAQALI NAOBEKA** by their representatives and members **ILIASERI VARO, JOELI VATUNITU & MANOA DRIUVAKAMAKA GADAI.**

FOURTH DEFENDANT

APPEARANCES : Mr Moapa for the Plaintiff
Mr Apted for the 1st & 2nd Defendants
Mr Cati for the 3rd Defendant (ILTB)
Mr Tunidau for the 4th Defendant

DATE OF HEARING : 4 September 2020

DATE OF JUDGMENT : 28 October 2020

DECISION

1. In a ruling I made on 10 December 2019 proceedings in HBC 100/2012 and HBC 27/20016 were consolidated. On 14 April 2020 a consolidated amended statement of claim was filed, and by summons filed on 22 July 2020 the 4th defendant applied to strike out the claims against them under O.18, r.18(1) of the High Court Rules on the basis that the claim against them was *scandalous, frivolous, vexatious and an abuse of the processes of the Court*. This is the decision on that application, which was heard before me on 4 September 2020.

2. Although it is not specifically referred to in the summons referred to above, it became apparent in the course of the hearing that the essential basis for the 4th defendants' application to strike out is that the named 4th defendants are not individually or collectively representatives for the Mataqali Naobeka (the capacity in which they have been named as defendants), and cannot, or should not be asked to take on, or have imposed on them the responsibility for representing the Mataqali and its members. The basis for this argument is Order 15, rule 14 High Court Rules, dealing with representative actions. Although the foundation for this argument is not expressed in any way in the summons of 22 July 2020, and is certainly not obvious from a reading of the summons, no complaint was made by counsel for the plaintiff about being taken by surprise by the thrust of the defendants' arguments, for which the main support came in the course of submissions made by counsel for the 1st and 2nd defendants.

3. I am grateful for the helpful written submissions made by counsel.

4. I note that this will be the 12th decision of the Court in these proceedings (counting both sets of proceedings now consolidated) since the first action was commenced in 2012. These decisions include an order striking out the plaintiff's claim made by the Master at Lautoka in November 2016 on the application of the 1st and 4th defendants, and a decision of Mackie J in October 2018 setting aside that order. It is clear from those decisions ([2016] FJHC 1041 and [2018] FJHC 1019) that the original bases for that strike-out application were:

    i. *the suggestion that the plaintiff's business activities in Fiji were illegal for being undertaken without a Foreign Investment Certificate that authorised the particular business activity being operated by the plaintiff, and therefore the plaintiff was not entitled to make any claim in respect of those business activities.*
    ii. *the argument that the proceedings commenced by the plaintiff in 2016 were vexatious as being a means of 'getting around' an earlier decision by the Master refusing consent to add the (now) 2nd defendant as a party to the original (2012) action and file an amended statement of claim.*

    and that the issue raised by the present application was not raised. Nevertheless, the plaintiff's counsel's submissions before me included the suggestion that the strike out issue is *res judicata* and cannot be raised.

The plaintiff's claim against the 4th defendants

5. In so far as it affects the 4th defendants, the statement of claim says (in summary of the essential elements):

    i. The 4th defendant Mataqali Naobeka is the land owner of Malamala island (off Nadi).
    ii. The 1st defendant Naobeka Investment Limited (*NIL*) is a company established by the 4th defendant to undertake (as trustee) commercial activities for the benefit of the members of the mataqali.

iii. NIL was lessee of Malamala under a lease from the 3rd defendant (*ILTB*), and subleased the island to the plaintiff (*Kento*) (with the agreement of the 4th defendants and after a payment by Kento to the 4th defendant mataqali) under an agreement to sublease for a term of 25 years commencing on 1 August 2007 for use in its tour business.

iv. NIL purported to terminate the sublease in March 2012 when the lease still had a further 20 years to run.

v. There was no current breach of the sublease by Kento to justify termination, or if there was NIL was estopped by its previous conduct from relying on it, or the process followed by NIL to terminate the lease did not comply with the law, and hence the purported termination was wrongful and unlawful.

vi. NIL and the 4th defendant mataqali (via un-named people who were 'members' of both) sank the plaintiff's ship/vessel used in its tourism venture, and the 4th defendant (together with the ILTB and the second defendant) *encouraged, counselled, assisted and caused* NIL to unlawfully terminate its contract with Kento in 2012, and grant a new sublease to the 2nd defendant in 2015. The 4th defendant did this by:

   (a) [encouraging] and otherwise [interfering[with the decisions of the majority of members of the landowning unit and the decisions of the directors of [NIL] and [causing NIL] to renege on the exercise of the plaintiff's rights under the sublease agreement, including the right of transfer under Special Condition B(1) of the First Schedule of the sublease agreement.

   (b) the third named 4th defendant [writing] to the Prime Minister to 'intervene on the matter' and 'the Prime Minister directed his investigators to investigate this dealing'.

   (c) The second defendant [paying] monies to [encourage, counsel and otherwise assist] NIL, ILTB and the 4th defendant to stop the plaintiff exercising its rights under the sublease agreement (including the right to sell its interest in the sublease) and to ensure that NILL terminated the plaintiff's sublease and issued a new sublease to the 2nd defendant.

vii. The actions of the 4th defendant (along with those of the other defendants) were intentional and calculated to interfere the plaintiff's rights under the sublease, and did so, and were unlawful.

viii. The unlawful actions of the 4th and other defendants caused damage to Kento by preventing Kento from operating its business, as a result of which Kento lost $0.5m per year over the subsequent 20 year term of its lease, a total of $10m.

ix. The court should also award Kento aggravated damage of $1m because the defendants' (including the 4th defendant's) actions were deliberate and intended to cause harm to Kento, and did so.

6. Specifically on the issue of the status of the 4th defendants the statement of claim says:

5. *The 4th Defendants are members of and representative of the traditional landowners of the said Malamala Island and are being sued individually and collectively together with the other members as Mataqali Naobeka.*

Evidence in support of the application

7. In support of the application to strike out the claim an affidavit dated 17 July 2020 has been sworn and filed by Iliaseri Varo, one of the named 4th defendants. Mr Varo acknowledges in his affidavit that he is the Turaga ni Mataqali Naobeka or Chief of the Landowning Unit named as the 4th defendant. As such he is of course a member of the mataqali, and so (along with all the other members of the mataqali as recorded in the iVola na Kawa Bula (VKB) (register of iTaukei living members administered by iTaukei Lands Commission) is a native or iTaukei owner as defined in the iTaukei Lands Act 1905. He is also a director of the 1st defendant company.

8. However Mr Varo makes it clear that he does not consider that he 'represents' the mataqali in the manner suggested in the statement of claim, and says he has never held himself out as, nor does he recognise the other named 4th defendants, as being representatives of the Mataqali Naobeka. He says that the mataqali has never expressly or in writing authorised him to act as its 'representative'.

9. The plaintiff has not filed any affidavit in response to that of Mr Varo.

The Law

10. The principles for striking out a statement of claim are clear. The starting point is the right of parties to have their disputes heard and decided on their merits.

11. Order 18, rule 18 of the High Court Rule reads;

> *18(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action or anything in any pleading or in the indorsement, on the ground that –*
> *(a) it discloses no reasonable cause of action or defence, as the case may be; or*
> *(b) it is scandalous, frivolous or vexatious; or*
> *(c) it may prejudice, embarrass or delay the fair trial of the action; or*
> *(d) it is otherwise an abuse of the process of the court;*
> *And may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*

12. In the case of **National MBF Finance (Fiji) Ltd v Buli** [2000] FJCA 28; ABU0057U.98S (6 JULY 2000) the Court of Appeal held;

> *The law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. It follows that an application of this kind must be determined on the pleadings as they appear before the Court.*

This does not mean that the jurisdiction to strike out is confined to plain and obvious cases. The New Zealand Court of Appeal in **Lucas & Son (Nelson Mail) v O'Brien** [1978] 2 NZLR 289 referred to and followed the following comments by Barwick CJ in a decision of the High Court of Australia in **General Steel Industries Inc v Commissioner for Railways** (NSW) (1964) 112 CLR 125, 128-130:

> *The plaintiff rightly points out that the jurisdiction summarily to terminate an action is to be sparingly employed and is not to be used except in a clear case where the Court is satisfied that it has the requisite material and the necessary assistance from the parties to reach a definite and certain conclusion."*
> *.... in my opinion great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case by the appointed tribunal. On the other hand, I do not think that the exercise of the jurisdiction should be reserved for those cases where argument is unnecessary to evoke the futility of the plaintiff's claim. Argument, perhaps even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed."*

13. However, the present application does not (unlike the previous application for striking out decided by the Master in 2016) depend on the proposition that the claim as pleaded cannot succeed against the 4th defendant. Rather it depends principally on the argument that the court should exercise its jurisdiction under O.15, r 14 to stop the claim against the named 4th defendants at least in so far as they are sued as representatives of the mataqali. Acceding to this application will not mean that the claim cannot continue against the named 4th defendants in their personal capacities (the success of which will ultimately depend on the plaintiff proving that they have participated in the alleged activities in ways that makes them liable to the plaintiff in some way), but will mean that the wider mataqali (and its assets) are not at risk from the plaintiff's claim.

14. Order 15, rule 14 provides:

> ***Representative proceedings (O.15, r.14)***
> *14(1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 15, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.*
> *(2) At any stage of proceedings under this rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this paragraph, the Court appoints a person not named as a defendant, it shall make an order under rule 6 adding that person as a defendant.*
> *(3) A judgment or order given in proceedings under this rule shall be binding on all the persons as representing whom the plaintiff's sue or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.*
> *(4) An application for the grant of leave under paragraph (3) must be made by summons which must be served personally on the person against whom it is sought to enforce the judgment or order.*
> *(5) Notwithstanding that a judgment or order to which any such application relates is binding on the person against whom the application is made, that person may*

dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability.

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

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

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

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

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

> *much beyond that in the last hundred years, and I do not think that it is necessary to go further, at any rate for the purposes of this suit'.*
>
> *This seems to me to make it plain that the rule is to be treated as being not a rigid matter of principle but a flexible tool of convenience in the administration of justice. Such an approach is, I think, at least consistent with cases such as* ***Bromley v Smith, Wood v McCarthy****, and* ***Wyld v Silver****; and in* ***Harrison v Marquis of Abergavenny*** *((1887), 3 TLR 324 at p 325), Kay J described that rule as being "a rule of convenience only". The approach also seems to be consistent with the language of RSC, Ord 15, r 12(1). This provides that*
>
> > *Where numbers persons have the same interest in any proceedings ... the proceedings may be begun, and, unless the Court of otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.*
>
> *By r 12(3)–(6), ample provision is made for protecting those who, being bound by a judgment against a person sued on their behalf, nevertheless wish to dispute personal liability. The language is thus wide and permissive in its scope; yet it provides adequate safeguards for the substance. I would therefore be slow to apply the rule in any strict or rigorous sense: and I find nothing in the various passages cited to me from Daniell's Chancery Practice (8th Edn, 1914) which makes me modify this view.*

I apologise for the length of this quotation from the judgment of Megarry J, but it seems, with respect, to capture the essence of what this rule is for, and how it is to operate.

16. In approaching a case such as this, where it is argued that named individuals can and should be taken to represent, as defendants, a mataqali to which they are said to belong, it is important to understand the distinction between a mataqali and its individual members, and the interest that those members have in the collective assets of the mataqali. The distinction between the mataqali and its members was explained in the decision of the High Court of Fiji (then the Supreme Court) in **Patel v Prasad** (1976) 22 FLR 210 where the Court said:

> *Mr Shankar argued that Meli's case [**Meli Kaliavu & Ors. v Native Land Trust Board** (1956) 5 FLR 17] established that a mataqali is a collective unit. With respect I do not think that it establishes anything of the sort. To my mind it makes clear that individual members of a mataqali cannot establish any rights in respect of mataqali land. Nor can a shareholder in a company or even a director of a company establish any right to company land. Still less of course, can a member of a club or other unincorporated body establish a right to club property. However, the position in **Meli Kaliavu's** case might have been different had the five members sued in a representative action as in **Wyld v Silver** [1963] Ch. 243, cited by Mr Scott. That indeed is, I think, what Hammett J. refers to when he says that if any damage had been suffered by, the mataqali, the mataqali could recover.*

That was not a case that was concerned with O.15, r.14, but it makes the point that the rights of the mataqali and its members are not synonymous. The mataqali as a collective has certain rights, which may be for the benefit of its members. But the rights of the members are not the mataqali's rights, nor is the reverse true. This distinction is important, particularly where the suggestion is that individuals can be sued – as distinct from suing - in a representative capacity on behalf of the mataqali.

17. The issue of whether one or more of its members of a mataqali can sue in a representative capacity on behalf of themselves and other members was decided by the Court of Appeal in **Narawa v Native Land Trust Board** [2002] FLR 273 following a thorough review of decisions from around the world relating to communally owned indigenous land. In applying O.15, r.14 HCR the Court held:

> *These and other authorities to which we were referred put beyond doubt the proposition that native customary rights and obligations may be recognised by the common law and enforced in the courts. More particularly, in the case of a mataqali, it may, by representative action or by action brought by all those belonging to the mataqali as an unincorporated association, bring proceedings in the court seeking common law or equitable remedies for any breach of rights it is able to establish.*

In coming to its decision in this case the Court of Appeal also confirmed (at p.275/47 by reference to **Meli's** case (referred to above)) that an individual member of a mataqali cannot sue and recover damages personally where damage has been to the mataqali (or to the plaintiff in his capacity as a member of the mataqali) rather than to personal rights of the plaintiff that are incidental to his/her membership of the mataqali. In that decision the Court allowed the mataqali's representative action to continue, and in doing so allowed its appeal against the decision of the High Court striking out the claim.

18. However, it is important to note that the case of **Narawa** was one where the mataqali was the plaintiff. It is much harder to find cases where the court has upheld a claim against a party said to represent multiple defendants. Although O.15, r.14 unquestionably extends to such a case, different and difficult issues arise where a plaintiff selects certain named individuals, and attempts to sue them in a representative capacity for a wider group. One of the more obvious difficulties is the issue of choice. Where the plaintiff claims on behalf of others, at least he has chosen to do so. On the other hand, where a defendant is sued on behalf of others, he is no doubt a reluctant participant in the action in any case, but in addition he may have no interest in representing others, or indeed doing so may be contrary to his personal interests in the proceedings. Even more important the parties said to be represented may have conflicting interests from the named defendant by whom they are to be represented, or the named defendant(s) may otherwise be someone who cannot sensibly represent the interests of the wider class. In **Roche v Sherrington** [1982] 2 All ER 426 Slade J held:

> *If a plaintiff wishes to invoke RSC Ord 15, r 12 for the purpose of bringing an action against named defendants as representatives of a wider class, one essential condition is that the persons represented should have the same common interest in defending the proceedings in question. This is made clear by the opening words of the rule. In a case where separate defences may be opened to some members of the class in question, there can be no common interest within the rule:*

Some of the difficulties that would arise if this requirement was not observed are mentioned in the judgment of the House of Lords in **London Association for Protection of Trade v Greenlands Ltd** [1916] 2 AC 15. Lord Parker delivering the decision of the House noted:

> *To use the words of the 8th edition of Lindley on Partnership, ... 'If liabilities are to be fastened on' any members of such an association 'it must be by reason of the acts of those members themselves, or by reason of the acts of their agents; and the agency must be made out by the person who relies on it, for none is implied by the mere fact of association'. In view of such cases it would be going very far to hold that every member was liable for the tort of the secretary, even though such tort were committed in the course of carrying out the duties assigned to him under the contract between him and the persons who engaged him. In other words, there might be separate defences open to some members of the association and not to others, and if this were so there would be no common interest within the rule.*

19. It is helpful to refer to the commentary in The Supreme Court Practice 1999 (the White Book) on the UK equivalent of this rule, which is more comprehensive than the corresponding commentary in the High Court Rules. At paragraph 15/12/27 the commentary in the White Book says:

> *Before authorising a person to represent himself and others as defendants, the Court must be satisfied that he is authorised to represent them ... and may require a meeting to be called for the purpose. Before deciding in any particular case whether a representation order under this rule should be made in regard to defendants, it is necessary to consider two questions (i) what is the cause of action, and (ii) what is the precise class of potential defendants who are to be represented by the defendants on the record for the purpose of imposing liability on them if judgment is given for the plaintiff (per Scott LJ in **Barker v Allanson** [1937] 1 KB 463 at 475). The Court does not leave the ultimate selection of representative defendant to the mere will or choice of the plaintiff or defendants, and will only make a representation order as against proper persons to defend on behalf of others.*

and at 15/12/44:

> *This rule expressly empowers the Court to prevent the continuation of proceedings brought by or against representative parties ...*
> *Even where the three-fold test of common interest, common grievance and a remedy beneficial to all is satisfied, the Court retains a discretion under [the rule] to refuse to allow proceedings to continue as a representative action.*

20. An issue that should be taken into account by a court deciding whether to allow a representative action to continue is the nature of the plaintiff's claim. In **J Bollinger SA & Anor v Goldwell Ltd** [1971] RPC 412 Megarry J in the High Court of England said (at pp 420-421):

> *In my judgment, a representative action cannot be brought unless the whole of the claim is appropriate to that form of action. Putting it at its lower, it would be highly inconvenient if there were parts of the action to which varying considerations would apply, depending upon the circumstances of each individual litigant included in the action either in person or by representation.*

On the same topic the White Book suggests (at 15/12/27):

> *Where separate defences may be open to some members, there can be no common interest within this rule.*

This principle has been applied in a number of cases, which illustrate its application.

i. In **Trustees of the Roman Catholic Church v Ellis & Anor** [2007] NSWCA 117 (24 May 2007) the Court of Appeal of New South Wales, Australia struck out the plaintiff's claim (arising from sexual abuse by a young alter server by a priest) against the trustees of the church on the basis that they could not be liable for the actions of the priest merely because the priest was a member of the church administered by the trustees. To succeed in his claim the plaintiff would need to show that the trustees either authorised the offending activity, or were vicariously liable for it. The defendants membership of the same organisation did not by itself establish either.

ii. In **Amos Removals and Storage Pty Ltd v Small** [1981] 2 NSWLR 525 a representation order was made in respect of 800 members of a trade union alleging conspiracy to interfere with contractual relations. The evidence showed that all the members of the union had participated (by attending a stop-work meeting at which the industrial action was approved) in refusing to release or accept containers from warehouses not approved or recognised by the union, and hence each participating member had the common interest to hold them liable.

iii. In contrast the case of **Mercantile Marine Services Association v Toms** [1916] 2 KB 243 involved a claim for libel in an article published in the journal of an unincorporated organisation with 15,000 members. The Court of Appeal was not persuaded that all the members had the same interest so as to allow a representative action to continue against them. Some might argue that the article was not defamatory, others might say that the published words did not apply to the plaintiff, or were true, or were not authorised by them. These defences would often depend on evidence, and the named representatives could not hope to provide an adequate defence to all the members.

iv. A more recent New Zealand case is **Tahi Enterprises Ltd & anor v Te Warena Tana & Miriama Tamaariki as executors in the estate of Hariata Arapo Ewe and ors** [2018] NZHC 516 in which Lang J said;

> 31. *... in cases were the plaintiff seeks the appointment of a representative defendant, the courts must be vigilant to ensure that administrative convenience does not come at the cost of injustice to the persons whom that person is appointed to represent.*
>
> 39 *These cases demonstrate that the courts are likely to approve the appointment of representative defendants in cases where individual members of the represented group are unlikely to have different defences to the plaintiffs' claim. Where that it not the case, the interests of justice will generally require the plaintiff to proceed against the individuals who comprise the group.*
>
> 49 *The ability to advance different defences is an extremely important issue in the present case because the plaintiffs are endeavouring to hold individual members or the Iwi personally liable for damages that could amount to $1.3m together with costs and interest. Those persons should have the ability to make their own decisions as to how they should conduct their defences. I acknowledge that the Court has the ability to make ancillary orders permitting individual members to 'opt in' and defend the proceeding themselves. I have a concern, however, that members of the Iwi may not take that option even though they may have a good defence. The*

only way to alleviate this concern is to require the plaintiffs to add individual members of the Iwi as respondents and serve the pleadings on them. This is likely to ensure those persons understand the gravity of their position.

v. In contrast with the **Tahi** case, a brief and unreported decision of Paterson J in the High Court of New Zealand shows where and in what circumstances it may be appropriate to appoint a defendant as representative for other defendants. In **Whakatane District Council v Keepa** (unreported HC Rotorua M7/00 27 June 2000) the judge appointed the defendant to represent 500 + members of his Iwi and made the following comments:

This is a matter where there clearly should be a representative defendant. All owners of the Ruatoki blocks are affected and it would be impracticable and inexpedient to direct service on more than 500 owners. They have the same interest in the subject matter, namely, whether or not the Ruatoki blocks are exempt from rating.

Analysis

21. In the present proceedings the plaintiff's claim names the 4th defendant as *Mataqali Naobeka by their representatives and members (the named 4th defendants).* It is clear that as an unincorporated body the Mataqali Naobeka cannot, unlike a company or other incorporated organisation (however that incorporation occurs), be sued in its own name. Being unincorporated it does not have conferred upon it the separate legal personality and status that usually accompanies incorporation (e.g. s.44(1) Companies Act 2015, s.8 Charitable Trusts Act 1945). In spite of the fact that it is well understood to what the name refers, there is therefore no legal entity known as Mataqali Naobeka which the named 4th defendants can represent. Instead Mataqali Naobeka is a convenient and well understood general classification referring to the group of individuals who comprise the mataqali. Even if the named 4th defendants are properly named in a representative capacity, they represent not the Mataqali Naobeka, but the individuals who are members of that mataqali. The proper description of the 4th defendants should therefore be as follows:

ILIASERI VARO, JOELI VATUNITU & MANOA DRIUVAKAMAKA GADAI sued on their own behalf and on behalf of all other members of the Mataqali Naobeka.

22. However, the important issue here is not how the 4th defendant is described in the entituling, but whether this is an appropriate case for the Mataqa Naobeka to be sued via representatives, and if so whether the three named 4th defendants should be appointed to represent the mataqali.

23. The decisions referred to above show that O.15, r.14 should be seen *as a flexible tool of convenience in the administration of justice* rather than a *rigid matter of principle*. If the plaintiff has a genuine claim against the members of the Mataqali Naobeka as a collective, an order appointing representatives to defend the claim on behalf of the mataqali is likely to be a more sensible approach to the conduct of the proceedings than the alternative of requiring the plaintiff to identify all the members of the mataqali, join them as defendants, and serve them with the writ of summons.

24. But I have reached the clear conclusion that the plaintiff's claim against the 4th defendants is not, as presently formulated in the Amended Statement of Claim of 14 April 2020, one that is, or could be, a claim against the mataqali members as a collective. The Consolidated Statement of Claim presents two categories of claim against the four defendants. As against the 1st defendant, Naobeka Investment Ltd, with whom the plaintiff says it had a contract incorporated in an agreement to sub-lease Malamala Island for 25 years from 1 August 2007, the plaintiff's claim is for breach of contract (by unlawful early termination). As against the remaining defendants, the claim (set out in paragraphs 27 and 28 of the statement of claim) is for unlawful interference with contractual relations by the defendants – with knowing of the sublease held by the plaintiff - encouraging, counselling and assisting the 1st defendant to breach the contract in the manner set out above. Particulars of the alleged encouragement, counselling and assistance are provided as follows:

(a) The 2nd, 3rd and 4th Defendants encouraged and otherwise interfered with the decisions of the majority of the members of the landowning unit and the decisions of the directors of 1st Defendant and caused the 1st Defendant to renege on the exercise of the Plaintiff's rights under the sublease agreement, including the right to transfer under Special Condition B(1) of the First Schedule of the sublease agreement (hereinafter the 'Sale Condition').

(b) The third-named 4th Defendant wrote to the Prime Minister to 'intervene on the matter' and 'the Prime Minister directed his investigators to investigate this dealing'.

(c) The 2nd Defendant paid moneys to, encouraged, counselled and otherwise assisted the 1st, 3rd and 4th Defendants to stop the Plaintiff exercising its rights under the sublease agreement and the Sale Condition and to ensure that the 1st Defendant terminated the Plaintiff's sublease and issue it to the 2nd Defendant.

(d) Certain employees of the 3rd Defendant took steps to ensure that the Plaintiff's sublease was 'torn up' and the Plaintiff could not exercise its rights under the sublease agreement and the Sale Condition and to facilitate the termination of the Plaintiff's sublease and its reissue to the 2nd Defendant.

(e) The repeated attempts to unlawfully terminate the Plaintiff's sublease as particularised in paragraphs 22 and 23 above

(f) The Plaintiff and the 1st Defendant entered into a Deed of Settlement on 21 May 2013 for the settlement of their dispute but the 1st Defendant with the assistance of the minority of the 4th Defendant Mataqali and the other named 4th Defendants refused and failed to comply with the terms and conditions of the said Deed.

25. Leaving aside the question of whether, if established, such conduct is capable of founding a claim for unlawful interference with contractual relations, I make the following observations about this claim, in so far as it relates to the Mataqali Naobeka;

i. Except for the assertion in paragraph (b) of the particulars, it does not identify who from the 4th defendant mataqali undertook any of the activities referred to, or in what capacity – vis a vis the mataqali – they did so.

ii. It does not allege that the members of the mataqali authorised any of the alleged actions, either expressly or by implication. Indeed by referring to the activities of a minority (paragraphs (a) and (f)) it suggests that the mataqali did not authorise the activities complained of.

iii. No basis is set out in the statement of claim whereby it could be said that the members of the mataqali were collectively or individually vicariously liable

for the activities of the un-named individuals who are said to have carried out the offending activities.

iv. Even if these matters were addressed in the statement of claim so as to raise, for the purpose of deciding whether to allow a representative action to proceed, a presumption that those allegations could be proved, it is likely – indeed, inevitable – that certain members of the mataqali would be entitled to defend any claim against them on the basis that they were not aware of the activities of others, and had not authorised them, or approved them so as to give rise to personal liability for those activities, if they were wrongful.

26. The cases referred to above show that the courts have made orders allowing an action to proceed against representative defendants only where all the members of the group represented have the same interest in the proceedings, and no other interest. The different outcomes in the **Tahi Enterprises Ltd** and the **Whakatane District Council** cases illustrates the point. The first of these was a case akin to this one, where the plaintiff sought to hold the iwi members liable for a breach of contract by a trust set up by the iwi. The court refused to authorise the representative action against the iwi members, and the comments of Lang J quoted in paragraph 18(vi) above apply equally to the present case. On the other hand, the second case concerned whether land owned collectively was subject to rates. In that case the interests of all the collective owners – arising as it did only from their interest in the land, and not otherwise - were the same, and the court held that a representation order should be made.

27. Here the liability of the members of the mataqali, if there is any, will arise not from its collective ownership of land or assets, but from the fact that they expressly agreed to, or can be taken by implication or operation of law to have agreed to or allowed, the tort of unlawful interference with a contract to be committed on their behalf. As it is presently constituted, the plaintiff's claim does not even allege this, so it is difficult to see how the plaintiff can satisfy the requirements of O.15, r.14 to show that the members that it seeks to have represented by the named 4th defendants are *numerous persons [having] the same interest in any proceedings.*

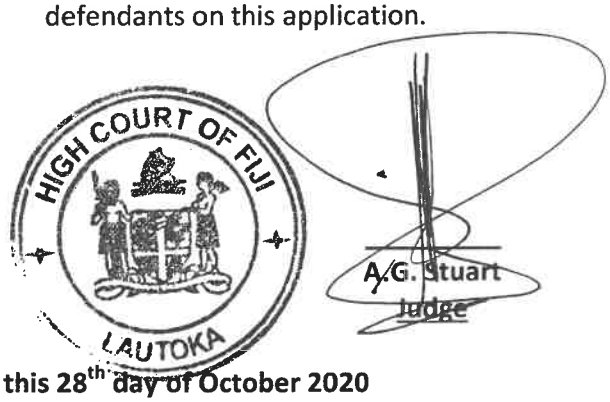
28. Even if I was satisfied that an order should be made that the members of the mataqali be sued as defendants via a representative, I do not necessarily agree that the named 4th defendants should be the representatives for the mataqali members. This is not said by way of criticism of Messrs Varo, Vatunitu and Gadai, but because if the case proceeds to trial, their interests seem likely to be different from those of the wider membership of the mataqali. Although – except in the case of Mr Varo's letter to the Prime Minister - they have not been identified in the statement of claim as being personally involved in the alleged unlawful activities, it seems that likely that they have been named because they were closely involved in what happened in relation to the termination of the sublease from the 1st defendant to the plaintiff, and the subsequent re-letting of the island to the 2nd defendant. If so, they may be liable for their own actions in ways that the wider membership would not be liable, and this possibility means that the three gentlemen named would, if ordered to act in a representative capacity, have a conflict between their duty to defend the claims

on behalf of the members of Mataqali Naobeka, and their interest in having any personal liability they have shared by the wider mataqali.

Conclusion

29. Accordingly, on the summons by the 4th defendants dated 22 July 2020 to strike out the claims against them I make the following orders:

    i. the claim against Iliaseri Varo, Joeli Vatunitu and Manoa Driuvakamaka Gadai as representatives of the members of Mataqali Naobeka is struck out (this does not affect any claim against them in their personal capacity only).
    ii. The plaintiff is to pay costs of $600 (summarily assessed) to the 4th defendants on this application.



At Lautoka this 28th day of October 2020

SOLICITORS:
Babu Singh & Associates, Suva for the plaintiff
Munro Leys, Suva for the 1st and 2nd defendants
ILTB in house solicitor, for the 3rd defendant
Kevueli Tunidau Lawyers, Lautoka for the 4th defendant.