NATIVE LANDS COMMISSION v JONETANI KAUKIMOCE (ABU0043 of 2008)

COURT OF APPEAL — CIVIL JURISDICTION

CALANCHINI AP, CHITRASIRI, MUTUNAYAGAM JJA

21 February, 21 March 2012

iTaukei — commissions — records of commission — errors — corrections to record — jurisdiction of Commission — whether Court has jurisdiction — public body performing public function — correct procedure — judicial review — private law dispute — High Court Rules O 53 — Native Land Act ss 3, 4, 6, 8, 9, 10, 16, 17.

The appellant Native Lands Commission (the Commission) held an inquiry into land claims and membership of land owing units of the Yavusa Qalikarua at Qalikarua village on the island situated in the Province of Lau. The respondent claimed that following the inquiry, two documents appeared in the records of the Commission that contained inconsistent and contradictory information. The respondent sought a declaration that there was an error in the Commission's records and an order by the Court directing the Commission to correct that error. The trial judge found that there was an error and ordered the Commission to amend its records to reflect the Court's finding. The Commission appealed against that decision.

Held –

(1) It is only the Chairman of the Commission who has the jurisdiction to determine whether an error has been made and, if so, to direct the Registrar of Titles to correct that error. The jurisdiction to consider a submission that an error has been made is not given to the Court. The judge had exercised a jurisdiction that is vested in the Commission.

(2) The respondent's claim raised issues that touched upon the role of a public body performing a public function. As such, the issues fell under the heading of public law issues rather than private law rights. The correct procedure for seeking redress of public law grievances is to apply for judicial review under O 53 of the High Court Rules. The respondent proceeded by way of originating summons, which constitutes an abuse of the process of the Court.

(3) Section 3 of the Native Land Act applies when there is a private law dispute between parties, at least one of whom represents a proprietary unit that relates to an infringement of a customary right. Under those circumstances, the Court is required to decide the dispute according to native custom and tradition, which in turn shall be determined by evidence from witnesses capable of "throwing light thereon." In such proceedings, the Court is exercising its original jurisdiction as the initial decision-maker.

Appeal for determining jurisdiction allowed

Cases referred to

R v Panel on Take-overs & Mergers; Ex parte Datafin plc [1987] 1 All ER 564, applied.

Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155, cited.

O'Reilly v Mackman [1983] 2 AC 237; *Timoci Ramokosoi and Others v Native Lands Commission*; *Ratu No 2 v Native Land Development Corporation* [1991] 37 FLR 146, considered.

Vosailagi v Native Lands Commission [1989] 35 FLR 116, explained.

R Green for the Appellant.

N. Nawaikula for the Respondent.

[1] Calanchini AP. This is an appeal from a judgment of the High Court (Jitoko J) at Suva handed down on 2 May 2008.

[2] In an action commenced by Originating Summons the Respondent on behalf of himself and members of Mataqali Navau of Yavusa Qalikarua sought the following relief:

> *"1 A Declaration that Native Land Register pertaining to the various land owning units now residing at Qalikarua Village noting them as members of Yavusa Qalikarua with sub-units (Mataqali) consisting of Mataqalis Narocake, Nadurubau, Toka, Levukana and Nasau is wrong, erroneous and contrary to customs and tradition.*
>
> *2 A Declaration that the proper and correct description is Yavusa Muairewa consisting of Mataqali Navau, Nadurubau, Toka, Levukana and Nasau with Mataqali Narocake as the dependent unit.*
>
> *3 An Order under s 10 (1) of the Native Land Act directing the Defendant to amend its register and insert the correct description herein."*

[3] The Respondent filed an affidavit sworn by Jonetani Kaukimoce on 21 August 2006 in support of the claimed relief. An answering affidavit sworn by Watisoni Waqa on 20 October 2006 was filed on behalf of the Appellant. At the hearing which commenced on 20 June 2007 the Respondent called ten witnesses. The Appellant did not call evidence and relied on its answering affidavit and any evidence obtained from the witness during cross examination.

[4] The dispute between the parties arose out of an inquiry conducted by the Appellant on the island of Matuku in 1938. A single Commissioner (the late Sir Lala Sukuna) held an inquiry into land claims and membership of land owing units of the Yavusa Qalikarua at Qalikarua village on the island situated in the Province of Lau.

[5] The spokesperson who made the presentation on behalf of the Yavusa told the Commissioner that the Yavusa consisted of five mataqali and 12 tokatoka. He also informed the Commissioner that the boundaries of the Yavusa were known, that the boundaries of each of the five mataqali within the Yavusa were established and that the members of each mataqali and each of the 12 tokatoka were known and confirmed.

[6] The Respondent claimed that following the inquiry there appeared in the records of the Commission two documents that contained inconsistent and contradictory information.

[7] The first document is the page containing List No. 720 in the Register of Native Land Owners kept by the Appellant which shows that in respect of the District of Matuku under Mataqali Narocake the tokatoka Navau was extinct.

[8] The second document is the page in the Evidence Book Record dealing with claim 1261 which stated:

> "*Navau: Sa ketou talega na matq Narocake."*

[9] At page 13 of his decision the learned trial Judge explained this entry in the following manner:

> *"Ratu Sukuna recorded (the spokesperson's) statement on Navau as follows: "Sa ketou taleqa na matq. Narocake. Sa dodonu na kena i yalayala." The entry states emphatically that Navau is also Mataqali Narocake ("Katou" in Lau dialect means "we are" rather than "ours" as appears in the English translated version) and that the Navau land boundaries are established as correct."*

[10] The Respondent challenges two aspects of the Appellant's records. The first was that Navau, whether as a mataqali or tokatoka, had been described as extinct when it continues in existence up to the present day. The second was that Navau's status was described as a tokatoka when in fact it should have been described as a mataqali.

[11] The learned trial judge concluded that Navau was not extinct and continued to exist to the present day. In reaching that conclusion the learned judge preferred the entry in Claim 1261 of the Commission's Evidence Book Record as being more reliable because it had been compiled by the Commissioner as he conducted the inquiry. It must be said that the learned Judge relied on his own translation of the entry in Fijian.

[12] The learned Judge also concluded that Navau not only continues to exist but continues to exist as a mataqali of Yavusa Qalikarua.

[13] The learned Judge's translation appears to indicate that Navau and Mataqali Narocake are one and the same. However this seems to be at odds with his conclusion on page 20 where the learned Judge states:

> *"The Court is fully aware of the implication of this judgment. By ordering the amendment to the Commission's record Mataqali Navau is added as the sixth mataqali to Yavusa Qalikarua, now comprising Narocake, Nadurubua, Toka, Levukana, Nasau and Navau. _ _ _. The fact that the decision may result in a single tokatoka under a mataqali or a mataqali that is synonymous with the tokatoka is not unique. Such phenomenon exists elsewhere in other parts of Fiji."*

[14] The learned trial Judge correctly stated the issue before him when he observed at page 20 of his decision.

> *"The Plaintiff's application is simply for the Commission's record to be corrected on the ground that there had been an error made. That is all."*

[15] And at page 21 the learned trial Judge stated:

> *"_ _ _ The Court finds in favour of the Plaintiff's Originating Summons and hereby declares the existence of Mataqali Navau of Yavusa Qalikarua. Order is made that the defendant amends its records reflecting the Court's finding pursuant to s 10 of the Act."*

[16] A formal Order in those terms was sealed by the Court on 23 July 2008. The Appellant was ordered to pay $650.00 costs.

[17] The Appellant raises five grounds of appeal in its application for an order from this Court that the Judgment delivered on 2 May 2008 be wholly set aside and quashed. The Appellant takes issue with the learned trial Judge's interpretation and application of a number of sections of the iTaukei Lands Act Cap 133 (formerly known as Native Lands Act and referred to hereafter as the Act). The Appellant also challenges certain findings of fact made by the learned Judge on the basis that there was no evidence or insufficient evidence to support the findings.

[18] However, in its first ground of appeal, the Appellant challenges the decision on the basis that the learned Judge erred by usurping the jurisdiction vested exclusively in the Appellant under the Act. It is convenient now to turn to the relevant provisions of the Act. However, before doing so, it is necessary to clarify the correct use of terminology. Pursuant to s 3 of the Native Lands (Amendment) Decree 2011, the principal Act (the Native Lands Act) is amended by deleting the word "*native*" wherever it appears and inserting "*iTaukei*". Since

the events and the judgment at first instance occurred prior to this amendment, the word "*native*" will be used in this decision with occasional alternative reference to the word "*iTaukei*".

[19] Under s 4 of the Act the Native (iTaukei) Lands Commission (the Commission) is appointed by the Minister. The Commission may consist of one or more Commissioners each of whom has the powers of the Commission. Under s 4 the Commission is charged with the duty of ascertaining what lands in each province are the property of native owners. In other words what lands are native lands and whether the same are held by mataqali or some other division or sub-division of the people.

[20] Pursuant to s 6 of the Act the Commission shall inquire into the title of all lands claimed by mataqali or other divisions or sub-divisions of the people (i.e. the title to all native land) and shall describe in writing (1) the boundaries and situations of such lands and (2) the names of the members of the respective communities claiming to be owners of the land so described and situated.

[21] s 8 of the Act requires the Commission to establish a Register of Native Lands (the Register), in which the Commission is required to record the boundaries and situation of lands that have been ascertained as native lands.

[22] Section 9 requires the Commission to record in the Register the boundaries of land the ownership of which has been decided and also to record in the Register the names of persons comprising the land owning unit of that land.

[23] Section 10 is of particular relevance to this appeal and as a result its terms are stated in full:

> *"10 (1) The volumes of such register according to the provinces, tikinas, towns or in whatever way the Commissioner may determine shall from time to time be transmitted to the Registrar of Titles who shall preserve the Register of Native Lands with the same care as the registers of land granted by the Crown.*
>
> *(2) When it is found that an error has been made in the preparation of such register or that any Fijian has been recorded and registered in any proprietary unit other than the proper unit or that the name of any Fijian has been inadvertently omitted from the Register recording the proper unit of such Fijian, it shall be lawful for the Registrar of Titles on the receipt of an order under the hand of the chairman of the Native Lands Commission to correct the same or delete or add the names of such persons as the case may be."*

[24] Sections 16 and 17 of the Act also make provision for the performance of certain functions by the Commission in the case of a dispute arising (a) in connection with land and (b) in connection with the headship of any division or sub-division of the people having the customary right to occupy and use native lands.

[25] When the Act is read as a whole it is quite clear that it was the intention of the legislature that the statutory functions that have been outlined above should be performed by the Commission being the statutory body that was established by s 4 of the Act. It is also quite clear that when performing its various functions under the Act the Commission is required to do so in accordance with i Taukei (native) custom as evidenced by usage and tradition. Apart from being mandated by virtue of s 3 of the Act, there is an additional reason why this should be so as was explained by Tuivaga CJ in *Vosailagi v Native Lands Commission* [1989] 35 FLR 116 at 130:

> *"Fijian custom and tradition has its own in-built method of resolving even the hardest of disputes. It is called "vei sorosorovi" and it is invoked to restore peace and*

harmony to village life and in a larger context to the life of the vanua. It, of course, requires a huge helping of magnanimity, wisdom and understanding. It is only when Fijian custom and tradition is ignored or gives way to expediency that disputatious situations will arise in Fijian society".

[26] As the learned Judge noted at page 20 of the judgment:

"The Plaintiff's application is simply for the Commission's record to be corrected on the ground that there has been an error made. That is all."

[27] Under the Act, a reference to the Commission's record must be taken to be a reference to the "*Register of Native Lands*" in which is recorded by the Commission a description of the boundaries and situation of land recorded and settled according to native custom as evidenced by usage and tradition. Also recorded in "*Register of Native Lands*" are the names of the persons comprising the proprietary unit in respect of the land thus recorded and settled. The "*Register of Native Lands*" is referred to in Fijian as the *"Vola Ni Kawa Bula*" and abbreviated in everyday usage to "*VKB."*

[28] Under s 10 (1) the volumes of the VKB are deposited with the Registrar of Titles for safe keeping. It is s 10 (2) of the Act which deals with errors that may have been made in compiling the '*VKB'*. Whether an error has been made is a matter for the Chairman of the iTaukei Lands Commission. If the Chairman is satisfied that an error has been made he shall direct the Registrar of Titles to correct that error. It is only the Chairman of the Commission who has jurisdiction to determine whether an error has been made and if so to direct the Registrar of Titles to correct that error.

[29] The Respondent sought a declaration that there was an error in the Commission's records and an order by the Court to correct that error. It required the Court to perform a function that was not given to it under the Act. In my judgment it is clear that whether a mistake has been made and whether the Register should be corrected are matters for the Commission and more particularly the Chairman of the Commission. The jurisdiction to consider a submission that an error has been made is not given to the Court. The learned judge has exercised a jurisdiction that is vested in the Commission. This is the effect of his observations on pages 19 and 20 of the judgment. It is the Chairman of the Commission and not a Judge of the High Court who is charged with directing that the Registrar of Titles correct an error in either the Register of Lands or the Register of Native Land Owners regardless of whether the Registers are kept as one or separately.

[30] To some extent that fact appears to have been recognised by the Respondent who outlined, in his affidavit from paragraphs 27 to 33, the history of correspondence that passed between the Appellant and the Respondent and/or members of his land owning unit between 1964 and 2004. However no copies of any correspondence were exhibited to the affidavit. In paragraph 35 the Respondent deposed:

"That the error contained in the Defendant's record has been the subject of concern of many members of Yavusa Muairewa but that every time the Defendant is asked to correct it, its usual reply is that it has no power to correct its record."

[31] Although there was no material before the Court to support that claim, it is clear that if the Appellant has made that assertion then it is not correct. Section 10(2) expressly gives the Chairman the authority to order the Registrar of Titles

to correct the Register if the Chairman has found that an error has been made. The Chairman is required to determine whether an error of the kind to which reference is made in s 10 (2) exists.

[32] So the question arises how does a person in the position of the Respondent proceed when a statutory body such as the Appellant does not perform a function that is expressly required of it under the Act. In this case the Respondent sought a declaration from the Court that there was an error in the Appellant's records and an order that the error be corrected. The proceedings were commenced by originating summons.

[33] The Respondent was seeking relief from the Court in the exercise of its original jurisdiction. To determine whether the Respondent has proceeded correctly, it is necessary to consider the distinction between the High Court's original jurisdiction and its supervisory jurisdiction when considering its jurisdiction to grant declaratory relief. In the exercise of its original jurisdiction (i.e. when the High Court is making or taking the initial decision) a declaration may be obtained in addition to any other remedy that may be obtained. A declaration may be granted in addition to or in place of another remedy. However when exercising its supervisory jurisdiction over a statutory body the jurisdiction to grant a declaration is limited as a remedy to issues that relate to the decision - making process of the initial decision – maker. (See *Judicial Review of Administrative Action* Fifth Edition; de Smith, Woolf and Jowell at pages 737 – 738).

[34] The question whether the Court should be exercising its original or its supervisory jurisdiction is answered by asking whether the Respondent's claims arose under public law or gave use to a private law dispute.

[35] This issue was not considered by the learned judge in the instant proceedings. However in *Timoci Ramokosoi and Others v Native Lands Commission* (unreported civil action No 299J of 2000 delivered 15 June 2007), the same Judge had stated at page 6:

> *"Where there are issues both involving public law as well as private law rights then in my view the Plaintiff is at liberty to choose his forum. In this case, clearly, there is a challenge to the exercise by a public body of violating a principle of public law, namely, the right to be heard amounting to denial of natural justice. On the other hand there is allegation of violation by the public body of private law namely the right of the First Plaintiff's name to be entered in his mother's Yavusa and upon which the Plaintiff's are seeking certain declarations on such right and an order to prevent the Defendant from interfering with those rights. Under the circumstances the Plaintiffs, in my view, are entitled to using this action other than by judicial review."*

[36] However, in my judgment, the more appropriate test to be applied was discussed by the Court of Appeal in *R v Panel on Take-overs & Mergers; Ex parte Datafin plc* [1987] 1 All ER 564. The headnote to that decision stated:

> *"In determining whether the decisions of a particular body (or person) were subject to judicial review, the court was not confined to considering the source of that body's (or person's) powers and duties but could also look to their nature. Accordingly, if the duty imposed on a body (or person), whether expressly or by implication, was a public duty and the body was exercising public law functions the court had jurisdiction to entertain an application for judicial review of that body's decisions."*

[37] In the present appeal the Appellant, the Commission, has been established by legislation. It has a number of expressly stated functions to perform under that legislation. One of those functions is to record the names of the members of

land-owning or proprietary units. A further function is expressly stated that upon a finding of an error the Chairman of that statutory body may direct the Registrar of Titles to correct the error. To be correctly recorded in the Register (in this case in the VKB) is to become a member of proprietary unit and hence to acquire a beneficial interest in the native land held by the proprietary unit. Although there is indeed a private law element in respect of a claim to a beneficial interest in property under the Act, whether or not that right is acquired is dependent upon (1) the Commission performing its function under s 9 and (2) correcting any error under s 10(2). In my judgment both are public law functions being performed by a statutory body created by legislation. Since the decision of the House of Lords in *O'Reilly v Mackman* [1983] 2 AC 237 there is no longer any requirement to establish that the statutory body was under a requirement to act judicially in order to invoke the public law procedure of judicial review and to seek the remedies available under the procedure.

[38] When a decision is taken or made by a person designated by a statutory provision to perform a statutory function the High Court has a supervisory jurisdiction to ensure that the decision maker has not exceeded or abused his powers and that he has performed his duties. This supervisory jurisdiction over public bodies is by way of judicial review. An application for judicial review is made pursuant to the procedure set out in O 53 of the High Court Rules. On the other hand where the High Court is required to make an initial decision affecting the private rights of individuals by way of declaration or order not involving a public law element (i.e. a public body performing a public law function) the proceedings are commenced by either writ or originating summons. The decision in *O'Reilly v Mackman* (supra) is authority for the proposition that it is an abuse of the process of the Court to seek a declaration from the Court in its original jurisdiction in a public law case where the claim should proceed by way of judicial review under O 53.

[39] Order 53 r 1 provides that an application for an order of mandamus, prohibition or certiorari shall be made by way of an application for judicial review in accordance with the provisions of this Order. The Court also has jurisdiction to grant a declaration or an injunction in appropriate cases.

[40] In the present case the Respondent deposed in his affidavit that numerous requests had been made for the alleged error or errors to be corrected. It is stated in the affidavit that the Appellant claimed that there was no jurisdiction to correct such an error. It would appear that the Respondent might have been in a position to pursue an application under O 53. However the affidavit also stated that the last request was made in 2004. As a result any application for judicial review would at some stage have been met with the objection of substantial delay. However there does not appear to be any impediment to the Respondent making a further formal application to the Chairman. The procedure under O 53 may then be utilised in the event that the Appellant has refused to exercises his statutory function. Furthermore, any decision made by the Chairman may be amenable to challenge under O 53.

[41] The consequences for utilising the incorrect procedure for obtaining a public law remedy was clearly stated by Lord Diplock in *O'Reilly v Mackman* [1982] 3 All ER 1124 at 1133:

> *"So O 53 _ _ _ has provided a procedure by which every type of remedy for infringement of the rights of individuals that are entitled to protection in public law can be obtained in one and the same proceeding by way of an application for judicial*

review, and whatever remedy is found to be the most appropriate in the light of what has emerged on the hearing of the application can be granted to him. If what should emerge is that his complaint is not of an infringement of any of his rights that are entitled to protection in public law, but may be an infringement of his rights in private law and thus not a proper subject for judicial review, the court has power under r 9 (5), instead of refusing the application, to order the proceedings to continue as if they had begun by writ. There is no such converse powers under the Rules _ _ _ to permit an action begun by writ (or originating summons) to continue as if it was an application for judicial review."

[42] Order 53 r 9(5) of the Rules of the High Court makes similar provision in the following terms:

"Where the relief sought is a declaration, an injunction or damages and the Court considers that it should not be granted on an application for judicial review but might have been granted if it had been sought in an action begun by writ by the applicant at the time of making his application, the Court may, instead of refusing the application, order the proceedings to continue as if they had begun by writ _ _ _."

[43] Even though this appeal is by way of a re-hearing on the papers and even if so minded to consider the Respondent's claims at least in respect of the declaratory relief sought by the Respondent, this Court has no jurisdiction to consider the Respondent's application commenced by Originating Summons as if it had been commenced as an application for judicial review under O 53.

[44] In summary then I have concluded that the learned Judge has proceeded to consider and decide questions upon which there was no jurisdiction to do so and in doing so has intruded into the Appellant's jurisdiction. I have also concluded that the Respondent's claim raised issues that touched upon the role of a public body performing a public function. As such the issues fell under the heading of public law issues rather than private law rights. The correct procedure for seeking redress of public law grievances is to apply for judicial review under O 53 of the Rule. The Respondent has proceeded by way of Originating Summons. This constitutes an abuse of the process of the Court.

[45] I also note that the last correspondence concerning the error was in 2004. The Respondent's Originating Summons was filed in the Court on 25 August 2006. Even if the Respondent had commenced the proceedings under O 53, he faced considerable difficulty at the leave stage as a result of the provisions concerning delay in O 53 r 4.

[46] I would add a further word of caution to the Respondent in relation to the nature of judicial review proceedings. In doing so I consider it appropriate to refer to the observations of Lord Brightmen in *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 at 1173:

"Judicial review is concerned not with the decision, but with the decision – making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be guilty of usurping power."

[47] During the course of his submissions Counsel for the Respondent referred the Court to s 3 of the Act and in particular the following:

"_ _ _ 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 dispute 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."

[48] Counsel submitted that this provision enabled the High Court to exercise jurisdiction and to determine the Respondent's application since it involved a dispute in which the question of the tenure of native land was relevant. It was submitted that not only did the Court have jurisdiction, but also that its jurisdiction was original. As a result the relief could be claimed by proceedings commenced by originating summons or by writ.

[49] The submission does raise an issue concerning the purpose of s 3 of the Act. As an initial observation I would say that if that submission was accepted, then the roles and functions of the Appellant would become redundant. The Act has been drafted so as to carefully and clearly set out a number of functions and roles that are the sole responsibility of the Appellant. They are functions and roles that fall within the ambit of the public law.

[50] As a result it is necessary to arrive at an interpretation of s 3 that is consistent with the intention of the legislative and consistent with the Act. Section 3 requires a court of law to decide any dispute arising for legal decision, in which dispute the tenure of native land is relevant, according to native custom and usage.

[51] However it is necessary to refer to s 6 (5) of the Act which states:

> *"If there is a dispute as to the ownership of any lands marked out and defined as aforesaid the Commission shall inquire into it and, after hearing evidence and the parties to the dispute, decide the question of ownership and record its decision."*

[52] Section 16 and 17 of the Act also contain provisions dealing with the settlement of disputes by the Commission. From these provisions it is apparent that all disputes amongst the iTaukei (Fijian) relating to ownership, boundaries, membership of land owning units or any other matter concerning native land, are the responsibility of the Appellant in the first instance for adjudicating and settling. Therefore the reference in s 3 to "*a dispute arising for legal decision*" in which the question of *"the tenure of native land is relevant*" must be a reference to a dispute over which the Commission does not have responsibility for settling under the Act.

[53] On this point the decision of Cullinan J in *Ratu No.2 & v Native Land Development Corporation* [1991] 37 FLR 146 gives an indication as to how s 3 should operate.

[54] In that action the Plaintiffs commenced proceedings by writ challenging their eviction from native land following the grant by the Native Land Trust Board of a development lease over the land. The writ claimed that the Plaintiffs in their capacity as native Fijians, had beneficially occupied and cultivated each one acre approximately of the land at Navesi since the 1960's and 1970's respectively by virtue of native custom usage and tradition.

[55] The following summary of the background to the action is taken from the judgment at pages 146 and 147. The yavusa Naulivatu, Nayavumata and Vatuwaqa were the owners in common of over 388 acres of native land at Navesi, Suva. One lot in particular consisted of 274 acres with its western and eastern boundaries adjacent to Waikalou Creek and Tamavua River respectively and bounded on the south by Suva Harbour. On 1 August 1908 over 30 acres of this lot was leased to a Margaret Hilda Wull for a period of 50 years. On 20 October 1938 over 28 acres of that lease was assigned to Alfred Henry Marlow which lease was subsequently referred to in the judgment as the *"Marlow lease*". The Marlow lease therefore expired on 31 July 1958. On 7 April 1959 Mr Marlow

was informed by the second defendant (the Board) that he could remain on part of the land (over 10 acres), as a tenant-at-will, with effect from 1 August 1958.

[56] Similar arrangements were made by the Board in relation to the Marlow lease with fifteen others as tenants-at-will. On 22 February 1978 the Board gave Mr Marlow six months notice to quit and it would appear his tenancy-at-will was terminated on 31 August 1978.

[57] Then on 19 October 1979 the Board issued to the First Defendant (NLDC) an approval notice stipulating a lease for 10 years from 1 October 1979 at the half yearly rent of $100 per acre in respect of 36 acres which included the area of the Marlow lease. The First Defendant proceeded to develop the area when a number of people were discovered to be in occupation of the land, including the Plaintiffs. The First Defendant considered them to be in unlawful occupation and threatened legal eviction against them.

[58] As Cullinan J noted at page 154:

> *"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."*

[59] The learned judge in his judgment considered in detail the legislative history of what is now s 3 of the Act. Cullinan J then concludes at page 161 that:

> *"_ _ _ in any event quite clearly the provisions of s 3 must be construed with reference to the provisions of the Native Land Trust Act."*

[60] Although Cullinan J went on to discuss a number of significant issues relating to the operation of the Native Land Trust Act alongside the Native Lands Act, his comments on the role and purpose of s 3 of the Act at page 185 are relevant to the present appeal:

> *"But the Fijian does not depend upon the provisions of s 3 of the Native Lands Act for his right to access to the courts in respect of the land which he occupies. He has the same right as anyone else: s 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 the Court in respect of an infringement of a customary right _ _ _. It must 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 then 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."*

[61] In my judgment the above represents a correct statement of the effect of s 3 of the Act. The section applies when there is a private law dispute between parties, at least one of whom represents a proprietary unit, that relates to an infringement of a customary right. Under those circumstances the Court is required to decide the dispute according to native custom and tradition which in turn shall be determined by evidence from witnesses capable of "*throwing light thereon*." In such proceedings the Court is exercising its original jurisdiction as the initial decision-maker.

[62] The present appeal, on the other hand, relates to proceedings which more properly fall within the supervisory jurisdiction of the Court since, under the Act, the initial decision maker is the Chairman of the Commission. As such the

present appeal relates to a public law grievance and the only avenue of redness is by way of the procedure for which provision is made in O 53 of the High Court Rules.

[63] What I have said above and the conclusions that I have reached are sufficient for me to indicate that the appeal should be allowed. It is not necessary to consider the remaining grounds of appeal as they relate to the merits of the learned Judge's decision to grant relief when there was no jurisdiction vested in the Court to determine the applications.

[64] I would allow the appeal and costs to the Appellant.

[65] **Chitrasiri JA.** I agree with the reasons and proposed orders of Calanchini AP.

[66] **Mutunayagam JA.** I also agree with the judgment and proposed orders of Calanchini AP.

[67] **Orders of the Court**

1. Appeal allowed.
2. The orders of the Court below are set aside.
3. The Respondent's Originating Summons is dismissed as an abuse of the process of the Court.
4. The Respondent is to pay the costs of the proceedings in the Court below fixed at $650.00 and the costs of this appeal which are fixed at $2,500.00.

Appeal dismissed.