RATU EPELI KANAKANA v A-G FOR FIJI (THE SUVAVOU CASE): BLENDING EQUITABLE RELIEF WITH JUDICIAL REVIEW

KENNETH CHAMBERS*

BACKGROUND

Suvavou means "new Suva". The Suvavou people are native Fijians who now mainly live in or around Suvavou Village near Lami outside Suva. European settlement in the Suva area dates from the 1860s. On 10 October 1874 sovereignty of the Fiji Islands was ceded to the British. At that time the predecessors of Ratu Epeli Kanakana lived in a village in what is now Thurston Gardens, adjacent to the Suva City central business district. Ratu Epeli is currently *Roko Tui Suva, Turaga ni Yavusas* and *Turaga ni Mataqalis.*

Suva has been the capital of Fiji Islands since 1882. It is built on Suvavou land,[1] but with the exception of the sum of £200 per annum in perpetuity for 300 acres on which Government House is now located, no compensation was paid when the land was acquired by the colonial government. The unimproved capital value (land value) of Suva City in 2005 was estimated to be about $ 693,435,386.[2] The Suvavou people now live on a relatively small area of borrowed land on the edge of a polluted lagoon next to what was until recently the city dump.

On 26 February 1999 a writ of summons and a statement of claim was filed by Ratu Epeli and 10 others in the Fiji High Court seeking compensation for the loss of 6,684.3 acres of Suva Peninsula land.[3] The claim area is the whole of the Suva Peninsula.[4] Preliminary skirmishing was therefore not altogether unexpected and the Attorney General took issue on the cause of action, jurisdiction and the limitation question. On 24 February 2000 an interlocutory application by the defendant to strike out for no reasonable cause of action[5] was comprehensively declined by Byrne J and a further last ditch attempt by the defendant on "preliminary legal issues" was rejected by Pathik J on 20 October 2006. Both interlocutory decisions are well reasoned and robust, setting the stage for an important judgment. Hearing of the substantive action commenced in the High Court on 30 October 2006 and concluded in March 2007. Judgment is reserved.

---

* LLB(Hons), DUV(Hons), PDLP, MIBA, Lecturer in Planning and Environmental Law, Suva.

[1] *Kanakana v AG for Fiji* (Unreported, High Court of Fiji, Civil Action No. 116 of 1999, 20 October 2006, Pathik J) referred to below as 'Pathik J', 3, the 'claim area'.

[2] Suva City Council Financial Records.

[3] *Kanakana v AG for Fiji* (Civil Action No. 116 of 1999).

[4] *Kanakana v AG for Fiji* (Unreported, High Court of Fiji, Civil Action No. 116 of 1999, 24 February 200, Byrne J) referred to below as 'Byrne J', 6.

[5] *Fiji High Court Rules 1988,* Order 18 Rule 18.

THE ISSUES

There is a large body of evidence from British colonial history suggesting that the repercussions of the judgment in this proceeding could be significant. *Kanakana* is the tip of an iceberg and it has potential to open the floodgates. In Fiji alone there are said to be anywhere up to 500 examples of native Fijians deprived of land under fraudulent or dubious circumstances.[6] In many of those examples, the colonial government is said to have been implicated actually or constructively. Enlarging that focus out to the Pacific region, similar fact situations easily number in the thousands.

Given that context, the proceeding is interesting from a number of perspectives:

- Matters at issue date from approximately 140 years ago, prior to the *Deed of Cession of Fiji to Great Britain* on 10 October 1874, when on 13 July 1868[7] Ratu Seru Cakobau purported to sell Suva Peninsula to the Polynesia Company.[8]

- The plaintiff alleges that Colonial Ordinance No. 25 of 1879 purporting to statute bar the claim was obtained by fraud or mistake contrary to Clause 1 of the Deed of Cession.

- '[T]he issue of compensation for the extinguishment of native title in breach of fiduciary duty or the return of lands wrongfully in the hands of the State in right of the Crown has not been considered as yet in a Court of law in Fiji.'[9]

- At the interlocutory stage, authorities from the United States of America, New Zealand, Australia, Canada, the United Kingdom and Africa were cited.[10]

- Although the plaintiff expressly submitted that the claim 'does not affect freeholds in the hands of private holders'[11] counsel for the defendants insisted that 'the State is concerned the remedies sought may impact on the security of title all over Fiji.'[12]

- Not only does the claim relate to the Suva Peninsula, it also catches parts of the Suva Harbour lagoon foreshore and seabed.

[6] Fiji Government, *Report on Native land in Fiji* (2007).
[7] Byrne J, 10.
[8] R A Derrick, *A History of Fiji* (1950) 177 – 183; Byrne J, 6 and 10.
[9] Pathik J, 5.
[10] Byrne J, 2: the plaintiff cited a total of 51 authorities.
[11] Pathik J, 13.
[12] Pathik J, 14.

- Quantum is enormous. Land-value evidence at trial ranged from FJD571 million to FJD1.4 billion and total evidence of quantum at trial is reputed to be over FJD2 billion.[13] By way of comparison, the 2006 provisional Fiji Bureau of Statistics figures for gross domestic product and current revenue are FJD4.6477 billion and FJD1.39 billion respectively.[14]

- Finally, Justice Pathik will go down in legal history with the first instance judgment in this proceeding, either as a Prendergast or as a Brennan, because there appears to be no middle ground.

THE LAW

Many of the land dealings in Suva Peninsula took place before the Deed of Cession in 1874 under the auspices of the Cakobau government,[15] but it is alleged that exclusive occupation of the Suva Peninsula by the Suvavou people at Cession was an established fact.[16] The plaintiffs rely on the four-part test for native title set out in *Delgamuukw v British Columbia*[17] so the main threshold allegations are that native title is *sui generis* arising from occupation before assertion of British sovereignty and that at common law native title is inalienable except upon surrender to the Crown.[18] It is therefore open to the plaintiffs to allege that the Cakobau "sale" in 1868 could not extinguish native title either of itself or accompanied by a purported occupation.[19] It is then alleged that Fijian native tenure and the Deed of Cession are incorporated in municipal law by Ordinance XXI of 188[0][20] and that in any event, native title at common law could only be extinguished by valid exercise of legislative power referable to the Deed of Cession.[21]

Much has been written on the effect of treaties in municipal law.[22] It is however generally accepted that insofar as a treaty is declaratory or is incorporated into

---

[13] See, for example, 'Landowners trial adjourned' *Fiji Times Online* (Suva, Fiji) 1 February 2007; 'Suva Peninsula worth $571m' *Fiji Times Online* (Suva, Fiji) 8 March 2007. Both from http://www.fijitimes.com/section.aspx?s=news.

[14] Fiji Government Bureau of Statistics website http://www.statsfiji.gov.fj/ (Accessed 10 September 2008).

[15] Byrne J, 7.

[16] Byrne J, 8.

[17] (1998) 153 DLR (4th) 193, 208 (per Lamer CJC, approving McEachern CJ at first instance).

[18] See Byrne J, 10, referring to *Delgamuukw* and *Mabo* decisions.

[19] See *Tampoi v Matusin*, (UKPC 1984) http://www.ipsofactoj.com/archive/1984/Part4/arc1984(4)-009.htm (Accessed 29 August 2008) for a discussion of adverse possession with joint ownership.

[20] Byrne J, 13. Note that the judgment refers to the date of the Ordinance of 1881.

[21] Byrne J, 13.

[22] See T Bennion , 'Treaty-making in the Pacific in the Nineteenth Century and the Treaty of Waitangi' (2004) 35 *Victoria University of Wellington Law Review* 6; Hon. Sian Elias, 'The Treaty of Waitangi and Separation of Powers in New Zealand' in B.D. Gray and R.B. McClintock (eds), *Courts Policy: Checking the Balance* (1995).

domestic law, it is effective. At the end of the day it all comes down to 'the honour of the Crown',[23] and the principle that no sharp dealing should be sanctioned by the Courts in this regard.[24]

Sharp dealing by the colonial government or its institutions and the remedy available for that (if any) is the central issue in this proceeding. The plaintiffs allege equitable fraud by the State and its predecessor the Crown in acquiring or dealing with Suva Peninsula; and by the Native Lands Commission in failing to make proper inquiry to ascertain what land was the rightful and hereditary property of the plaintiffs. 'It appears to be common ground that no enquiry has ever been carried out to ascertain or demarcate the traditional boundaries of land owned by the various Mataqalis'.[25]

A familiar refrain from throughout the Pacific region is that corruption, misfeasance and nonfeasance are extensively evident in the conduct of authorities set up by colonial governments for the administration of native title. So when it comes to the defendant's submission that: 'there was nothing to stop the plaintiffs from first bringing their claim to the [Native Lands] Commission,'[26] it is not surprising to see that: '...the plaintiffs have claimed the lands from the government via the Fijian Affairs Board, the Commission, the Director of Lands, the Minister of Lands, the Attorney General and the President and yet the Commission has done nothing to verify this claim.'[27] Jitoko J recently referred to the Native Lands Commission inquiry in a High Court decision requiring the Commission to rectify its records from 1938 relating to an "extinct" mataqali, quoting: 'The conspiracies and perjury that stand revealed from time to time are simply appalling'.[28] The plaintiffs say that all this is in breach of an equitable obligation or fiduciary duty owed by the state to protect Suvavou native title to Suva peninsula and harbour and that the state is clothed with fiduciary obligations in the nature of a constructive trust.

The plaintiffs and their predecessors have been out of possession of Suva Peninsula for about 130 years and there has never been a case like this in the legal history of Fiji. The plaintiffs say that their native title was never extinguished and that their dispossession was a consequence of fraud, mistake and discriminatory acts that were concealed in documents not fully discovered by the plaintiffs until February 1999 so limitation cannot run until the full materials for the claim were discovered.[29] They claim that the state is obliged by statute to correct historical errors,[30] to ascertain and demarcate the plaintiff's land,[31] and to acknowledge the

[23] *Sparrow v R* [1990]4 WWR 410, 436.
[24] *R v Taylor and Williams* (1981) 34 OR (2d) 360, 367 (MacKinnon CJ).
[25] Byrne J, 6.
[26] Byrne J, 15.
[27] Byrne J, 16.
[28] The quotation is of G.V. Maxwell (NLC Chairman), Report to the Colonial Secretary dated 6 June 1913, in Legislative Council Paper No 27 of 1914.
[29] Pathik J, 2.
[30] Byrne J, 13.

plaintiffs ownership of Suva Peninsula.[32] They say that failure to do these things is a breach of fiduciary duty owed by the Crown and the state to the plaintiffs, arising from the inalienability of native title.[33] Byrne J says: 'I am not satisfied that the Plaintiffs' argument is doomed to fail.' [34]

ANALOGIES AND AUTHORITIES

Equitable jurisdiction has always been perceived as the long arm of the law, doing justice in hard cases. Equitable jurisdiction is available '[w]here the principles of law by which the ordinary Courts are guided give no right, but, upon the principles of universal justice, the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent.' [35] F.W. Maitland in 1904 supported importation of the trust concept into public law,[36] and 'public trusts' have, since the House of Lords decision in *AG v Dublin Corp.* been available to ensure the proper application of 'public money'.[37] *Roberts v Hopwood,* in the House of Lords,[38] is an authority for the proposition that officers of a local authority are 'somewhat in the position of trustees or managers of the property of others' obliged to 'have due and alert regard' to the 'general legal doctrine that persons that hold public office have a legal responsibility to those whom they represent' and are 'subject to a duty towards the public whose money and local business they administer.'[39] *Prescott v Birmingham Corp* dealt with a council's decision to provide free bus travel for pensioners at the expense of the general body of ratepayers.[40] The Court of Appeal said: 'Local authorities are not, of course, trustees for their ratepayers, but they do…owe an analogous fiduciary duty…'[41] Finally, *Bromley LBC v GLC* is a relatively recent application of public trust principles, where the GLC proceeded to pass on to Bromley a proportion of the costs of reducing London's public transport fares by 25% without any council decision-making process on the merits.[42] Finn comments on 'the close resemblance which the fiduciary officer bears to the public official' and says that equitable relief and fiduciary duty 'reflects in a very large measure that applicable to judicial review of administrative action.'[43]

---

[31] Byrne J, 16.
[32] Section 1, Ordinance XXI of 1880: Relating to Native Lands.
[33] Byrne J, 14.
[34] Byrne J, 15
[35] *Stevens v Chown* [1901] 1 Ch 894, 904-905 per Falwell J*; Austria (Emperor) v Day* (1861) 3 DeGF&J 217, 253, per Turner LJ.
[36] *The Collected Papers Vol 3* (1911) 402.
[37] 1 Bligh NS 312 (1827).
[38] [1925] AC 578.
[39] Ibid 595-596.
[40] 1 Ch 210, 227 (CA).
[41] Ibid 227-229.
[42] [1983] AC 768 (CA and HL).
[43] P.D. Finn, *Fiduciary Obligations* (1997) [214-223].

A Malaysian Court of Appeal decision, *Selangor v Sagong Tasi*,[44] is notable for the finding that: 'There is nothing startling in the trial judge holding the defendants to be fiduciaries in public law'. [45] The reasons for imposing fiduciary duty in *Sagong Tasi* were:

> In a system of parliamentary democracy modeled along Westminster lines, it is Parliament which is made up of the representatives of the people that entrusts power to a public body. It does this through the process of legislation. The donee of the power – the public body – may be a Minister of the Crown or any other public authority. The power is accordingly held in trust for the people who are, through Parliament, the ultimate donors of the power. It follows that every public authority is in fact a fiduciary of the power it wields…. It is never meant to be misused or abused. And when that happens, the courts will intervene in the discharge of their constitutional duty.[46]

The court continued, citing G.P.S. De Silva CJ (Sri Lanka Supreme Court):

> 'Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms.' [47]

It held also, citing Raja Azian Shah CJ (Malaya):

> 'The courts are the only defense of the liberty of the subject… In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these powers and influence are exercised in accordance with law.' [48]

---

[44] *Kerajaan Negeri Selangor & 3 Ors v Sagong Bin Tasi & 6 Or* (Unreported, Court of Appeal Malaysia, Rayuan Sivil No. B-02 419-2002 19 September 2005, Gopal Sri Ram, JCA, Arifin bin Zakaria, JCA, Nik Hashim bin Nik Ab. Rahman, JCA) http://www.malaysianbar.org.my/content/view/1835/27/ (Accessed 10 September 2008) (referred to below as *Sagong Tasi*).
[45] *Sagong Tasi* [48].
[46] *Sagong Tasi* [48].
[47] *Sagong Tasi* [49]; *Premachandra v Major Montague ayawickrema* [1994] 2 Sri LR 90, 105.
[48] *Sagong Tasi* [51]; *Pengarah Tanah danGalian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhn* [1979] 1 MLJ 135.

It held finally, citing Salleh Abas LP (Malaya), '… *public interest, reason and sense of justice* demand that any statutory power must be exercised reasonably and with due consideration.' [49] (emphasis added)

Gopal Sri Ram JCA concludes the Sagong Tasi judgment with the observation:

> In my view, all these important pronouncements are merely different ways of saying the same thing. They all support the proposition that power conferred by Parliament is held in trust. Hence those who are the repository of that power are fiduciaries. Whether they have breached their fiduciary duty in a given case is a question that must perforce be resolved in accordance with the peculiar facts of the particular case. [50]

Without actually saying it, these pronouncements come about as close as it is possible to get to expressing the basis of judicial review as a creation of the common law independent of the *ulta vires* principle and of express constitutional or statutory provisions. By implication from *Sagong Tasi,* the same may be said of the source of trust or fiduciary obligations on the state in native title cases.[51]

Toohey J declared in *Mabo (No.2), obiter*, that 'Parliament, it is held, could not have intended that the governmental agencies it has created and vested with enormous power over citizens should act unreasonably or unfairly'.[52] This supports the following propositions:

- there is a general presumption that the British Crown will respect the rights of indigenous peoples occupying colonised territory;

- that this itself indicates that a government will take care when making decisions which are potentially detrimental to aboriginal rights;

- and particularly, that 'A fiduciary obligation on the Crown does not limit the legislative power of [Parliament] but legislation will be a breach of that obligation if its effect is adverse to the interests of the titleholders…'[53]

It is possible to argue that the source of trust or fiduciary duties on the state to protect native interests is independent of treaty, constitution, and statute. Native title to land is now accepted as a *sui generis* proprietary interest in land,[54] and in order to avoid the distortions that appear to be concerning the High Court of

[49] *Sagong Tasi* [52]; *Savrimuthu v Public Prosecutor* [1987] 2 MLJ 173.
[50] *Sagong Tasi* [53].
[51] Cf: Hon. E.W. Thomas, 'Centennial Lecture: The Relationship of Parliament and the Courts: A tentative thought or two for the new millennium' (2000) 31 *Victoria University of Wellington Law Review* 5; Hon. Sian Elias, above n 22, 6.
[52] *Mabo v Queensland (No.2)* [1992] HCA 23, http://www.austlii.edu.au [80].
[53] Ibid [91].
[54] Above n.18; *Mabo (No 2),* above n 52, per Deane, Gaudron JJ [89] and Brennan J [62]; *Ward v Western Australia* [1998] FCA 1478 per Lee J.

Australia, [55] it might be time to postulate a *sui generis* public law duty to act fairly and reasonably, analogous to that of a fiduciary, perhaps consequent to colonisation.[56] The beauty of the equitable jurisdiction is that courts do not usually allow limitation provisions,[57] or the doctrine of *laches*,[58] to stand in the way of a claim for breach; and fiduciary duty can be tailored to fit.[59]

CONCLUSION

Native title jurisprudence is slowly emerging from our colonial history. In Australia, the Privy Council analysis in *Cooper v Stuart*,[60] and Blackburn J's statement in *Milirrpum v Nabalco Pty Ltd* that the 'doctrine of communal native title…does not form, and has never formed, part of the law of any part of Australia'[61] have now been held to be wrong by the High Court of Australia.[62] In New Zealand the Court of Appeal accomplished something similar in *Ngati Apa v AG:* [63] denials of the validity of native title by Prendergast CJ in *Wi Parata v Bishop of Wellington*,[64] and by the Court of Appeal in *Re the Ninety-Mile Beach*,[65] were 'wrong in law and should not be followed'.[66]

Official Spanish colonial policy in the 1500s was strongly influenced by Spanish natural-law theorists. Francisco de Vitoria in *De Indis Noviter Inventis* says that 'communities of men, regardless of race or creed, owe each other the same natural duties',[67] and Hugo Grotius in *Mare Librum* says: 'plunder is not excused by the fact that the plunderer is a Christian.'[68]

Brennan J in *Mabo (No. 2)* says:

> it is appropriate to identify the events which resulted in the dispossession of the indigenous inhabitants of Australia, in order to dispel the misconception that it is the common law rather than the action of

[55] *Breen v Williams* (1994) 35 NSWLR 552 at 570 per Meagher JA; see text above.
[56] Cameron Syme, 'Colonisation: The Source of a Presently Enforcable Fiduciary Duty' [2000] *Australian Indigenous Law Reporter* 28 http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/AILR/2000/28.html?query=Cameron%20and%20Syme%20and%20Colonisation (Accessed 10 September 2008).
[57] See T. Buti, 'Removal of Indigenous Children from Their Families: The Litigation Path' (1998) 27 *Western Australia Law Review* 203.
[58] Pathik J .
[59] *Mabo (No 2)*, above n 52 per Toohey J [89].
[60] (1889) 14 App Cas 286.
[61] (1971) 17 FLR 141 (NT SC).
[62] *Mabo (No 2)* above n 52.
[63] [2003] NZCA 117, per Elias CJ at par 13.
[64] (1877) 3 NZ Jur (NS) 72.
[65] [1963] NZLR 461.
[66] See n 63.
[67] Quoted in Scott, *The Spanish Origin of International Law* (1934) Appendix A.
[68] Quoted in Lindley, *The Acquisition and Government of Backward Territories in International Law* (1926).

> governments which have made many of the indigenous people of this country, trespassers on their own land.[69]

Reiterating Finn's observations, of 'the close resemblance which the fiduciary officer bears to the public official' and that equitable review of fiduciary duty 'reflects in a very large measure that applicable to judicial review of administrative action',[70] Brennan J says that the issues in native title cases are often ultimately judicial review of historical legislative or administrative action from over 100 years ago.

Courts have had some difficulty with the concept of fiduciary duty in native title cases. Wilcox J concurring with Merkel J in *Nulyarimma v Thompson* said in 1999: 'I offer no view as to whether such a [fiduciary] claim may be effectively made. I only say that it would be a very different claim from that now before the court.'[71] Both *Bromley LBC v GLC*[72] and *Sagong Tasi v Selangor*[73] are fusions of equitable principles with judicial review.

Kanakana v AG appears to be the most recent illustration of that hybrid, but the parties do not appear to have expressly addressed the court on those issues, apparently relying entirely on private law analysis when the matters at issue are substantially public law in nature. At common law, native title can only be extinguished by consent or by valid exercise of legislative or administrative power. So if the plaintiffs need to reach back 100 years into colonial history to remedy a native title grievance, they cannot simply rely on breach of statutory duty.[74] They need to persuade the court that the state owes a fiduciary duty towards its original inhabitants,[75] as fiduciaries in public law,[76] as Greater London Council did to Bromley LBC and as the State of Selangor did to Sagong Tasi.

---

[69] *Mabo (No 2)*, above n 52 [82]; see also David V Williams, *Te Kooti Tango Whenua: The Native Land Court 1864 -1909* (1999).
[70] P D Finn, *Fiduciary Obligations* (1997) [214-223].
[71] [1999] FCA 1192 [34].
[72] [1983] AC 768 (CA and HL).
[73] Cited in n.43 above.
[74] Byrne J, 13-14.
[75] Byrne J, 15.
[76] *Sagong Tasi* [48].