

IN THE COURT OF APPEAL, FIJI
[CIVIL APPELLATE JURISDICTION]

CIVIL APPEAL NO. ABU 011 of 2015
(High Court Civil Action No. 354 of 2005)

BETWEEN : DIRECTOR OF LANDS *First Appellant*
: SANAILA CAVUDUADUA *Second Appellant*
: THE REGISTRAR OF TITLES *Third Appellant*
: ATTORNEY-GENERAL OF FIJI *Fourth Appellant*
: I-TAUKEI LAND TRUST BOARD *Fifth Appellant*

AND : EPARAMA ROKOMOUTU *Respondent*

Coram : Basnayake, JA
Jameel, JA
Amaratunga, JA

Counsel : Ms T. Baravilala with Ms. O. Solimailagi for 1st, 3rd
and 4th Appellants
: Ms A. Veretawatini for 2nd Appellant
: Ms. L. Komaitai for 5th Appellant
: Mr. N. Nawaikula for Respondent

Date of Hearing : 02 February 2017

Date of Judgment : 23 February 2017

JUDGMENT

Basnavake, JA

[1] I agree with the reasoning and conclusion of Jameel, JA.

Jameel, JA

A. Introduction

[2] This is an appeal from a final judgment delivered by the learned Judge of the High Court, sitting at Suva, dated 04th February 2015.

[3] The Learned Judge of the High Court held that the 1st Defendant/1st Appellant (hereinafter referred to as the '1st Appellant') had acted unlawfully and beyond its powers in granting Crown Lease dated 9 April 2002, bearing No.14729, to the 2nd Defendant/2nd Appellant (hereinafter referred to as the 2nd Appellant), despite the passage of Act Nos. 12 and 13 on 1 May 2002, amending the Native Land Trust Act, with retrospective effect from 30 November 2000.

B. Factual Background and Chronological Sequence

[4] The 2nd Appellant's father was the original lessee, of the impugned lease granted on 17 September 1975, for a period of twenty-five years. The 2nd Appellant continued in occupation, and prior to the expiry of the lease, applied for a renewal on 20 February 1998. In November 1998, the Divisional Surveyor General Eastern wrote to the 2nd Appellant informing him that the extension of his lease had been approved, subject to certain conditions. This was accepted by the 2nd Appellant.

[5] In January 2002, final approval was granted for the renewal of the lease to the 2nd Appellant. On 6 March 2002, the 1st Appellant informed the 2nd Appellant that his lease was ready for execution. The arrears of lease rental were paid on 8 April 2002, the lease was executed on 9 April 2002, and was registered on 15 April 2002.

- [6] In the meanwhile, in 1999 the 4th Defendant/Appellant (hereinafter referred to as the 4th Defendant) tabled Bill No. 15 and Bill No. 16 in Parliament, by which, it was proposed to transfer the control of all Schedule A and B lands from the Director of Lands, (the 1st Appellant) to the Native Lands Trust Board, the 5th Defendant / Appellant (hereinafter referred to as the 'The Board'), in this appeal.
- [7] In this background, on 23rd August 1999, in anticipation of the passage of the said Bills, the Board wrote to the 1st Appellant requesting the 1st Appellant to refrain from issuing any new leases in respect of Schedule A and B lands.
- [8] On 12 July 2000 the Interim Civilian Government passed two Decrees No. 14 and 15, which were published in the Gazette, and were to come into force on a date appointed by the Minister for Fijian Affairs. Decree No.14 was titled "Native Land Trust (Amendment) Decree 2000", and Decree No.15 was titled "Native Lands (Amendment) Decree 2000".
- [9] On 1st March 2001, the Court of Appeal in the case of **Republic of Fiji and the Attorney General v Chandrika Prasad** (Civil Appeal No. ABU 0078 of 2000S) (1 March 2001), held that the Interim Civilian Government following the coup in May 2000 was illegal, that the 1997 Constitution was the supreme law of the Republic of Fiji Islands, that the Constitution had not been abrogated; and that Parliament had not been dissolved, but had been prorogued for six months.
- [10] On 1st May 2002, Parliament enacted Act No.12 of 2002 which amended the Native Lands Trust Act, and Act No.13 of 2002 which amended the Native Lands Act. Although these two Acts were passed on 1st May 2002, and gazetted on 10 May 2002, they were made retrospectively operative, and deemed to have come into force on 30th November 2000.

C. *The Proceedings in the High Court*

[11] The Plaintiff/Respondent (hereinafter referred to as 'the Respondent'), challenged the grant of the lease by the 1st Appellant to the 2nd Appellant on the basis that he had no power to issue the lease, whilst the two Decrees of May 2000 were in operation, and the powers of control and administration of Lands set out in Schedule A and B of the State Lands Act had been transferred to the 5th Appellant Board. This appeal is from the Judgment of the High Court holding that the 1st Appellant had no power to issue the lease at the time he did.

[12] The Plaintiff filed Originating Summons and Affidavit dated 15th July, 2005 and sought the following reliefs:-

- (i) Declarations that the Director of Lands had acted *ultra vires* in granting the lease to the 2nd Defendant, and that the lease was null and void,
- (ii) an Order of *Mandamus* directing the Registrar of Titles to cancel the said lease.

The Court refused the application for Mandamus for non-compliance with Order 53 of the High Court Rules. The Court proceeded to consider only the application for Declarations.

D. *Judgment of the High Court*

[13] The judgment of the High Court can be summarised in as follows:-

- i. The principles of law enunciated by the Court of Appeal in the case of **Republic of Fiji and the Attorney General v Chandrika Prasad** (supra), did not empower the 1st Appellant to grant leases because, the Decrees Nos.

14 and 15 '*were in force until the Act was passed in May 2002*'(emphasis added).

- ii. The reason for giving Act Nos. 12 and 13 retrospective validity was to give effect to Decrees Nos. 12 and 13, passed by the Interim Government on 12 July 2000.
- iii. Sections 1(3) and (4) of the Native Lands Trust (Amendment) Act No.12 cannot be used to give validity to the lease granted to the 2nd Appellant, and the said amendment saves only matters covered in sections 6 to 9 of the Act.

E. **The Grounds of Appeal**

[14] The grounds of appeal as pleaded are as follows:-

1. The Learned Judge erred in law and in fact in finding that the 1st Appellant had acted unlawfully and beyond its powers in granting Crown Lease No. 14729 to the 2nd Appellant.
2. The Learned Judge erred in law and in fact in finding that the principle adopted in *The Republic of Fiji and Attorney General of Fiji v Chandrika Prasad*, (Civil Appeal No. ABU 0075/200S) did not give authority to the 1st Appellant to grant leases since Decree No.14 and 15 were in force until the Act was passed in May 2002.
3. The Learned Judge erred in law and in fact in finding that the 1st, 3rd and 4th Appellants submitted that the interpretation of retrospective effect does not give legal validity to the Decree Nos. 12 and 13,
4. The Learned Judge erred in law and in fact in finding that the Director of Lands was well aware about the law existing at the time for granting of the lease and that the reason for giving effect retrospective to the Acts No. 12

and 13 of 2002 was to condone the provisions of the two Decrees No. 13 and 14.

5. The Learned Judge erred in law and in fact in finding that the lease granted by the 1st Appellant on 9th April 2002 cannot be recognised under Section 1(3) and (4) of Act No.12 because Section 1 (3) validates only matters set out in Section 6 to 9.
6. The Learned Judge erred in law in not considering submissions outlining the Constitutional and vested land rights of the 2nd Appellant.

F. **The issues for determination by this Court**

- [15]
- i) Whether the 1st Appellant acted *ultra vires* his powers in the State Lands Act, as amended by Act Nos. 12 and 13, in issuing the said Lease to the 2nd Appellant, notwithstanding the retrospective provisions in the said Acts.
 - ii) Whether the lease granted was covered or saved by Section 1(3) of Act No.12 of 2002.

G. **Analysis and Discussion of the Law**

- [16]
- All Counsel referred to the case of **Chandrika Prasad** (supra) and its impact on the matter for determination by this Court. It is therefore necessary for this court to consider the applicability of the principles laid down therein to the facts of this appeal, in order to determine whether the Decrees Nos. 14 of 2002 and 15 of 2002, read with the retrospective provisions in the Native Land Trust (Amendment) Act No. 12 of 2002, and the Native Lands (Amendment) Act No.13

of 2002, transferred the powers of Schedule A and B lands to the 5th Appellant Board.

The impact of the judgment in The Republic of Fiji and the Attorney General of Fiji v Chandrika Prasad Case

[17] In this case, the Court of Appeal held *inter alia* as follows-

- (i) The 1997 Constitution remains the supreme law of the Republic of The Fiji Islands and has not been abrogated.
- (ii) Parliament has not been dissolved. It was prorogued on 27 May 2000 for six months.

[18] The Court considered the legality of intervening acts by the Interim Civilian Government, and at page 47 held *inter alia* as follows-

“Our conclusion that the 1997 Constitution remained in force throughout raises the question of the *extent to which the decrees*, executive acts and decisions of the administrations since 19 May 2000 are to be recognised as valid.’ (Emphasis added).

[19] In determining this question of the extent to which the Decrees and executive acts of the Interim Government were valid, the Court adopted the statement of Lord Pearce in **Madzimbamuto v Lardner-Burke** [1969] 1 AC 645, which will be referred to below.

[20] In determining the legality of the intervening Acts and applying the necessity test to the validity of the Decrees, this Court must consider the chronology of events. In this case, the 2nd Appellant had applied for the renewal of his lease in February 1998, even before the Bills for amending these statutes, had been introduced for the first time. At that point of time, the control and administration of State Lands was yet with the Director of Lands, as the State Lands Act had not been amended. In fact the evidence reveals that the authorities took all regular steps in order to consider the application for the renewal of the lease.

- [21] Even when the Decrees were passed on 12 July 2000, the 2nd Appellant's lease had not yet expired, the date of expiry being 17th September 2000. Whilst his application for renewal was pending, Bill No.15 of 1999 to amend the Native Land Trust Act, and Bill No.16 of 2000 to amend the Native Lands Act, were introduced but not taken up by Parliament. In May 2000, the two Decrees passed, were identical to the two Bills Nos. 14 and 15, which had previously been tabled in, but not passed by Parliament.
- [22] However, when the judgement of the Court of Appeal was delivered on 1 March 2001, holding that Parliament had not been dissolved, it rendered the Decrees nugatory, unless they passed the tests of necessity set out in the judgment. The Respondent in paragraph 3 of his written submission also agrees with this position. For the reasons that will be elaborated below, the High Court was in error in holding that the Decrees were in force until May 2000 because of the retrospective provisions in Native Land Trust (Amendment) Act No. 12 of 2002, and the Native Lands (Amendment) Act NO.13 of 2002.
- [23] In view of the finding of the High Court that the Decrees were valid until 1st May 2002, it is necessary to consider the legality of the Decrees. This requires this Court to consider the three tests of the doctrine of necessity propounded by Lord Pearce at p 732, in the case of, Madzimbamuto v Lardner-Burke [1969] 1 AC 645, and adopted by the Court of Appeal in Chandrika Prasad (supra). The three tests were articulated as follows; -

I accept the existence of the principle that acts done by those actually in control without lawful validity may be recognised as valid or acted upon by the courts, with certain limitations namely (a) so far as they are directed to and reasonably required for ordinary orderly running of the State, and (b) so far as they do not impair the rights of citizens under the lawful.... Constitution and (c) so far as they are not intended to and do not in fact directly help the usurpation ..."

H. The First, Second, Third and Fourth Grounds of Appeal

- [24] As these grounds of appeal in effect cover a single point, namely the validity of the Decrees 14 and 15, they are dealt with together.

- [25] Applying the three tests of necessity to the facts of this case, it is apparent that the judgment in the case of **Chandrika Prasad** (supra), results in the restoration of the *status quo ante* in respect of the two Decrees relied upon by the Respondent. In other words, the fact that Parliament was regarded as having been only prorogued, necessarily means that the Decrees did not acquire legal effect. Thus, the said Decrees Nos. 14 of 2000 and 15 of 2000 have no legal effect, after the judgment in the case of **Chandrika Prasad** (supra).
- [26] Applying the necessity test to the Decrees, it cannot be said that they were ‘reasonably required for ordinary, orderly running of the State’. These Decrees related to amending an existing law, namely the State Lands Act under which State lands were already being administered by the Director of Lands. Therefore, it is not reasonable to contend that the proposed transfer of powers in respect of State lands “was reasonably required for the ordinary, orderly running of the State”.
- [27] The second test is whether retrospective operation of the statute impairs the rights of citizens under the lawful Constitution. Since the lease was executed under the existing State Lands Act on 9 April 2002, *before* the Native Land Trust (Amendment) Act No. 12 of 2002, and the Native Lands (Amendment) Act No.13 of 2002, amended same and transferred the powers of Schedule A and B lands to the 5th Appellant Board, a right to the land had already vested in the 2nd Appellant. Thus, by the time the Act was amended on 1 May 2002, transferring the powers of control and administration from the 1st Appellant to the 4th Appellant, the 2nd Appellant’s rights under the lease had already vested in the 2nd Appellant on 9 April 2002.
- [28] The resulting position in accordance with the judgment in **Chandrika Prasad** (supra) then is that the powers of the Director of Lands under the State Lands Act remained unaffected by the passage of the two Decrees, as well as the retrospective validation provisions in the Native Land Trust (Amendment) Act No. 12 of 2002, and the Native

Lands (Amendment) Act No.13 of 2002. Therefore, the issuance of the lease by the 1st Appellant was within his powers and not *ultra vires* the Act.

I. ***The Fifth Ground of Appeal – that lease granted cannot be recognised under section 1(3) and 1(4) of Act No. 12 of 2002***

[29] The High Court held that the lease granted to the 2nd Appellant cannot be recognised under section 1(3) and 1(4) of the Act because these sections validate only matters covered in sections 6 to 9 of the Native Land Trust (Amendment) Act No. 12 of 2002.

[30] Sections 1(3) and (4) provide as follows:-

“(3) Any Act done in respect of matters set out in Sections 6 to 9 of this Act between 30th November 2000 and the publication of this Act in the Gazette is validated and deemed to have been done under the principal Act or other written law.”

“(4) At the date of publication of this Act in the Gazette, any unallotted extinct land (including any improvements on such land) occupied by the State for which no lease or other instrument or agreement has been issued remains to be vested and controlled by the State until such lease or other instrument or agreement has been issued by the Board.”

[31] An examination of the provisions of sections 6 to 9 reveals that in view of the transfer of powers of the control and administration to the Board, all references to the Director Lands, were replaced with that of the Board. That is why section 6 provides that where a lease was granted by the Director of Lands before the commencement of this Act, the Director is replaced by the Board, but otherwise the conditions of the lease remain the same.

[32] Section 6(2) provides that leases that were issued before the commencement of this Act, as well as those which were current at the commencement of this Act will be deemed to have been issued by the Board. This again, is clearly to empower the Board to administer

those leases that were already in existence. The fact that section 6 also provides for the existing terms and conditions of the lease to continue indicates that there was a positive intention not to interfere with, or displace any vested rights.

- [33] Section 7 provides that all contracts, agreements, conveyances , deeds, leases, licenses and other instruments or undertakings are binding and enforceable by or against the Board after the commencement of this Act. This is also to ensure continuation of administrative and executive actions that had commenced prior to the amendment of the laws.
- [34] Section 8 provides for the Registrar of Titles to comply with the applications by the Board in respect of registration, and section 9 provides for pending actions not to abate, but to continue by or against the Director of Lands, as the case may be.
- [35] Therefore sections 6 to 9 are intended to ensure continuity and give validity to the actions of the Director of Lands taken between 30 November 2000, and the date of the publication of Native Land Trust (Amendment) Act No. 12 of 2002, and the Native Lands (Amendment) Act No.13 of 2002, namely 1 May 2002.
- [36] In this case, the 1st Appellant granted the lease to the 2nd Appellant on 4 April 2002, which is clearly within the time frame provided for in section 1(3) of the Native Land Trust (Amendment) Act No. 12 of 2002, and the Native Lands (Amendment) Act No.13 of 2002. Therefore, the impugned lease is covered under section 1 (3) of the Native Land Trust (Amendment) Act No. 12 of 2002, and the Native Lands (Amendment) Act No.13 of 2002, and the 1st Appellant did not act *ultra vires* his powers.
- [37] This court must then deal with the finding of the learned Judge of the High Court in paragraph 15.11 of the judgement that “*1st Defendant was well aware about the existing law at the time of the grant of the lease*”. This finding is incorrect in law and fact. It is incorrect in law because, mere awareness or public opinion on anticipated, or possible

legislation cannot *per se*, eclipse, erode or take away in any manner existing law that has been passed by Parliament. This law was the State Lands Act which had not been repealed, and although it could be considered to have been in a state of abeyance from the time of the passage of Decree Nos. 14 and 15, until the delivery of the judgment in the case of **Chandrika Prasad** (supra), it cannot be taken to have amended the existing law, so as to transfer the powers of the Director of Lands to the Board.

- [38] This finding of the Learned Judge of the High Court is incorrect in fact because, when the lease was granted on 4 April 2002, the judgment in the case of **Chandrika Prasad** (supra), had been delivered holding that the acts of the Interim Civilian Government were not legal, and therefore the Decrees relied upon had no legal force. Therefore, the powers of the Director of Lands contained in the State Lands remained unaffected. The legal transfer of powers from the Director of Lands to the Board took place only after Act No. 12 of 2002 was enacted by Parliament.

J. The Impact of the Retrospective operation of Act No. 12 of 2002

- [39] In this case, the 2nd Appellant's father was the original lessee and the 2nd Appellant applied for the renewal. It is clear that he has been in possession for a considerable period of time, and had been using the land, which had been leased as Agricultural land.
- [40] The judgment of Lord Mustill in **L'Office Cherifien des Phosphates and Another v Yamashitha – Shinnihon Steamship Co.Ltd, The Boucaraa** [1994] 1 All ER 20, cited by Counsel for the 1st, 3rd and 4th Appellants, is relevant to the determination of the issue in this case. The relevant portion is as follows: -

“Parliament was presumed when enacting legislation not to have intended to alter the law applicable to past events and transactions in a manner which was *unfair* to those concerned in them unless a contrary intention appeared. Accordingly, the question whether an act was retrospective was to be determined according to whether in a particular case the

consequences of reading the statute with the suggested degree of retrospectivity was, *having regard to the value of the rights affected*, the clarity of the language used and the circumstances in which the legislation was enacted, *so unfair* as that the words could not have been intended to mean what they might appear to say” (emphasis added).

- [41] This is an attractive principle of law and can be appropriately adopted in this appeal. Thus, there can be no rigid rule of interpretation. Accordingly, if the application of retrospectivity will result in extreme unfairness and will prejudice previously, legitimately obtained rights, the literal rule may be justifiably not resorted to. The interpretation given by the High Court results in such unfairness in all the circumstances of this case and cannot be upheld.
- [42] In any event, the provisions of section 1(3) prevail over the provisions of section 1(1) of the Native Land Trust (Amendment) Act No. 12 of 2002. Therefore, matters arising under the provisions of section 1 (3) are not invalidated by the deeming provision in section 1(1) of the Native Land Trust (Amendment) Act No. 12 of 2002 and the Native Lands Act (Amendment) Act No. 13 of 2002.
- [43] The court will be slow to presume that Parliament intended to alter the law applicable to past events and transactions in a manner that is unfair to persons who had acquired rights to property by legitimate means. It is not irrelevant that the matter in issue here was a renewal of a long – standing lease, and not the execution of a new lease.
- [44] The main purpose of the amending Acts was to transfer to the Board control and power to deal with all native, as well as all State land for the benefit of the Fijian owners, in accordance with section 4 of the Native Lands Trust Act. However, it cannot be presumed that the Board would necessarily act to the prejudice of persons who were legitimately in possession of lands.

[45] Section 29 (1) of the Constitution of the Republic of Fiji provides that all ownership of land, and all rights and interests in land leases and land tenancies that existed immediately before the commencement of this Constitution shall continue to exist under this Constitution. This argument though raised had not been considered by the High Court. There is merit in it, and it informs the interpretation adopted by this court.

[46] In considering the applicability of retrospective legislation, an interpretation that would result in prejudicially affecting vested rights is to be avoided. This is all the more important in a case such as this because, the intention of the legislature in enacting Act No 12 of 2002 cannot be said to have been to prejudicially affect the rights of persons, such as the 2nd Appellant, who was in lawful occupation. Thus, the issuance of the lease by the 1st Appellant to the 2nd Appellant on 4 April 2002 was in accordance with law.

K. Conclusion

[47] At the time the lease was issued the law that applied was the State Lands Act. Accordingly, the 1st Appellant had the power to issue the lease to the 2nd Appellant and did not act *ultra vires* his powers. For the foregoing reasons the judgment of the learned High Court Judge is set aside. The appeal is allowed with costs in a sum of \$5000.00, payable in equal shares, to the 1st and 2nd Appellants by the Respondent within 30 days of this Judgment.

Amaratunga G.D, JA

[48] The facts relating to the Originating Summons were vividly described in the Judgment of the court below by Justice Kotigalage.

[49] The crux of the argument in the court below involved the interpretation of Sections 1(3) and 6 of the Native Lands Trust (Amendment) Act 2002 (i.e Act No 12 of 2002). The two paragraphs that dealt the main issue in the court below state as follows:

*'15.11The 1st; 3rd; and 4th Defendants submitted the interpretation of retrospective effect does not give legal validity to the Decree No. 12 and 13. This is a far fetch argument and does not carry any merits. The Director of Lands 1st Defendant was well aware about the law existing at the time for grant of the lease. The reason for giving effect retrospective to the Acts No. 12 and 13 of 2002 was that to condone the provisions of the two Decrees Nos. 13 and 14. **The argument that Director of Lands had the right to grant the lease in April 2002 fails and I determine the Director of Lands acted ultra vires and without any lawful authority.** Accordingly, there is no merit of the submissions made by the 1st; 3rd and 4th Defendants, on this issue.*

*16. I further conclude the lease granted by the 1st Defendant on 6 April 2002 cannot be recognized under Section 1(3) and (4) of Act No. 12 because Section 1(3) validates only matters set out in Sections 6 to 9. The recognition was given for the leases granted by the Director of Lands **prior to the commencement of the Act No. 12 ie. 30 November 2000.** The leases given after 30 November 2000 are not recognized under the provisions of the Section 8 and 9. '(emphasis added)*

- [50] First, the court below had not considered the existing law on the 9th of April, 2002 when the Director of Lands granted the lease. It is *sine qua non* to consider the law applicable on 9th April, 2002 before pronouncing any legality of the actions of the Director of Lands, at the material time. There is no qualm that law prior to enactment of amending law, Act No 12 of 2002, conferred the Director of Lands the power to grant lease in the category of lands in issue. This power was taken away only on 1st May, 2002 after gazette was published in terms of the said Act No 12 of 2002.

- [51] The enactment of amending law to the Native Land Act (Cap 133) as well as Native Lands Trust Act (Cap134) *ipso facto* proves that the existed law vested the lands belonging to extinct *Mataqali* with the state. (i.e. Director of Lands).

- [52] Since neither Bills before the Parliament in 1999 nor the Decrees of 2000, that attempted to take away the power of the State (i.e Director of Lands) to deal with land belonging to extinct *Mataqali*, had any legal authority on 9th April, 2002 the law relating to the land in issue was the law that existed prior to 1999.

[53] The Director of Lands had exercised acted *inter vires* and the land in issue in Originating Summons, vested with the state according to the Native Lands Trust Act and his power to deal with such land was taken away by Act No 12 of 2002. Though the commencement of the said amendment contained in Act No 12 of 2002 was dated back to give retrospective effect, there was a saving contained in Section 1(3) and sections 6-9 of the same Act, providing immunity for past acts stipulated in the same Act in sections 6-9.

[54] The Section 1(3) of the Act No 12 of 2002 states as follows:

'(3) Any Act done in respect of matters set out in Section 6 to 9 of this Act between 30th November 2000 and the publication of this Act in the Gazette is validated and deemed to have been done under the principal Act or other written law'

[55] Looking at the said provision the intention of the legislature is to give validity to matters set out in Sections 6 to 9 of the Act No 12 of 2002 during the time period between 30th November, 2000 to the publication of the said Act 12 of 2002 in the Gazette. (i.e. 1st May 2002).

[56] So, Section 1(3) created an exception or saving to the general retrospective effect of the Act 12 of 2002. The said Act is deemed to have commenced on 30th November, 2000. So the retrospective effect of the Act No 12 of 2002 will not be applicable to matters set out in Section 6 of the Act.

[57] The next issue is whether the act done by the Director of Lands (1st Defendant - 1st Appellant) in the issuance of lease on 4th April, 2002, was any act specified in Section 6 of the Act No. 12 of 2002. The said Section 6 deals with the issuance of leases by the Director of the Lands.

[58] The Section 6 of the Act No 12 of 2002 states as follows:

'6.- (1) Where a lease of any land was granted to any person by the Director of Lands under section 19(1) of the principal Act before the commencement of this Act-

(a) the Director of Lands is replaced by the Board as lessor for all purposes; and

(b) the income from the lease must be dealt with in accordance with section 19A(2) of this Act, but otherwise the terms and conditions of the lease remain as before.

(2) All leases, deeds and instruments issued by the Director of Lands in respect of any land allotted or otherwise dealt with under section 19(1) of the principal Act before the commencement of this Act and current at the commencement of this Act shall, until their expiry or earlier termination in accordance with their terms and conditions, be deemed to have been issued by the Board and governed by the principal Act. (emphasis is mine)

[59] The Director of Lands had issued a lease to 2nd Appellant (Sanaila Cavuduadua), the on 9th April, 2002. The land in issue was vested with the state, when the said lease was granted. Director of Lands who had the power and authority to deal with such land and accordingly he had issued the lease to the 2nd Appellant.

[60] The Act No 12 of 2002 vested the lands contained in the schedule with the Native Lands Trust Board, and the said vesting had retrospective effect from 30th November, 2000. This was presumably done to give validity to certain acts done since 30th November, 2000 as there were at least three failed attempts to pass the said amendment and there were some uncertainty as to the laws which prevailed since 1999, but after the decision of, the *Republic of Fiji and Attorney General of Fiji v. Chandrika Prasad* (Civil Appeal No. ABU 0078/2000S) (decided on 1st March, 2001) was pronounced, it cleared the air. It is clear that said decision invalidated the two decrees in issue. This decision was affirmed by Fiji Court of Appeal, subsequently.

[61] While the retrospective effect of the vesting of the said lands are important, it is also important to consider the official acts done prior to the gazette of the Act No 12 of 2002

on 1st May, 2002. The officials including the Director of Lands had to act according to the existed law prior to 1st May, 2002 and for that purpose the Section 1(3) of the Act No 12 of 2002 made some exceptions to the retrospective effect.

[62] In the said context the '*commencement of this Act*' contained in the Section 6 of Act No. 12 of 2002, should be interpreted as **1st May, 2002** which is the publication of the gazette of Act No. 12 of 2002 and **not the 30th November, 2000**.

[63] If a literal interpretation is given to Section 6 of the Act No 12 of 2002 the '*the commencement of this Act*' would mean 30th November, 2000 in terms of Section 1(1) of the Act No 12 of 2002. This is obviously not the intended meaning and if literal interpretation is given, it creates a mischief.

[64] If the above literal interpretation is accepted it would create a pointless result and the provisions contained in Section 1(3) and Section 6 of Act No. 12 of 2002 would not serve the purpose for which they were enacted.

[65] The text 'Statutory Interpretation' (4th Edi) by Francis Bennion¹ at page 858 states as follows

'The court seeks to avoid a construction that produces a futile or pointless result, since this is unlikely to have been intended by Parliament. Sometimes however there are overriding reasons for applying such a construction, for example where it appears that Parliament really intended it or the literal meaning is too strong.'

[66] The literal interpretation of phrase '*before the commencement of this Act*' means time before the 30th November, 2000 which is the commencement date of the Act No 12 of 2002 in terms of the Section 1(1) of the said Act and if so, there is no need to specially mention about that time period to make it an exception as intended in Section 1(3) of the said Act. Section 1(3) is clear enough that the Section 6 should be applied to time period between 30th November, 2000 and publication of the date of Act No 12 in the gazette.

¹Bennion F.A.R. Statutory Interpretation- A Code (4th Edi) Butterwoths, 2002 p 858

This is to give validity to the actions stipulated in Section 6 of the Act No.12 up to the date of gazette as no one could have anticipated such retrospective legislation when such acts laid in Section 6 were performed in good faith.

[67] If literal construction is given the section 6 will not serve any purpose and there will be a lacuna in the law as regard to certain acts done by the officials prior to the publication of Act No. 12 of 2002, namely from 30th November,2000 to the 1st May,2002. Section 1(3) of Act No. 12 deals with the said period. The acts which some exceptions are made are contained in Section 6 of the Act No. 12 of 2002. This is expressed as *lex nil frustra facit* (the law does nothing in vain).

[68] In *Halki Shipping Corp v Sopex Oils Ltd* [1998] 2 All ER 23at 43-44. Henry LJ held,

‘I would be extremely reluctant to hold that neither the 1930 amendment nor its repeal in 1996 affected the law, as it had always been superfluous. First, its genesis contradicts that view. Second, the presumption is that Parliament does nothing in vain.’ (emphasis mine)

[69] If the interpretation given in the judgment of the court below is accepted neither Section 1(3) nor Sections 6 serve any purpose. The Act No 12 of 2002 is as good as without those provisions and there is no evidence that this aspect was considered in the court below.

[70] The Latin phrase *lex non praecipit inutilia* (the law does not demand the doing of useless things)² which was used by Lord Denning MR in *Barett Bros(Taxis)Ltd v Davis (Lickiss and Milestone Motor Policies at Lloyd’s, Third parties)* 1966 1 WLR 1334 at 1339 can also supplement the argument that Section 1(3)of Act No.12 of 2002 should be interpreted in a manner that was intended by the parliament and not to defeat its purpose and not to make the Sections 6 of Act No. 12 of 2002, superfluous.

² *ibid*

- [71] As an alternate tool for interpretation of Sections 1 (3) and Section 6 of the Act No. 12 of 2002, enacting history of the Act No. 12 of 2002 may also be of assistance. In the court below the enacting history is described in detail but it had not applied the same in the analysis. There were two Bills presented to the parliament in 1999³ and the purpose of that was to vest the land of the extinct Mataqali with the Native Land Trust Board as opposed to with the State. For this purpose Amendments to the Native Lands Act (Cap .133) and Native Land Trust Act (Cap. 134) were required. While these two Bills were before the Parliament some events took place and they were not passed. But subsequently the identical provisions in the said Bills were included in two Decrees that were gazette on 12th July, 2000 as Decree No 14 of 2000 and Decree No 15 of 2000.
- [72] All Decrees since the ‘prorogue of Parliament’ were found null and void except where they passed the test of necessity in terms of a judgment delivered on 15th November, 2000 in the High Court and it was affirmed in the Fiji Court of Appeal on 1st March, 2001. So the law relating lands belonging to extinct Mataqali, including the land subject to the lease granted to the 2nd Appellant (Sanaila Cavuduadua), reverted to the position prior to the Decrees 14 and 15 of 2000.
- [73] Parliament enacted Act No 12 of 2002 and Act No 13 of 2002, for the identical purpose⁴, of the two decrees and also two bills that never saw the light of the day due to some events. The Act No 12 of 2002 was passed with retrospective effect from 30th November, 2002. This retrospective application could not be applied across the board for all the official acts, due to the events that happened and for that purpose in the Act No 12 sections 1(3) and Sections 6-9 were specifically included. These provisions could not be found in the earlier Bills that were presented to the Parliament in 1999 or in the two Decrees that were gazette in 2000. Apart from these savings contained in Section 1(3) and Sections 6-9 of the Act No 12 of 2002 and corresponding Bill and the Decree are identical.

³ (i.e. Bill No 15 of 1999 and Bill No 16 of 1999

⁴ i.e. the Bills of 1999 and Decrees of 2000

It should also be noted neither two Bills that did not see the light of the day, nor the two decrees that were annulled by court decision, had any retrospective provision. So there was no necessity to have a provision similar to Section 1(3) and Sections 6-9 of the Act No 12 of 2002. With the introduction of retrospective effect some saving was needed to give validity to certain official acts done by the Director of Lands. So the enacting history proves that the Sections 6-9 were an exception as it would give immunity to the acts done in accordance with the existing law while giving retrospective effect to the commencement of the amending Act No 12 of 2002.

[74] Bennion on Interpretation of Statutes (4th Edi) at p 520 state as follows:

'The enacting history of an Act is the surrounding corpus of public knowledge relative to its introduction into Parliament as a Bill, subsequent progress through and ultimate passing by, Parliament. In particular it is the extrinsic material assumed to be within the contemplation of Parliament when it passed the Act. ...'

[75] A perusal of Bills 15 and 16 of 1999 and the Decrees No 14 and 15 of 2000 along with the Act No 12 of 2002 are helpful to interpret Section 6 of the Act No 12 of 2002 and the phrase '*commencement of this Act*' should be considered as publication of gazette on 1st May, for the purposes of Sections 6-9 of the Act No 12 of 2002.

[76] The Section 6 in Act No 12 of 2002, had not specified any date and this was due the fact that when the Act is passed the notification in gazette is not certain. Since publication in gazette is the official notification of the commencement or operation of the said Act.

[77] The actions of the Director of Land up to the publication of the gazette is indemnified. The date of publication in the gazette is the notice to all the government officials as well as to the public in general the change of law and till that date Director of Land cannot be expected to refrain from his functions and powers conferred to him by the law. The retrospective law cannot reverse Director of Land's lawful acts done in good faith unless that was expressly intended by the parliament. Parliament while enacting Act No. 12 of

2002 retrospectively, had explicitly excluded actions stated in Sections 6-9 from retrospective effect.

[78] Statutory Interpretation by Bennion (4th Edi) at p 405 stated:

'The sole object in statutory interpretation is to arrive at the legislative intention. This Part examines what is meant by this concept. Its place as the paramount criterion is explained. It is shown not to be a mere myth or fiction. To understand it we need to know the nature of legislation. The duplex approach to it is explained. Parliament delegates to the courts the function of spelling out its intention..... Sometimes the words accidentally fit facts that were never foreseen. Intention is distinguished from purpose or object and from motive.

At p 411

'In construing legislation it is necessary to bear in mind both the concept of the ideal legislature and the fact of fallible drafter, and produce a synthesis between them. This duplex approach to legislative intention requires an Act to be construed with due regard to the fact that its text is both-

(a) *A text validated by legislature which is treated by constitution as sovereign and infallible, and whose members are all taken to share in the intention embodied in the text notwithstanding that certain of them may in fact have disagreed with, or been unaware of some or all of the Act's provisions; and*

(b) *A text produced by fallible drafter who is not a legislator but possesses an intention taken to be adopted by the legislature.*
(underlining is mine)

[79] In my judgment the intention of the Parliament in enacting Act No. 12 of 2002 with retrospective effect is clear from Section 1(1) of the said Act. At the same time the Parliament was aware of the existing law and actions that were done prior to the said Amendment came in to operational and for that some saving was done in Section 1(3) of the Act. By using the word 'commencement' an unintended meaning was made possible by the drafters and this was a mistake of the drafter, but this would make the Section 6 useless.

[80] In *Shahid v Scottish Ministers* [2016] 4 All ER 363 at 372, it was held in UK Supreme Court (Per Lord Reed):

“[21] The only principle of statutory interpretation which might enable the plain meaning of legislation to be circumvented is that it can be given a strained interpretation where that is necessary to avoid absurd or perverse consequences: see, for example, IRC v Hinchy [1960] 1 All ER 505 at 512, [1960] AC 748 at 768 (Lord Reid), and R (on the application of Edison First Power Ltd) v Central Valuation Officer [2003] UKHL 20, [2003] 4 All ER 209, [2003] 2 EGLR 133 (paras [25] (Lord Hoffmann) and [116] (Lord Millett)). Indeed, even greater violence can be done to statutory language where it is plain that there has been a drafting mistake: Federal Steam Navigation Co Ltd v Department of Trade and Industry [1974] 2 All ER 97 at 100, [1974] 1 WLR 505 at 509 (Lord Reid), and Inco Europe Ltd v First Choice Distribution (a firm) [2000] 2 All ER 109 at 115, [2000] 1 WLR 586 at 592 (Lord Nicholls of Birkenhead).”

[81] The literal interpretation could interpret the ‘commencement of this Act’ contained in Section 6 as deemed commencement date of Act No 12 of 2002 in terms of Section 1(1) of the Act No 12 of 2002. This was a mistake of the drafters and ‘commencement of this Act’ in Section 6 should mean the date of gazette or the publication of the Act No 12 of 2002 in order to give purposive meaning in line with Section 1(3) of the Act No 12 of 2002.

[82] In my judgment the interpretation given in the court below was an unintended result, due to the usage of word ‘commencement’ which could mean alternatively as date of operation or the date of publication in the gazette. Over reliance on the literal meaning without taking overall effect of such an interrelation, was an error in the interpretation.

[83] Section 1(3) of the Act No 12 of 2002 had cleared the air beyond any doubt, and the court below had not considered the conflicting meaning that would flow under Section 1(3) and Section 6 of the Act No 12 of 2002 if the meaning adopted by the Plaintiff is affirmed. Over emphasis on literal interpretation, without considering the purpose of the Section

1(3), in the court below, resulted in the incorrect finding that the Director of Land had acted *ultra vires* when he had acted *intra vires* at the time of issuance of the lease, in accordance with the existed law.

- [84] There are more than one method of interpretation that support the view that the Section 6 should be applicable for acts done prior to the publication of gazette on 1st May, 2002 as stated in Section 1(3) of the Act No 12 of 2002. The ‘commencement of this Act’ contained in section 6 can only mean 1st May, 2002 to give a purposeful meaning to the said Section 6. The alternate meaning, given by the court below, will obviously create a mischief. The literal meaning of Section 6 leading to unintended meaning was a result of mistake of drafters. So, the litigants should not be at the receiving end due to the mistakes of the drafters. The Appeal is allowed and the orders of the court below are quashed. The Director of Lands had acted within his powers under the existed law of the land on 9th April, 2002. Since, there was a mistake by drafter and the court below had given strict literal interpretation, in my judgment it is not proper to order any costs for this appeal or in the court below.

The Orders of the Court are:

1. *The Judgment of the High Court, dated 4 February 2015, is set aside.*
2. *The Appeal is allowed with costs in a sum of \$5000.00, payable in equal shares, to the 1st and 2nd Appellants by the Respondent within 30 days of this Judgment.*



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Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL



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Hon. Madam Justice F. Jameel
JUSTICE OF APPEAL



.....
Hon. Mr. Justice G. Amaratunga
JUSTICE OF APPEAL