

IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU  
LUGANVILLE SANTO

CASE No. 18 of 1994  
19 April 1995

BETWEEN

JOHN NOEL (as representative of the  
descendants of Crero Toto, deceased)

Applicant

AND

OBED TOTO

Respondent

Coram: Kent J

Mr J Malcolm for the Applicant

Mr S. Hakwa for the Respondent

JUDGMENT<sup>1</sup>

INTRODUCTION

What commenced as an apparently simple matter, in fact involves a number of important and difficult questions. An area of land on the island of Santo, known as Loroneth, includes the well known Champagne Beach. In 1987, Cooke CJ determined that the custom owners of the land were Obed Toto and Philip Pasvu. The greater portion of the land was determined to belong to Obed Toto. Previously, the land had been alienated and the original custom owners had not for many years occupied the land.

The Island Court had decided that all of the land, Loroneth, belonged to Philip Pasvu. The matter came to the Supreme Court, by way of an appeal against that decision. At the time of both the hearing in the Island Court and the Supreme Court, the head of the Toto family, Crero Toto, was still alive. He was the father of Obed Toto. In the Island Court, the named claimants of the land, were Obed Toto, Crero Toto, John Noel and Philip Pasvu.

John Noel is the grandson of Crero Toto. John Noel is the son of Crero Toto's daughter Julie, Crero's first born child. Following the decision of the Island Court an appeal was

---

<sup>1</sup>Revised on 30 May 1995, correcting typographical errors in original written judgement

lodged to the Supreme Court. I do not have available to me, the notice of appeal but the grounds of appeal are set out in the judgment of Cooke CJ dated 6 July 1987.

In his judgment, Cooke CJ ruled as follows -

"I therefore declare that *the Appellants are* the true custom owners of title 553 and 632 as edged in black on the attached survey plan marked A and that portion of title 632 to which *the Appellant is* entitled as custom owner is edged in red on the plan marked B together with that portion of land G and H and the land edged in black with blue stripes.

I further consider that the Respondent has some rights in the area through his grandfather Andrew and declare that he is the true custom owner of the area edged in green on the same survey plan marked A. That portion of Champagne Beach west of the nabanga tree belongs to the Respondent. The remainder to the east as marked in black to *the Appellants*.

Schedule A is the description of *Obed Toto land* and Schedule B is the description of the Philip Pasvu land." (Emphasis added)

Whilst the question of the land held to belong to Philip Pasvu is not a matter for consideration here, it is difficult to understand how the Learned Chief Justice came to the decision that he did in dividing the land into separate areas. He refers to the entitlement of Philip Pasvu coming through his grandfather Andrew, but the evidence referred to in the judgment indicates that Andrew died without children. It is not the purpose of this judgment to reconsider the findings and I will not do so. The purpose of this action is to explain and clarify the rights of members of the Toto family.

As the land includes the popular tourist location Champagne beach, income is earned by giving rights to cruise ships to visit the area. Those visiting the Beach by land, pay an entry fee to the area and thus further income is earned. A difficulty arises with respect to this income, in determining who has the right to the benefit of that income.

In general terms, custom land does not belong to any individual. Mr Hakwa, who appeared on behalf of Obed Toto said in the course of his submissions -

"All actions before the Island Court and this court can only be a representative action. In Vanuatu, land is owned by families, a group, a tribe, or even a whole Island.

A chief would be a person holding for other people. Mr Toto can only act in a representative capacity."

I accept that this submission is correct and that when Obed Toto was held to be the custom owner, he was the representative of his family.

Because of this finding, it is unnecessary for me to discuss the evidence which was given before me, regarding how it came about that Obed Toto was named in the judgment as the sole appellant. I think that in cases such as this, to avoid confusion, the action, if brought in the name of one or more individuals, should state that it is brought in a representative capacity. There are several judgments of the Supreme Court in the past, which refer to the representative nature of actions with respect to custom ownership of land. The judgments that I have seen do not however deal with the question of the entitlement to the income of the custom land.

#### THE ACTION.

These proceedings were brought by way of Originating Summons. I consider that when clarification of a judgment is sought, it is appropriate to use this procedure. The Summons here seek the following declarations -

1. The Applicant is the custom owner of Land title 553, also called Champagne Beach pursuant to Land appeal Case L6/85.
2. The Applicant is equally entitled to any or all benefits arising from any or all activities connected with or conducted on or from the said land.
3. The Applicant is entitled to an account as to profits since the date of decision of Land Appeal Case L6/85.
4. A declaration as to the appropriate management and financial control of the said land pursuant to Land Appeal Case L6/85.

I heard evidence in the matter a good deal of which concerned the question of whether Obed Toto was the owner of the land in his own right, as a consequence of the judgment, or whether he held in a representative capacity. The evidence also related to the way in custom, family members could obtain individual rights from the head of the family. Basically this evidence establishes that family members must ask the head of the family for land. The head of the family is then said to be required to give rights to that person. The evidence in this case, as in others I have heard, did not explain how a family member could enforce the so called right, if the request was refused. Neither does the evidence explain, if the request was for a portion of the land, how it is decided how much land is to be given or how the location is to be determined.

As to the income from the land, it is asserted by the applicant that family members are entitled to a share of the proceeds whilst Obed Toto gave the following evidence -

"I am the boss of the money. If I don't want to give it, I can keep it all."

Obed Toto is said to be the custom owner, in the sense of being the head of the family of custom owners, by virtue of the fact that he is the first born son of Crero Toto, the previous family head.

CUSTOM RIGHTS OF FAMILY MEMBERS.

Crero Toto had children to two wives. His first wife died, leaving the following children -

Julie Toto  
Obed Toto  
Nanas Toto  
Serac Toto

Obed and Serac are sons and Julie and Nanas, daughters of Crero.

Crero Toto's second wife died without children.

The third wife had the following children -

Keleth Toto  
Thele Toto  
Judy Toto  
Jenny Toto  
Tom Toto  
Kwa Toto  
Edward Toto.

The evidence given before me states that when daughters marry, they lose their custom entitlement to the land of the father. This evidence was qualified to some extent however, by saying that they still may have some rights, but in some way a lesser right than that of their brothers.

The evidence does not explain to me the true extent of the rights of family members. It is described as a right to ask the head of the family for a piece of the land. The head of the family is said to be required to give land to an eligible family member, upon request. The nature of custom ownership is that the land cannot be actually disposed of. It is retained for the benefit of future generations. The apparent purpose of the Constitutional provisions with respect to land was to confer ownership permanently upon the custom group who were the original owners of the land.

The Constitution provides -

Article 73

"All land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants.

Article 75

"Only indigenous citizens of the Republic who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of their land."

I assume that "recognised system of land tenure" equates with custom ownership.

Article 81 provides for purchases of land from custom owners, for redistribution to indigenous citizens or communities from over populated islands. I think that these provisions mean in combination, that apart from the circumstances referred to in article 81, a custom owner cannot permanently dispose of custom land. That is, descendants of custom owners cannot be deprived of land by decisions of their ancestors. This appears to be somewhat inconsistent with some evidence I have heard as to custom disposal and acquisition of land and with some judgments I have read of this court in the past. For example, it has been previously held that an individual has acquired custom ownership of land from a previous custom owner, by way of sale. Although this may have been permitted in custom, it seems to me that the effect of the Constitution, is to prevent this from happening in the future. The Constitution, being the supreme law of the Republic of Vanuatu (Article 2.), would override custom. I point out that this matter has not been argued before me and I have not fully considered the effect of Article 74.

Article 74 provides that "The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu". I think that it is sufficient for the purposes of this judgment, to act upon the basis that the land in question is in the perpetual ownership of the descendants of Crero Toto.

I have considered the matters referred to, in order to endeavour to establish the way in which income earned from custom land should be distributed. Apart from Obed Toto's assertion that if he doesn't want to give the money to anyone unless he wishes, there is no evidence before me as to what the custom law is regarding the distribution of money. Of course, historically, there was no such thing as money.

I am therefore unassisted as to how I should resolve this question. All that the evidence discloses is that family members have the right to request the head of the family to grant them some part of the custom land. The extent of the right is said to be greater with respect to brothers of the head of the family than it is for sisters. They, if married may effectively cease to have any rights at all. Likewise their children would not have rights. This however is inconsistent with the evidence of Obed Toto himself who has conceded that John Noel has some right. John Noel is the son of Julie Toto, the first born child of Crero Toto.

I think that the expression right when used in custom, is a different concept from what is generally regarded as a legal right. A legal right would confer an entitlement to bring an action for the enforcement of the right. I do not think that custom contemplates such a thing. It is I think based upon the presumption that a family member having a right, will not be refused by the head of the family. It must also be based upon the premise that any request pursuant to the right of the individual will be a reasonable one in all the

circumstances and that it will be presumed that the response to the request will be reasonably exercised. Perhaps this would establish a legally enforceable right.

The evidence suggests that the head of the family can refuse if the request is not properly made. If some offence has been given by a family member to the head of the family, the head of the family should refuse any request until the offence given is remedied by following appropriate custom procedure. It is submitted here that the very taking of Court action against Obed Toto is an offence given in custom, which entitles Obed Toto to refuse requests from those family members involved in this action. In view of the questions raised in this case, I do not think that I am required to decide this issue.

#### WHICH FAMILY MEMBERS HAVE CUSTOM RIGHTS?

It is conceded that Serac Toto has rights. He is the brother of Obed, to the same mother. It is to a lesser extent conceded that the other brothers of Obed have some rights. I am unable in the end to see why brothers born of a different mother have any lesser rights. It was suggested, although not directly, by the evidence, that they have lesser rights because they were born and raised in a different area. That is in fact true.

Before he married the mother of the children in question, Crero Toto moved from Hog Harbour to Kole. This was a requirement of the people of Kole, if Crero was to marry his wife who came from there. He was apparently given the right to use land there. The implication is that the children who were born there, have no connection, through use or occupation, with the land at Champagne Beach. This is equally true, but what is its effect, if any upon custom rights?

Custom ownership is not related to current or continuous occupation of land. In Bue Manie and Kenneth Kaltabang v. Sato Kilman (land Case No. L5/84) Cooke CJ said-

"In this case, I am asked to decide who is the custom owner of Lakatoro . . . In custom, it is accepted that the custom owner is the descendant of the person who first came here and built a Nasara. *It makes no difference whether they left again for one reason or another*, the fact that they were the first occupants of the land and built a Nasara there gives them the right to be designated as the custom owners." p.1.(emphasis added)

I am not here suggesting that it is the building of Nasara which is the custom way of obtaining ownership in Santo. Custom varies from place to place to place. I am not here concerned with the question of the manner of acquiring ownership. The important feature of the judgment is that it is authority for the proposition that once acquired, custom ownership is permanent. Leaving the land does not divest the owners of their ownership.

Cooke CJ further stated -

"I may well hold that some people have occupational rights because of the length of time they have stayed on the land and worked it but occupational rights are not

custom ownership. If such was the case, parliament would have incorporated something to this effect in the Constitution." p. 2.

If occupation of the land is not required, it must follow that descendants of the original custom owners, who may have never lived on the land, are nonetheless the custom owners. In this case it is only necessary to go back as far as Crero Toto, to decide the question of who the custom owners are. In his judgment in the present case, it is clear that Cooke CJ found that Obed Toto was the custom owner because he was the first born son of Crero Toto. He did not find that Crero Toto had ceased to be the custom owner. Obed could only derive title through his father. Cooke CJ at p 4 said -

"I was impressed with two statements of Crero Toto, father of the Appellant, which I repeat in toto -

"I am Crero Toto. I claim the land Loroneth Title No. 553 because my grandfather Novathken and mother Kuvuru were both from Loroneth."

"He further stated: - p. 6

"I am Crero Toto. I claim Theiyas(Nesegnonmoror) Champagne Beach land title No. 632 to be mine.

Everybody in Hog Harbour village knows that Champagne Beach belongs to me Toto. Whenever anybody wants to spend a day at Champagne Beach they ask permission from my son Obed Toto."

The decision of Cooke CJ was based upon this evidence. Crero Toto was claiming to be the owner, not that he had somehow ceased to be the owner. He just did not live there any more.

At page 8 Cooke CJ gave this finding -

"I therefore declare that the *Appellants are* the true custom owners . . ."

The reference to appellants indicates that he was referring to the Toto family, which was at the time headed by Crero Toto. Obed Toto, was the named representative of that family.

Before me, Obed Toto gave evidence that his father had given the land to him in 1956. this is not referred to the judgment of Cooke CJ. I do not know if such evidence was given before Cooke CJ, but even if it was, it is clear that he did not base his finding upon an acquisition of ownership of Champagne Beach by Obed Toto in his own right.

I am satisfied therefore that the judgement of Cooke CJ means that brothers of Obed Toto are part of the group of custom owners of the land. The fact that they have different mothers is of no consequence.

I have only referred to the brothers rights at this stage. What is the position of the sisters? This question is of course of importance with respect to the rights, if any of the applicant John Noel.

Article 74 of the Constitution, to which I have already referred states that the rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu.

John Noel gave evidence that the custom of east Santo is that brothers and sisters own the land. He claimed that he had a right because his mother had a right. In the original case before the Island Court, John Noel was a joint applicant for the land with Obed Toto and Crero Toto. Thus 3 generations of people claimed the land. This is consistent with the assertion that sisters are regarded as custom owners. This necessarily includes married sisters, since Julie Toto, John Noel's mother was at the time of the application married.

Obed Toto in evidence, stated that members from the family who live at Kole were involved in both the court hearings before the Island Court and the Supreme Court. He said that he has given stalls to his sisters Julie and Nanas, at Champagne Beach.

Obed gave conflicting and confusing evidence about the rights of sisters. He said that his father gave him the rights to the land in 1956. This is not consistent with the statements of Crero Toto referred to and relied upon by Cooke CJ. Obed said that as his father had given him the right to the land, the second and third born have no right to the ground. He then said that sisters who are married, "their children have the rights of their father. That is the custom. . . . When a sister marries, her rights come from the husband." He then said, "If they want some land they can ask. If agree, allright, if no agree, no right. The nephews are in the same position."

With respect to brothers, he said, "He must come and see me. If I have a piece of land available I will give it. If not, I won't." Later he said that brothers have more rights than sisters. He added that his brothers have spoiled his reputation, but if they do custom, everything will be allright. Questioned further he said -

"If a brother asked for some ground for a house, I would give it to him. An unmarried sister, if land available and I wanted to I would. A nephew is in the same position."

In cross examination he said that the first born son is the boss of the line.

"If the second brother comes and asks, he may give him half the land. He becomes the custom owner. Once the land is given, it cannot be taken back. It is the decision of the first born son. If I give the land to a sister, she becomes the custom owner, even if she marries. If I give it, I will never take it back.



Money from the ground, if I own it, I get the money. I get to keep all the money."

Obed followed this evidence by repeating that he became the custom owner in 1956 when his father gave him the right. He said that his father did not have any rights after 1956. This does not appear consistent with the evidence given at the appeal and which was relied upon by Cooke CJ. He further said that the land was given back by the alienators in 1976 and that he had "kept it(the land) since then. I want all the money too. They spoiled my name."

In further evidence during cross examination Obed said that if land is given away it must be done in writing and that his father did not give the land to him in writing. He went on and said -

"The father is the boss, if he gives it to one, he looks after it for the others.

The one who has the right, all the others come to him and on request he gives them some."

I find the contradictions difficult to reconcile, but I do not say that Obed was being dishonest. I think that the entire concept of custom ownership is a difficult concept and thoughts and ideas regarding it are difficult to express. Translation into English also, I think is difficult. Obed gave his evidence in Bislama.

Thomas Reuben gave evidence on behalf of Obed Toto. He said that in east Santo custom, it is possible in a special case for a father to give the right to land to his son. As to the rights of brothers of Obed he said that Obed has the right to give land to his brother. The brother has a right as long as he "... comes through Obed."

Regarding the sisters, he said that the custom of east Santo is that once they are married the rights of the children come through their father. Again, in something of a contradiction he said that the nephews do have a right but they must come through the uncle and that the sister and step brothers have the same right as well. The sister Julie, has more right than a step brother. As I understand the evidence here, the brothers concerned are not step brothers, but half brothers. Although the sister has a right, she being a "... full blood brother", it is still possible for her to be refused.

He confirmed that if there are customary obstacles, Obed would have the right to refuse until the obstacles were removed. A family row would be a customary obstacle. He then gave this evidence -

"The head of the family has a responsibility to the family. Once the land is divided, they each have responsibility for their own land."

I think that the effect of the evidence is that it is accepted that the head of the family can give land to members of the family and that once it is given, that person is regarded as the custom owner of that piece of land. He or she, would cease to have rights over the land

of other family members. Each person to whom land had been given, would hold that land for his or her descendants. There would still be perpetual custom ownership of the land but it would be in ever diminishing parcels. The position as expressed by Thomas Reuben does not include the notion of joint ownership.

In cross examination he said that as to money, it is up to the family to decide how it is to be disposed.

Overall, the evidence does not make it easy to define what custom ownership really entails. Changing times and circumstances add to the difficulties.

There is a further factor which will most likely give rise to interesting problems in the future. In the evidence that I have heard, there is evidence which indicates that custom differentiates between male and female. Although I have not heard argument about it, I think that it is necessary for me to consider the effect of Article 5 of the Constitution. So far as it bears upon the issues here, Article 5 provides -

"The Republic of Vanuatu recognises that . . . all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of . . . sex . . . -

(d) protection of the law;

(j) protection for the privacy of the home and other property and from unjust deprivation of property;

(k) equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, . . . .

It is clear that it was the intention of the Constitution to guarantee equal rights for women. A law which discriminates against women would be in conflict with this aim. Equal treatment under the law is a fundamental right. So also is protection of the law. I have also referred to the provision which does not permit unjust deprivation of property. The Constitution gives the rights referred to ". . . without discrimination on the grounds of . . . sex . . . ."

A law which gives a lesser right to a woman, because of her sex is inconsistent with the guarantee of protection of the law, may be inconsistent protection from unjust deprivation of property and is inconsistent with the right to equal treatment under the law. The evidence before me suggests that custom, with respect to land rights does not give the same right to women as it does to men. If the woman marries, she is deprived of a right to property which she would otherwise have. The same does not apply to men. The custom therefore discriminates against women on the grounds of sex. It is the evidence that a woman may not be deprived of her right absolutely, but that any right she would have, would be lesser than that of her brothers.

A difficulty is encountered however, when one considers Article 74. This is the provision which states that rules of custom shall form the basis of ownership and use of land in Vanuatu.

Does this mean that if custom discriminates with respect to land rights of women the fundamental rights which are recognised in Article 5, do not apply? I do not think that this can be so. It is clear, as I have stated that the Constitution aims to give equal rights to women. It permits a law which discriminates in favour of women. By not specifically permitting discrimination with respect to land rights, it must be that such discrimination cannot be allowed.

Recently the Parliament has adopted Human Rights Charters with respect to women's rights. I do not have the Charters available to me but I am of the view that in adopting such principles, the Parliament is recognising rights of women as guaranteed under the Constitution. It would be entirely inconsistent with the Constitution and the attitude of the Parliament to rule that women have less rights with respect to land than men.

This may mean that in determining land rights in future, there will be a change in the basis of determining land ownership. This does not mean that ownership will be decided otherwise than in accordance with custom. Custom law must provide the basis for determining ownership, but subject to the limitation that any rule of custom which discriminates against women cannot be applied. General principles of land ownership will not be changed. In interpreting the Constitution, it must be presumed that when the Constitution was adopted, it was known that custom law discriminated against women with respect to land ownership. This being so, if it was intended to make an exception from the prohibition against discrimination upon the ground of sex, the exception would have been specifically referred to. This was not done. Therefore I have no difficulty in ruling that when the Constitution provides for the rules of custom being used as the basis of ownership of land, this must be subject to the fundamental rights recognised in Article 5.

**HAVE THE RIGHTS OF ANY FAMILY MEMBERS BEEN EXTINGUISHED?**

Both parties have argued that they have been given rights by Crero Toto, which have the effect of extinguishing the rights of the others. Obed Toto has claimed that in 1956, Crero Toto gave the land to him. From the judgment of Cooke CJ, I cannot find anything to indicate that he based his decision upon any such finding of fact.

The effect of the judgment of Cooke CJ determines the question of ownership of the land. This Court cannot, as has been correctly argued by Mr Hakwa, re-open that question. I am of the view however, that where there is uncertainty as to the meaning of the judgment, that persons with a sufficient interest can seek declarations as to the meaning of the judgment. I am of the opinion that when Cooke CJ held Obed Toto to be the custom owner, he was owner as representative of the family of Crero Toto. From the evidence that I have heard, I am of the view that Crero Toto requested Obed to be responsible for the management of the property, on behalf of the family.

The applicant has filed affidavits and produced a document which purported to be a will. That document was said to give the interest in the land to the applicant and those he represents. Insofar as the land is concerned, the document could not, in my opinion,

extinguish Obed Toto's rights. I do not therefore, consider it for the purposes of determining the questions which are raised in this case.

In passing, I must say, that I find it difficult to see how, in custom, the head of the family could give his entire custom land to one or some of his children, to the exclusion of others. Such an action appears to me to be inconsistent with the objective of the Constitution. Custom varies from place to place and changes with time and it seems to be generally accepted that the head of the family may give a part of the land to one child, which can then be divided and become the custom land of that child, to the exclusion of others. Custom also recognises joint ownership, where all family members have rights to the whole of the land, subject to rights of use and occupation of land allocated to individuals of families. In the evidence here, there was some suggestion that if land was requested by a brother, then the land would be divided. No such request has been made and the question of whether the land could or should be divided is not one which is before me in this case.

On the evidence before me, I cannot find that any action of Crero Toto, deprived any of his children from custom rights to the land in question.

In view of the matters to which I have referred, I am satisfied of the following -

1. Obed Toto was found to be the custom owner, as representative of the Toto family.
2. The following are members of the Toto family who have rights with respect to the land -

Julie Toto  
Obed Toto  
Nanas Toto  
Serac Toto  
Keleth Toto  
Thele Toto  
Judy Toto  
Jenny Toto  
Tom Toto  
Kwa Toto  
Edward Toto.

The descendants of each of these, together with those named, comprise the custom owner group of the land in question.

3. The land being custom land is held for the benefit of the future generations of the Toto family members referred to in 2. above.
4. Income is earned from the land from tourist activities at Champagne Beach.

## RIGHTS TO INCOME FROM THE LAND.

The type of income in question here, is income which derives from the fact that the land includes the natural feature of Champagne Beach. This feature, which gives the property monetary value, exists, irrespective of the labours or efforts of any members of the family. This being so, it is difficult to see how any one member of the family could be entitled to retain the income for him or herself. It would be otherwise if the income were earned by growing and selling crops or raising cattle.

I have found that Obed Toto is custom owner as representative of the family of the late Crero Toto and this being so, he does not by virtue of being head of the family, have the right to retain the money for his own benefit entirely. He is of course entitled to a share and he is entitled to recoup his expenses which are related to management and care of the property. He would also be entitled to payment for his labour.

The right of others to share in the income, derives from their rights as custom owners of the land. The income however, must be able to be used and as opposed to the land itself, it cannot be kept in perpetuity for future generations. If this were so, the money could never be spent. As to its distribution, there is no evidence which shows any custom rule as to how such distribution should be made. I think that the Court will have to determine this question by deciding what is fair and reasonable in the circumstances of the case.

## THE DECLARATIONS SOUGHT

Mr Hakwa has submitted that the proceedings are inappropriate and the court should decline to make any declarations. He has argued that the Court cannot proceed upon the basis of the liberty reserved to the parties to apply to the court for clarification of the judgment of Cooke CJ. He has argued that John Noel was not a party to the proceedings. As I have found that Obed Toto, in the matter before Cooke CJ, was a representative of the family of Obed Toto, such family members are properly to be treated as parties. John Noel has brought the matter to Court as representative of those family members. It is not necessary for me to decide therefore, whether he was in fact, in his own right, a party to the Supreme Court appeal.

Order 58 rules 1 and 2 of the Rules of the High Court of the Western Pacific gives power to make declarations on Originating Summons. Whilst the rules do not specifically refer to a question of construction arising from a judgment, I think that they are wide enough for the court to do so in some circumstances. A judgment on appeal with respect to custom land is a final order, which effectively establishes once and for all the rights of the persons in whose favour the judgment is given. Rule 1 of Order 58 allows any person claiming to be interested under a deed, will or other written instrument, to apply for the determination of any question of construction arising under the instrument and for a declaration of the rights of the person interested. The judgment and any order made thereunder, has the effect of establishing the rights of those in whose favour the judgment is made. It is therefore appropriate, where a question of construction of the judgment arises, for persons interested to seek declarations by this procedure.

The first declaration sought is as follows -

1. The Applicant is the custom owner of Land Title 553, also called Champagne Beach pursuant to Land Appeal Case L6/85.

I do not think that I can make a declaration in these terms. What I think was really being sought was a determination that the applicant and those whom he represents, are by virtue of the judgment of Cooke CJ, members of the group of custom owners of the land. I have found that Obed Toto was declared by Cooke CJ, to be custom owner as representative of the family of Crero Toto, rather than in his own right. In view of the findings I have made, I am prepared to make a declaration limited in that way.

The second declaration sought was -

2. The Applicant is equally entitled to any or all benefits arising from any or all activities connected with or conducted on or from the said land.

This declaration requires a determination as to how income earned from the property should be distributed. The applicant again seeks this declaration as representative of the descendants of the late Crero Toto.

There must, with respect to income earned from the land, be some limit to its distribution. Money cannot be held in perpetuity for future generations. If it was, it could never be distributed or used at all. In making any declaration of the kind sought, I think that it is important to try to establish some basis for the distribution not only of the money which has been paid by the visiting cruise ships, but to try to assist the parties for the future, so that they will hopefully, not be coming back to court every time there is a question about the disbursement of funds.

I think that Cooke CJ foresaw that there might be problems with the management of the property following his decision. Often, it seems that when custom land cases are decided upon appeal, there are many loose ends left, as to the actual use of the land, the manner in which it might from time to time be distributed and of course the use of income from the land. Generally, the evidence before the court is not sufficient for the court to clearly finalise all the matters which should be decided. The major problem appears to be related to the use of the land itself. Custom will usually mean that the head of the family will be the effective manager of the land. This involves the "right" to decide what areas of land and how much of it can be used for various purposes by family members. I have frequently asked for guidance from those giving evidence about custom, what happens if a request is refused by the head of the family. I did so in this case. I have not received any really helpful answer to that question. I will return to the question of the "benefits arising from any or all activities connected with or conducted on or from the said land".

As a general proposition, the members of the custom group who are the owners of the land, must be entitled to the benefits arising from the land. Obviously, there must be some limit, to what any individual can benefit. Recognising that custom dictates that the head of the family or custom group is the person from whom benefits must be sought, it is still the

position that that person is not entitled to keep the benefits for him or herself to the exclusion of others. At the same time, I do not think that the courts should, or can as a matter of law, simply sweep custom rules aside. The intrusion of money into the area of custom raises new considerations however. Custom is sometimes said to be something that has existed from time immemorial. The use and distribution of money by custom owners could not be said to be something that has given rise to a custom from time immemorial. Accordingly I think that it is open for the Supreme Court to establish some principles with regard to the use of money, but that must be done by reference in some way to custom rules.

Those who claim an entitlement to money earned from the property must establish that they are in custom entitled to benefits from the land. That is, they must be members of the group of custom owners of the land. In this case they must be descendants of the late Crero Toto. The actual members of the custom group in this case, are easily identifiable. They commence with the children of Crero Toto and extend to their children. In some cases the group will be larger, will not necessarily be members of the one family and they will perhaps be widely dispersed. That is not the case here.

Having identified those who are generally entitled to the benefits of the land, it will, in the case of money be necessary to apply some restriction as to how widely it is to be distributed. If it were to be distributed too widely, it may well be of no practical use to anyone. The matter of the restriction of distribution of money may well differ from case to case.

As a starting point, I think that the levels of descendants should be identified. That is simple in this case. Obed Toto is the first born male child of Crero Toto and custom determines that he is head of the family. I leave aside from this consideration, the question of the Constitutional provisions against discrimination on the ground of sex. Crero Toto had become the sole descendant of the original custom owner, at his level of descent. Therefore, the next level is confined to his children alone. All the children of Crero Toto, whether to his first wife or third wife, are upon the same level of descent. The next level is their children. In view of what I believe to be the appropriate solution to the problem in this case, it is not necessary for me to identify the grandchildren of Crero Toto. In the present circumstances, I think that it is appropriate, with respect to the distribution of income from the land, to go no further than the highest level of descent. To suggest that monies should be further distributed than this, would I think, have the effect of rendering the profits from the land practically worthless. Accordingly, as a general proposition, I think that there should be a distribution of the income, amongst the highest level of descendants, the children of the late Crero Toto. It is not necessary to consider the situation where a member of that level of descent had died leaving survivors. That is not the case here. If it were, I think that generally, the share to which any such person would have been entitled, should go to the surviving children of any such person. There may of course, be other considerations which would affect the situation in any particular case.

The next matter to determine, is the proportion of distribution to which each person on the same level of descent is entitled. I do not think that there is any justification for distinguishing between members of this group. They are all entitled equally in my opinion.

The fact that custom appears to distinguish between male and female descendants is resolved by the view that I have taken with respect to the effect of the fundamental rights provision of the Constitution. There is no basis for according female children a lesser entitlement than male children.

The view to which I have come therefore, is that with respect to income derived from the property itself, all the children of Crero Toto are entitled to an equal share. This applies to other benefits arising from the land as well.

I must make it clear, that I am not suggesting that income which is earned as a result of the work or investment of an individual, with respect to the land, must be shared amongst others. If, for example, a member of the custom group grew crops or raised cattle, that member would be entitled to retain for him or herself the income of such efforts. I think that this is in accord with custom, fairness and common sense. I am dealing here with income which is earned as a consequence of the very nature of the land itself. Income derived from tourism, by virtue of the very nature of the land itself is very different from income earned from farming. Income earned from logging of the land would fall into the same category as income earned from tourism as it is in this case. It is not appropriate that any one member of the family should be entitled to retain for his or herself, such income.

The position may well be different, where for example, an individual family member was granted the exclusive right to a portion of the land and developed it as tourist resort. A person is not to be deprived of that income which they generate from their own ideas and labours. The incentive to develop must not be stifled. Family members equally ought not be able to sit back and derive the benefits of the work and initiative of others.

The situation here in fact is, that Obed Toto is effectively the only family member in possession of the land. He has presumably incurred expenses and worked on the land, in a way that is related to the income which is earned from tourism. He is entitled to reimbursement for this. I think that this is recognised to some extent by the fact that the third declaration sought relates to an accounting as to profits with respect to the land from the date of the judgement of Cooke CJ in the appeal.

Accordingly, I am prepared to make a declaration along the lines of that sought as the second declaration. It will not be as broad as that sought, because it will be confined in accordance with the matters to which I have referred. Insofar as the income of the property is concerned, any distribution will be limited to the children of Crero Toto. It will be subject to deduction by Obed Toto, of properly incurred expenses and remuneration for his personal labour.

It will not always be the situation where money earned with respect to the land will be distributed amongst those entitled. It may be that it is appropriate for the money to be spent upon improvements of the facilities at the land and upon the amenity of the area. What I have decided is that in the absence of any plans or proposals for the expenditure of the money so far received for the purpose of improvements of the land for the benefit of all concerned, all the children of Crero Toto have equal rights with respect to the money



which has been paid for permitting cruise ships to visit the beach. The question of the management of the land will be considered later in this judgment.

As far as actual use or occupation of the land by other family members is concerned, Obed Toto has suggested that in custom, by taking the action they have, other family members must resolve their differences with him in accordance with custom, before they will be given any further rights to use or occupation of the land. I accept that such a course is required in custom. The difficulty it presents is as to what the position would be if there was further dispute. I do not think that I can, by this judgment, resolve this difficulty. The Court, is I think, required to recognise custom insofar as it is not in conflict with the law. Here, the very rights to which persons are entitled arise as a consequence of custom. This cannot mean however, that a person can be prevented from seeking to establish or enforce their rights by recourse to law in the courts. Any requirement of custom which was regarded as unreasonable, would not present a barrier to the courts making an order as to use and occupation of custom land. This would be in accord with both the law and custom, as I understand it.

It is clear from the evidence here, that Crero Toto regarded Obed Toto as the person who was to care for and manage the land. This decision does not alter that arrangement. It may well be however, that there are circumstances in which a court would alter the arrangements for control and management of custom land. In fact I am asked to decide that issue as a consequence of the declaration sought under paragraph 4. of the Originating Summons. I simply point out that the matters I have determined so far are based upon the assumption that Obed Toto has been given the responsibility for the management of the land until this time.

My finding is that there is a present right for each of the children of the late Crero Toto to an equal share of the monies paid by the cruise ship companies and to the money paid for entry fees by those visiting by road. Proper management might suggest from time to time that there should not be a distribution of any or all of the money so earned, but that it should be used for improvements and further development.

I must point out, that my decision regarding distribution of income, relates to the present situation. Circumstances will change in the future and different people will become entitled to distribution of income. This is a matter which should be decided by the parties in determining the future management and control of the land. I do not know what proposals the parties have for the future, but they could involve the establishment of a committee, a trust or even a corporation. Decisions must be made by someone or some group and the parties

The third declaration sought is -

3. The Applicant is entitled to an account as to profits since the date of decision of Land Appeal Case L6/85.

It follows from what I have said above, that it is appropriate for a declaration along the lines of that sought, to be given. This is in the interest of all parties. As I have pointed out, Obed Toto is entitled to reimbursement for his expenditure and his labour.

The fourth declaration sought is -

4. A declaration as to the appropriate management and financial control of the said land pursuant Land Appeal Case L6/85.

I do not think that I can give a declaration along these lines. There is no actual proposal before the court, by either party as to how this should be done. It is not, in the circumstances appropriate for the Court to determine how the property should be managed. There would need to be proper evidence given as to suggested management proposals, before a court could presume to be making such orders. I do not rule out, that if there was evidence which indicated that orders as to management were necessary and desirable and that there was proper evidence as to how this might be done, a court may well be in a position to make such orders. I do not think, in the absence of evidence of the kind to which I have referred, that it would be appropriate for me to do so in this case. Following my decision it will be necessary for the parties to give fair consideration to proposals for the future and I would hope that this can be resolved between the parties. Mr Malcolm, who appeared for the Applicants before me, has indicated in his opening submissions that there are some proposals which the parties will discuss, depending upon my decision. I trust that this will be done, in the light of what I have said and bearing in the mind the orders which I will make in this case. It would be a great pity if there could not be reached agreement over this land, which includes Champagne Beach. This property could be described as an asset not only to the custom owners, but to the country. It has intrinsic value from its very nature and is widely known in Vanuatu and beyond. Nothing that I have said can be taken as suggesting that the area is not properly managed, so as to permit any interference with the ownership or operation of the land by the custom owners. It is they who should be able to properly decide what should be the use to which this land is put, having regard to the proper interests of those entitled as custom owners. Custom ownership is of course, not only concerned with the financial benefits of the land. It is concerned with the tradition and culture of the people themselves. This must continue to be recognised.

As a result of the judgment in this case, it will be necessary for the parties to consult with one another to properly decide how it is that they will manage the property. According to custom, Mr Obed Toto, as head of the family must be involved in any such discussions. If there is disagreement, the matter will probably need to be brought back to Court. It is to be hoped that this can be avoided. There should first be attempts made to resolve any difficulties by applying custom rules. If this is not done, the Court may refuse to hear any further applications until it is satisfied that there has been a proper attempt to apply custom rules. Mr Obed Toto, could not unreasonably refuse to participate in any attempts to settle the family differences, according to custom. What is required here, is that all parties act reasonably for the interests of the family and for their future generations. Those who make requests should not be unreasonable and requests properly and reasonably made should not be refused. I understand from the evidence that this is in

accordance with custom. Obed Toto is in the position of a manager and he is in that position and in custom, entitled to respect.

I think that if all the parties act reasonably, they will be able to plan for the management and financial control of the property, without the court making orders as to what is to be done. In deciding the manner in which the property will be used, all the children of Crero Toto are, I find, entitled to an equal say. If any of them do not wish to exercise their rights, that is a matter for them. If those entitled are happy to follow custom and leave the decisions to Obed Toto, then that is also a matter for them. If the parties were of the view that custom gave the right to the first born son to have the first choice with respect to where he lived on the property and as to the position he held with respect to the management of the land was concerned, then it would be appropriate to permit this to be done.

Some suggestion has been made that it is the custom that if one of the Obed's brothers requested land and was given it by Obed, then the land would be divided and that part of the land would become the custom land of that brother and none of the other family members would in future, have any rights to that land. I understand that that may be the custom rule in some areas. On the other hand, custom in some places recognises a type of joint ownership of land where the actual portions occupied and used by some of the custom owners are redistributed from time to time, according to current needs. The evidence in this case is not certain enough for me to determine whether the true custom with respect to this land would require its permanent division. As a general proposition, I do not understand the Constitution to have contemplated that land would, as time went on, be divided into parcels of land which ever decreased in size. I think that in the absence of compelling evidence to the contrary, the presumption should be that the land is to be retained as one area, so as to be adequately preserved for the benefit of future generations.

Historically, division may not have caused a problem as it was no doubt possible for the areas of custom land to be extended as the population grew and areas of land which did not have custom owners could be taken over by new owners. It seems to me that this is no longer possible as I think that the Constitution presumes that all the land in Vanuatu has or has had custom owners at some time. Therefore, except pursuant to the provisions for redistribution of land which are in the Constitution, custom owners today, establish their title to land by establishing that the land has been theirs for generations, and not by claiming it by recent acquisition. It may be theoretically possible to establish that land has no custom owners and that title to it may be acquired now, in accordance with local custom. I think that it is most likely too late for this to occur however.

Upon the question of the application for a direction as to the management and financial control of the property, as I have said, there is not sufficient material before the Court for me to make any such orders. Neither do I think that it has been established that it is too late for the parties to be able to arrive at a proper decision as to the management and control of the land. I hope that they will be able to decide upon this question themselves. It must be remembered that I have decided that the judgment of Cooke CJ means that Obed Toto is the representative of the descendants of Crero Toto and he does not own the property either in his own right, or for the benefit of his descendants alone.

I add, that the property in question here is of such a nature that it would be desirable to keep it intact and not to have it permanently divided into individual holdings. I would recommend to the parties that they consider seeking advice as to the future management and development of this unique property. This would be to the great advantage of all those presently with rights over the property and for the future generations.

For the reasons I have set out, I will not make any declaration with respect to the management and financial control of the land.

#### SUMMARY

1. The effect of the decision of Cooke CJ in Land Appeal Case L6/85 is that Obed Toto is the named custom owner of the land described at pages 8 and 9 of the judgment in that case, as representative of the descendants of the late Crero Toto.
2. All of the children of the late Crero Toto have equal rights as joint custom owners of the land referred to.
3. All of the children of the late Crero Toto are entitled to share equally in the profits derived from payments made on behalf of cruise ships being granted rights to visit the land known as Champagne Beach. (Nothing in this judgment affects the entitlements of Philip Pasvu with respect to the land declared by Cooke CJ to be owned by him.)
4. Following an accounting by Obed Toto for the monies received by him with respect to the land at Champagne Beach and as to his reasonable expenses incurred with respect to his management of the property, each of the children of the late Crero Toto are entitled to demand and be paid an equal share of the profits from the land. The money received to which I refer, is what I describe as unearned income. This is not strictly a correct description, because the income is earned not solely because of the intrinsic nature of the land. Access must be provided and the area must be attended and cleaned, so as to make it a desirable place to attend. With respect to visits by cruise ships, there must be negotiations with the operators and so some effort is needed for the income to be earned. I use the expression to distinguish income received as it has been here, from income earned as a result of the effort of an individual or individuals, such as the raising of cattle or the growing of crops.
5. Consideration should be given by the children of Crero Toto deceased as to the future management of the land and the use of the monies which have been received and will be received in the future.

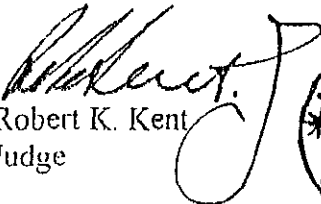
#### DECLARATIONS

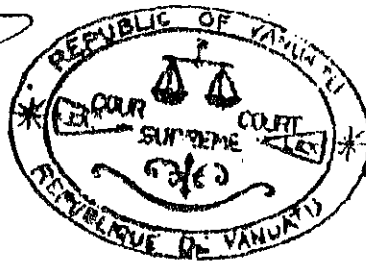
I propose to make the following declarations, subject to what counsel may have to say as to the precise form of the declarations -

1. I declare that Obed Toto is custom owner of the land found in Land Case L6/85 to be his, as representative of the descendants of Crero Toto deceased.
2. The Applicant, John Noel and those who he represents, are by reason of the decision in Land Appeal Case L6/85, custom owners of the land.
3. The children of the late Crero Toto are entitled to share equally in the "unearned income" from the land.
4. The applicant is entitled to an account as to the profits from the land since the date of the decision in Land Appeal Case L6/85.

As to the final form of the declarations, I will give counsel for the parties 7 days<sup>2</sup> from today to make further brief submissions and the final declarations will then be incorporated in this judgment.

As to the management of the land, I think that the parties should quickly make their peace with one another. It may be that that will involve some custom arrangement between them. I think that all parties should act reasonably with respect to this matter, so that any problems as to future management can be avoided. The parties have indicated that they have some proposals for the future and I trust that they can reach agreement. By them all working together in a spirit of co-operation, they will all benefit and derive full satisfaction from their custom land.

  
Robert K. Kent  
Judge



19/4/95

<sup>2</sup>As at the date of the revision of the original judgment, the parties have not submitted their views as to the final form of the declarations but have indicated that they will do so