IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction) **Civil Case No. 220 of 2012**

BETWEEN: FRANK ISHMAEL
Claimant

AND: KARL KALSEV
First Defendant

AND: KALMELU MARIMELU, KALTU IVOKY ATAVIAU,MORRIS TONGLEOMANU and EDWARD MATOKOALE
Second Defendants

AND: GOODIES LIMITED
Third Defendant

AND: THE DIRECTOR OF LAND RECORDS
Fourth Defendant

AND: REPUBLIC OF VANUATU
Fifth Defendant

AND: ANDREW POPOVI
Sixth Defendant

AND: TAMARA LONGWAH LEONG and JOHN TATAI MALAS
Seventh Defendants

Hearing: ***11 June 2014***
Further submissions 17 June and 4 July 2014
Judgment: ***14 July 2014***
Before: ***Justice Stephen Harrop***
Appearances: ***John Timakata for the Claimant***
Robert Sugden for the First, Second and Third Defendants
Christine Lahua (SLO) for the Fourth and Fifth Defendants
No appearance for the Sixth Defendant (John Malcolm - excused)
Willie Daniel for the Seventh Defendants

JUDGMENT OF JUSTICE SM HARROP

AS TO APPLICATION BY THE FIRST, SECOND AND THIRD DEFENDANTS TO STRIKE OUT THE WHOLE OF THE CLAIM

Introduction

1. This is a land case. Mr Ishmael says that he has been permanently residing in Tanoliu Village since September 1976 having been invited back to what he claims is his family's customary land by the then Chief, Chief Daniel Popovi. He says he has ever since then been in occupation, residing, cultivating and living off the land, and continuing to assert his claim to custom ownership. Mr Ishmael filed a notice of dispute in early 2006 and, along with eight other claimants, was a party to a customary land dispute hearing of Customary Land Case 01 of 2006 before the Sunae Joint Village Land Tribunal. He was unsuccessful in the tribunal's decision issued on the 9 January 2008, which declared Chief Andrew Popovi to be the "Custodian" of the Undaone and Esema land, but also recognized the rights of consultation of "family Popovi, Pakoa, Harry mo Minnie".

2. Mr Ishmael appealed to the Area Land Tribunal but the appeal has still, some six and a half years after the decision, not yet been heard, indeed I understand no hearing date has yet been allocated. No evidence has been adduced as to why there has been such a delay or as to what efforts have been made to advance determination of the appeal.

3. On 27 April 2001 Mr Kalsev obtained a leasehold title from the second defendants who say they are the undisputed custom owners of the land (the Esema land) which contains the leased land. That title, 12/0522/001 ("the lease"), at least as to part, relates to the land which Mr Ishmael and others associated with him, have been occupying.

4. Mr Ishmael claims in his amended claim filed on 28 June 2013 that Mr Kalsev obtained the lease by mistake and/or fraud. The fraud allegedly involved was collusion between the first and second defendants in knowingly falsely representing the second defendants as custom owners to the fourth and fifth defendants, resulting in the wrongful registration of the lease.

5. In April 2008 Mr Kalsev transferred the lease to the third defendant, Goodies Limited, for consideration. There is no suggestion that Goodies Limited was aware of any prior mistake

or fraud but Mr Ishmael alleges it was aware at all material times of his occupation of part of the relevant land.

6. The pleaded particulars of mistake maybe summarised as criticising the fourth and fifth defendants for not complying with their obligations under sections 8 (1) (b), 8 (2) (b) and 8 (2) (c) of the Land Reform Act [Cap 123]. The claimant alleges that because there was a dispute as to custom ownership the Minister of Lands should have been registered as lessor under section 8 and that the Minister ought to have consulted the disputing parties before any lease was granted.

7. The orders sought by way of relief by Mr Ishmael as regards the first and second defendants are: (a) a declaration that the first and second defendants had knowledge of and/or caused or contributed to the fraud and/or mistake, in consequence of which the rectification of leasehold title 12/0522/001 is sought; and (b) "an order for rectification in accordance with the Land Reform Act so as to cause the Minister to have management and control and to have power in accordance with s. 8 of the Land Reform Act."

8. As regards the third defendant , an order is sought declaring that as regards the claimant and his family the third defendant "obtained and acquired Lease Hold (sic) Title No: 12/0522/001 with overriding interest of the Claimant in accordance with s. 17 (g) of the Land Lease (sic) Act."

9. The first, second and third defendants deny the claims have any merit. They say the claimant is from Tongoa and has been a squatter on the land since (only) early 2003 when he was evicted from Tanoliu Village. Ever since, in their view, he and his relatives have been trespassers and have built makeshift accommodation and used the property for agricultural purposes without any right to do so. They further say that the seventh defendants, who have been joined to the proceeding, are illegally occupying part of the leased land after the claimant invited them there. In one sworn statement it is said that total number of trespassers has increased from about 20 in 2003 to about 80. Despite the fact that there have been notices to quit the land, issued both in writing and orally, since the beginning of the illegal occupation, the claimant and the seventh defendants remain in occupation and they are using the land for commercial purposes. Losses have been caused to the second defendants as lessors and to the third defendant as current lessee. It wishes to develop the land and is being

thwarted by the illegal occupation. As result, in August 2013 the second and third defendants issued counterclaims.

10. The sixth defendant has often in the intituling been referred to as Chief Andrew Popovi but his correct name is Andrew Kalontas. He was joined as a party because he is Chief of the area in which the disputed land lies and as noted above is the declared "Custodian" of the area containing the occupied land.

The application to strike out the claim

11. The first, second and third defendants have applied for the whole of claim to be struck out.

12. As regards the claim against the first and second defendants they say in their amended application dated 2 May 2014 that:

    (a) The claimant is seeking orders for deletion of the names of the current lessors of the registered lease and substitution of the Ministry of Lands as lessor.
    (b) The claimant seeks these orders pursuant to the Court's power given by s. 100(1) of the Land Leases Act.
    (c) The Court does not have power pursuant to s. 100 (1) to order that the name of the lessor of a registered lease be changed.

13. As regards the claim against the third defendant, the applicants contend that s. 17 (g) of the Land Leases Act does not protect the claimant's occupation of the land because such occupation must be, but here is not, pursuant to a legal right. They add that the claim would have to fail even if there were a legal right, because the claimant is claiming an *indefinite* right to occupy the land, so the lease would not be merely subject to the right but extinguished by it.

14. The strike out application is opposed by the claimant and seventh defendants. Mr Ishmael accepts the defendants' description of what he is seeking against the first and second defendants but submits that the Court does have the power pursuant to s. 100 (1) to order that the name of the registered lessor be changed , and that it should , after a trial, exercise it here.

15. As to the third defendant, Mr Ishmael argues that his right of occupation is founded on his claim to custom ownership of the Esema land within which the leased land is situated. That is a right of occupation which is recognised in law and which has yet to be finally determined by the customary land tribunal system since his appeal has not yet been heard, let alone decided. That, he submits, is a qualifying "right" to which the third defendant's holding of the lease is subject by virtue of s. 17(g).

Jurisdiction and approach to this application

16. Although there is no rule in the Civil Procedure Rules expressly providing for striking out of a statement of case which does not disclose a reasonable claim, there is no doubt the power exists, in the inherent jurisdiction of the Court. See for example: *Iririki Holdings v Ascension Ltd* [2007] VUCA 13 at [17], and see generally *Jenshel on Civil Court Practice in Vanuatu* at paragraph [4.2.1]. The Court does not evaluate evidence but proceeds on the assumption that every factual allegation is true or capable of proof. The power is to be sparingly exercised and only in a clear case. The claimant's case must be so clearly untenable that it cannot possibly succeed: *Electricity Corp Ltd v Geothermal Energy Ltd* [1992] 2 NZLR 641 (cited with approval in the *Iririki Holdings* case). Unless the statement of case is irremediable, the usual order will be to strike out but grant leave to replead.

17. Mr Sugden contends, and I accept, that I am entitled to take into account the sworn evidence before the Court, at least to the extent that it is not inconsistent with the allegations in the amended claim.

Issues

18. There are two issues I need to determine:

    1. In relation to the claim against the first and second defendants, does the claimant, on proof of all the pleaded facts, have a tenable claim to obtain an order for rectification by substituting the Minister of Lands for the second defendants as lessor (so as to cause him to have management and control of the land and related powers under s. 8 of Land Reform Act)?

2. In relation to the claim against the third defendant, does Mr Ishmael have a tenable claim to sufficient "rights" associated with his "actual occupation" of the land to qualify for the protection in s. 17 (g) of the Land Leases Act?

19. On behalf of the fourth and fifth defendants Ms Lahua said that they would abide the orders of the Court and did not wish to make any particular submission. Mr Daniel for the seventh defendants supports what Mr Timakata has said in opposition to the strike out application. Mr Malcolm was excused from attending the hearing because his client, the sixth defendant, also abides the decision of the Court.

Issue One: in relation to the claim against the first and second defendants, does the claimant have a tenable claim to an order for rectification under s. 100(1) of the Land Leases Act to the effect that the Minister of Lands be substituted as lessor?

20. I record that although paragraph 16 (b) of the prayer for relief in the amended claim does not expressly refer to s. 100 (1) of the Land Leases Act, Mr Timakata confirmed at the hearing that that is statutory provision on which the claimant relies as the basis for changing the name of the lessor to the Minister of Lands.

21. Mr Sugden's main point is that it is simply not possible for the Court to rectify the register by amending the name of the lessor because the Land Leases Register has not included any place for identifying the lessor. He points out that s. 4 of the Act mandates that the Register shall be divided into three sections in respect of each lease:

(a) The property section, containing a brief description of the lease together with particulars of its appurtenances;

(b) the proprietorship section containing the name, postal address in Vanuatu of the proprietor and note of any caution or restriction affecting his right of disposition;

(c) The encumbrances section containing a note of every encumbrance affecting the lease required by the Act or any law to be registered.

22. Section 1 of the Act defines "lessee" as meaning the proprietor of a lease or his successor in title. Proprietor is also defined to mean "(a) in to relation to a registered lease the person

named in the register as the proprietor thereof". Accordingly the lessor is the proprietor of the land and the lessee is the proprietor of the lease.

23. Mr Sugden referred me to the Court of Appeal decision in *Ratua Development Limited v Ndai [2007] VUCA 28* in which the Court of Appeal discussed at some length the land leases system in Vanuatu. At paragraph 25, it said*: "It is self-evident from these provisions that the persons registered are the proprietors of the leasehold estate in land, that is, the lessees. The Act does not provide for registration of the interests of custom owners of land (most custom land in Vanuatu is not even subject to leases). Nor does it in any way seek to regulate the custom ownership of land"*.

24. In paragraph 26 the Court of Appeal went on: *"There is indeed no specific place for the identification of lessors in the register. Although we assume that their names are recorded as part of the brief description of lease and the property section registered, it is clear that the property section is intended to record and identify the details of the lease not the lessors. It follows that the Lands Leases Register does not purport to and does not declare the custom ownership of the land subject to a registered lease. There is no Torrens system in respect of those to whom the land belongs, namely the custom owners"*.

25. As Mr Sugden put it, the claimant here seeks pursuant s. 100 (1) to have the Court record on the Register the symptoms of a dispute to custom ownership within the registered lease by naming the Minister as lessor. This is contrary, he submits, to the whole purpose of the Act which is to insulate the Register from any such disputes. In any event it is not something that can be contemplated under s. 100 (1) because the name of the lessor is not a part of the Register and s. 100 only empowers the Court to rectify the Register.

26. Mr Timakata's response in his written submissions was brief. He drew my attention to paragraphs 31 to 32 of the Court Appeal judgment in *Ratua* where it said:

"31 That is not to say there is no remedy available to a person claiming to be a custom owner of land in respect which a lease naming someone else as lessor has been or is about to be registered. In a case where the title of the registered proprietor of the leasehold interest is not protected by s. 100 (2) of the Act, a custom owner claiming to be the party who should be

the lessor may have available to him a remedy by way of cancellation of the registration of lease which shows another party as the lessor. In proceedings to enforce such a remedy, the Court would have power to make interim orders having an effect similar to a caution.

"32 In cases where the title of the registered proprietor of the leasehold interest is protected by s. 100 (2) of the Act, the lease cannot be cancelled, but rectification could nonetheless be ordered under s. (100) (1) by requiring the removal of person wrongly named as lessor, and the substitution of the true custom owner."

27. Mr Timakata submitted that this important land case should not be dealt with on a striking out application and that because that Mr Ishmael has lodged an appeal against the village land tribunal decision and done what he can to advance his claim to be a custom owner, the kind of rectification the Court of Appeal is talking about in paragraph 32 should remain open to him. Mr Daniel reinforced this point in his oral submissions.

Discussion and Decision on Issue One

28. I am satisfied that Mr Sugden's submissions must be upheld and those of Mr Timakata (and Mr Daniel) rejected.

29. It is important to focus on precisely what is being sought from the Court in the amended claim. The first order sought is merely by way of declaration and in isolation is of no particular account or value to the claimant. In any event, this application proceeds on the basis of assumption that the first and second defendants were indeed involved in the fraud or mistake which is the essence of the declaration the claimant seeks.

30. It is the claim for an order for rectification, seeking to invoke the Court's s. 100(1) jurisdiction, which is the substance of the claim against the first and second defendants. There is however no application for *Mr Ishmael's* name to be included as lessor so one might well conclude that he personally has no right or standing to ask for an order that the Minister of Lands be recorded as lessor. The Minister is not the applicant for rectification.

31. In any event, Mr Ishmael does not appear to have a sufficient interest in the land to apply to the Court for the exercise of its s. 100(1) jurisdiction. The Court of Appeal judgment in *Naflak Teufi Ltd v Kalsakau* [2005] VUCA 15 was not mentioned by counsel but I came across it when checking the Court's striking out jurisdiction. There the Court needed to decide the fundamental question of who may make an application for rectification or who may invoke s100 of the Land Leases Act. It noted the answer was not immediately apparent "as the section itself does not speak about Applicants or Claimants; it is purely an empowering section for the Supreme Court".

32. The Court went on (at page 5) :

"That is not to say that no one may apply to invoke section 100 outside the Court itself.

*We are satisfied on a consideration of the object and purpose of the section that, at the very least, a person seeking to invoke section 100 must include a person who has an interest in the register entry sought to be rectified and which it is claimed was registered through a mistake or fraud. Not only must there be proof of mistake or fraud but also that such mistake or fraud caused the entry to be registered. Furthermore it has to be proved that the mistake or fraud was known to the registered proprietor of the interest sought to be challenged or was of such a nature and quality that it would have been obvious to the registered proprietor had he not shut his eyes to the obvious or, where the registered proprietor himself caused such omission, fraud or mistake or substantially contributed to it by his own act, neglect or default. We use the word '**interest**' in the widest possible sense although accepting it may have in appropriate circumstances be distinguished from a mere busy body.*

We are satisfied from the pleadings that the Appellants in this case had a legitimate interest to seek rectification of the register pursuant to section 100 of the Land Leases Act [CAP 163]. Not only was the Appellants (sic) the holder of a registered negotiator's certificate in respect of the disputed land, but also, they were the Applicant first in time to seek a lease over the subject land. Plainly the Appellants were a competing Applicant for the land in question and on any sensible test, have a sufficient interest to seek rectification of the First Respondent's registration. We do not and can not put it any higher than that. As it is not relevant for the appeal we make no observation as to the quality of the allegations of mistake and fraud which caused the First Respondent to become registered as the lessee of the land in dispute.

*In light of the foregoing and our interpretation of section 100 of the Land Leases Act, we are satisfied that an Applicant for rectification of a register does not have to be able to show a right to be registered by way of substitution. In other words, a successful application pursuant to section 100 of the Land Leases Act can lead to rectification by way of cancellation or amendment of an entry in the register **not** necessarily in the registration of the person who initiates the challenge. The suggestion in our view that an Applicant for rectification must have a personal or legal right to be registered in place of the interest being challenged places an unwarranted gloss on the plain words of section 100.*

*In similar vein, the question of whether or not the Minister had the power to grant the First Respondent the lease over the disputed land asks the wrong question. No one doubts the right or power of the Minister to grant the First Respondent the lease over the disputed land but, that is not the issue in the case nor is it raised by section 100. The issue is **not** the power of the Minister to grant the lease to the First Respondent (which is accepted) rather, the issue is whether or not the First Respondent's registration was obtained as a result of fraud or mistake which may be raised by an applicant with a legitimate interest.*

The Appellants in all the circumstances must be treated as having a sufficient interest. The allegations made, if proved, could amount to fraud or mistake which might justify cancellation of the current registration in favour of the First Respondent. There is accordingly an issue to try and the proceedings should not have been pre-emptively struck out."

33. The appellants in *Naflak Teufi* were in a clearly distinguishable position from Mr Ishmael; they both held a registered negotiator's certificate and had been first in time to seek a lease over the land. That led the Court to find they had legitimate and sufficient interest in the land to seek rectification. By contrast, Mr Ishmael at present is not recognized as having *any* legitimate interest in the land, and that position is not, and cannot be, something which may change in any way, no matter how successful he might be in this proceeding. It is clear from the Court of Appeal's comments that it is not a precondition to success that he show a right to be registered in substitution, but he does need to show he has a legitimate interest in seeking rectification.

34 If Mr Ishmael were the undisputed custom owner *he may then* - but only then - in accordance with the Court of Appeal's obiter dicta in paragraphs 31 and 32 in *Ratua* (it was obiter dicta because the Court was dealing with a case concerning the liability for placement of a caution) have the opportunity to be substituted as lessor. But Mr Ishmael is not yet, and may never be, declared as the true custom owner. Indeed it might be said that in a sense he is something *less* than a claimed custom owner because the decision of the joint village land tribunal (which is the declaration of the true custom ownership position unless and until there is a successful appeal) is to the effect that he is an *unsuccessful* such claimant. In these circumstances he neither can expect to have his name placed on the Register as lessor, or at least not at present, nor does he have a legitimate basis to be asking the Court for a s100 order.

35. In any event, that is not what Mr Ishmael seeks. There is no basis on which the Court may order that the Minister of Lands be noted as lessor by using its power under s. 100(1). With due respect to the Court of Appeal, it must be questionable whether what was contemplated in paragraph of 32 of the *Ratua* judgment could actually be achieved under s. (100) (1). That is for the reason advanced by Mr Sugden, namely that it does not appear that amendment of the Register can extend to changing the name of the lessor because that is not something which forms part of the Register. This point would not have been fully argued before the Court of Appeal as it has been before me since that was not the focus of its decision.

36. As the Court of Appeal emphasised, the Register is not concerned with determination or identification of the custom owner or, it may be added, with the identity of the lessor. If Mr Ishmael is in future declared as custom owner he will have to consider how he can deal with what has occurred in relation to his custom land prior to that point. It is assumed here that the first and second defendants acted fraudulently, but in his claim the claimant effectively accepts that the third defendant is a purchaser of the lease in good faith and for proper consideration without notice of any fraud or mistake. That means on the face of it, under s. 100(2), that the registration of the transfer to it cannot be cancelled or in any way amended so as to adversely affect its title. Whether Mr Ishmael could in some way step in and acquire the benefits of being lessor in relation to its lease, perhaps even retrospectively, is an issue which would then arise. But it does not arise now because he is not a declared custom owner and in any event he is not seeking to have himself, but rather the Minister of Lands, noted as lessor

37. Mr Ishmael contends that the Minister should have stepped in and acted pursuant to the Land Reform Act. If that claim has merit, as to which I make no comment, then it ought to be pursued as a judicial review claim based his omission to do so. It has no place in a claim for relief under s. 100(1) of the Land Leases Act. If such a claim were launched the Minister would be a defendant. In passing , I note that despite the claimant seeking an order that the Minister of Lands be substituted as lessor, he has not joined him as a party to this case; surely the Minister is entitled to be heard on an application seeking an order that he take over control of custom land?

38. In summary, if he has indeed been the victim of fraud or mistake as he claims (and as is assumed for present purposes) to have been, then Mr Ishmael's proper remedy is not the one he seeks against the first and second defendants in this claim. The claim for rectification of the Register to change the name of the lessor to the Minister of Lands is misconceived and simply not available in law.

39. Returning to the applicable test on a striking out application, I am satisfied that this is one of those clear cases where that must occur : Mr Ishmael's pleaded claim against the first and second defendants cannot possibly succeed. Nor could repleading save the statement of case. In short that is because the wrong he seeks to right cannot, in law, be remedied in the way he seeks. On top of that, being merely a *claimed* custom owner, he does not have the requisite legitimate interest or standing to apply for rectification under s100.

40. For these reasons the claim against the first and second defendants as set out in the amended claim dated 28 June 2013 is struck out with costs on a standard basis awarded to each of those defendants against the claimant, to be taxed if they cannot be agreed.

Issue Two: Does Mr Ishmael have a tenable argument that he has sufficient "rights" associated with his "actual occupation" so as to make the Third Defendant's holding of its lease subject to his occupation by virtue of s. 17(g) of the Land Leases Act?

41. Mr Timakata submits that the third defendant took and holds its lease subject to the overriding right of Mr Ishmael as a person in actual occupation of land. He relies for this submission on section 17 (g) of the Land Leases Act.

42. Section 17 provides:

> *"**OVERRIDING INTERESTS***
>
> ***17**. Unless the contrary is expressed in the register, the proprietor of a registered lease shall hold such lease subject to such of the following overriding liabilities, rights and interests as may, for the time being, subsist and affect the same, without their being noted on the register-*
>
> > *(a) rights of way, rights of water, easements and profits subsisting at the time of first registration of that lease under this Act;*
> >
> > *(b) natural rights of light, air, water and support;*
> >
> > *(c) rights to sites of trigonometrical stations and navigational aids conferred by any law;*
> >
> > *(d) rights of compulsory acquisition, resumption, entry, search and user conferred by any law;*
> >
> > *(e) the interest of a tenant in possession under a sublease for a term of not more than 3 years or under a periodic tenancy;*
> >
> > *(f) any charge for unpaid rates or other moneys, which, without the condition of registration under this Act, are expressly declared by any law to give rise to a charge on land;*
> >
> > *(g) **the rights of a person in actual occupation of land** save where enquiry is made of such person and the rights are not disclosed; and*
> >
> > *(h) rights and powers relating to electric supply lines, telegraph and telephone lines or poles, pipelines, aqueducts, canals, weirs, dams, roads and ancillary works conferred by any law:*
>
> *Provided that the Director may direct registration of any of the liabilities rights and interests hereinbefore defined in such manner as he may think fit."* (emphasis added)

43. Mr Timakata referred me to the judgment of the Court of Appeal in *William v. William* [2004] VUCA 16 where the Court of Appeal discussed section 17 at some length:

"Section 17 is one of the provisions in Part IV of the Land Leases Act. That part contains the central provisions of the Act which establish and give effect to the notion of indefeasibility of registered titles. Section 14 deals with the effect of registration. It provides that "Subject to the provisions of this Act, the registration of a person as a proprietor of a lease shall vest in that person the leasehold interest..." . Section 15 provides that the rights of a proprietor of a registered interest shall be rights not liable to be defeated

> *"except as provided by this Act, and shall be held... subject... to such of the liabilities, rights and interests as are declared by this Act not to require registration and are subsisting..."*

These sections lead into the provisions of s.17 and give emphasis to the exceptions and limitations to indefeasibility that are provided for in the Act. Section 17 then provides for

> *"overriding liabilities, rights and interests as may, for the time being, subsist and affect the same, without their being noted on the register..."*.

A number of important matters arise from the language of s.17.

First, the liabilities, rights and interests identified in each of the paragraphs (a) to (h) are "overriding". They override liabilities, rights and interests otherwise enjoyed by the proprietor of a registered leased.

Secondly, the liabilities, rights and interests subsist and continue to subsist "without their being noted on the register".

Thirdly, the overriding operation applies to liabilities, rights and interests "as may, for the time being, subsist...".

It is clear from the nature of the liabilities, rights and interests described in paragraphs (c), (d), (f) and (h) that they may subsist indefinitely into the future. Paragraph (e) has within its terms a limit on the duration for which liabilities, rights and interests subsist as overriding once in the absence of a notation on the register. As paragraph (e) is the only paragraph which expresses a limitation on duration, and as other paragraphs may extend indefinitely, we consider paragraph 17(g) should also be construed as being capable of operating indefinitely.

In a particular case, how the provision operates to give overriding effect to the rights it protects will depend on the nature of the rights. For example, and pertinent to this case, if the person ***"in actual occupation of land"*** *is there pursuant to an equitable proprietary interest, the protection will subsist as long as the equitable interest continues. In such a case, the nature and duration of the equity will have to be determined. Where the interest is one acquired through or under a previous proprietor of a registered lease, the interest may continue for as long as the term of the lease.*

Fourthly, paragraph 17(g) applies to the rights of a person ***"in actual occupation of land"****. Whatever the exact limits of this expression, it plainly requires more than being merely in possession of land. At law, a person can be in possession of land although rarely, and sometimes never, setting foot upon it. That can be the situation of a lessee or a sublessee who enters into possession within the meaning of the law under a lease or sublease, and, in this respect, the limitation of s.17(g) to a person* ***"in actual occupation"*** *may be contrasted with the protection given under s.17(e) to a tenant in possession under a sublease for a term of not more than 3 years or under a periodic tenancy.*

We consider the expression ***"actual occupation of land"*** *requires that the person be physically occupying the land, although this does not necessary require that the person be constantly on the land. However, it would require a regular presence and use of the land. For example, a person residing in a house would be in actual occupation of the house and the surrounding curtilage even though that person may be absent to attend a place of employment for part of each day. If a person uses a plot of land as a garden that person is likely to be in actual occupation of the plot although not physically there for every hour of every day, or even every day of the week. The fact of ongoing cultivation and maintenance of the garden would provide the evidence of "actual occupation".*

Depending on the circumstances, the area actually occupied may extend to include areas used periodically as part of crop rotation. In the case of a plantation worked by a person, the person could be in actual occupation of a substantial plantation area, if that area comprises the farming unit conducted by that person. Questions of fact and degree are likely to arise and will need to be determined having regard to all the circumstances of the case, including the nature of the right being asserted and the evidence led in support of it.

Fifthly, s.17(g) operates in respect of ***"rights"****, that is rights recognized by the law of Vanuatu. A person in actual occupation who is a trespasser will have no "rights" which are protected by the provision. A right may arise under custom law, or it might be a right that derives from and through the proprietor of a registered lease or the predecessor in title of that lease. The nature of the rights asserted in this case by the appellants are rights which they say derive from the Ezra William when he was the registered proprietor of the lease.*

Sixthly, if the person in actual occupation claiming under s.17(g) establishes rights which support the occupation, the rights will be ***'overriding'*** *rights unless the proprietor of the registered lease establishes that enquiry was made of that person for an explanation of his or her occupancy, and the rights were not disclosed. The onus of proof as to the making of due enquiry is on the proprietor of the registered lease. To discharge that onus the proprietor would have to establish that a sufficient enquiry was made before the proprietor became the registered proprietor of the lease.*

Seventhly, the evident intent of s.17(g) is to protect on the one hand a person who is in actual occupation of land pursuant to rights recognized by law, and on the other

hand to provide a mechanism for those acquiring leases to protect themselves by making appropriate enquiry and inspection before acquisition. If a person in actual occupation is found on the land, the would-be purchaser, by making enquiry, can have the rights of that person identified so that the consideration for their acquisition can be adjusted, or the proposed acquisition can be abandoned. Alternatively, if the person found in actual occupation does not disclose a right that justifies his or her actual occupation, the would-be purchaser will obtain good title against that person, and will be entitled after registration to recover possession."

44. Relying on these observations Mr Timakata said that it was the claimant's case that (a) he is in actual occupation of the land the subject of these proceedings; and that (b) his actual occupation of the land the subject of these proceedings is through a right and interest recognisable in Vanuatu Law.

45. More particularly Mr Ishmael relies on the pleadings at paragraphs 2 and 6 of the amended claim which state:

> *"2. The claimant has been permanently residing in Tanoliu Village since September 1976 having been invited by the then Chief of Tanoliu, Chief Popovi to return to Esema the custom land boundary in which Tanoliu village is situated.*
>
> *6. The claimant has since 1976 been in permanent occupation of a parcel of land situated adjacent to Tanoliu village and upon which he has been residing, cultivating and living off the land."*

46. He also relies on similar statements in paragraphs 2 and 7 of his sworn statement dated 17 March 2014.

47. Mr Timakata goes on to submit, in the further submissions which I permitted him to file dated 4 July 2014, that Mr Ishmael's right to occupation "is founded in custom law and a right arising under custom law is a right recognizable and protected under section 17 (g)". He says further that it is in accordance with the principles of custom law of Efate and the Shepherds group of islands through ancestral customary governing structure and its customary links that the invitation to return was extended. Accordingly Mr Timakata submits that Mr Ishmael has a right recognisable in law and therefore cannot in the circumstances considered a trespasser or a person who has unlawfully entered into or

intruded upon the land. His customary land tribunal claim is still pending and is a claim in custom asserting an interest in the relevant land.

48. For the third defendant Mr Sugden accepts that Mr Ishmael was in "actual occupation" at the time the third defendant acquired its lease, and that his client was fully aware of it, but he submits that the Court of Appeal has made it clear in the passage quoted above that the only occupation of the land which is protected is occupation pursuant to a *legal right.* Trespassers are expressly said by the Court of Appeal not to be protected.

49. Mr Sugden by inference accepts that had Mr Ishmael's claim to custom ownership been established then he would have such a legal right. However that stage has not been reached and may never be. His claim is disputed and he has been unsuccessful in trying to establish it before the relevant joint village tribunal.

Discussion and Decision on Issue 2

50. After the hearing I sought further submissions from counsel because it seemed to me that in part, in paragraph 2 of his amended claim, Mr Ishmael was relying on his having been invited to reside on the land by the then Chief Daniel Popovi. Mr Sugden however submits that on analysis Mr Ishmael's case as pleaded is not based on the Chief's invitation but rather on the customary claim in respect of which the invitation was merely the precipitating event for Mr Ishmael's move to Tanoliu and for the making of his, so far unsuccessful, claim to custom ownership.

51. Mr Sugden also makes the point that the claim to occupation cannot be based on the original invitation because that would recognize Chief Popovi's superior custom right to Esema land and this is confirmed by Mr Ishmael's current appeal in which he challenges the customary land tribunal decision in favour of Chief Andrew Popovi, the son of Chief Daniel Popovi.

52. I accept Mr Sugden's submissions in this regard and by inference so does Mr Timakata because his most recent submissions show the claim relies on the nature and asserted legitimacy of Mr Ishmael's customary claim, not on the original invitation. Clearly the

invitation is of no account (especially after so many years) unless there is a valid custom ownership right behind it.

53. In my view this issue must be resolved against Mr Ishmael. At present Mr Ishmael has not established *any* kind of right in respect of the land he is occupying. He has a *claim* to such a right but it has not been determined in his favour, indeed it has at the first instance been declined. As a matter of common sense, someone who claims to be the custom owner of land cannot be entitled to occupy it in advance of establishing that claim, at least not without the permission of the declared custom owner.

54. Mr Ishmael does not have the permission of Chief Andrew Popovi who says in paragraph 3 of his sworn statement filed on 4 March 2013:

> *"Frank Ishmael is complaining in respect to this lease despite being a squatter. He has misled this Court in paragraph 2 of his sworn statement; he attended on the land as a squatter in 2006 and he remains a squatter. He has no right to the land, to any gardens or any houses or anything else in the area. He has no ancestral claims to the area. The claimant is from Lumbukuti village in Tongoa Island. Prior to coming to Tanoliu, North Efate he was doing the same thing in Epi Island and got evicted from there by the customary owners. He came from Epi to Tanoliu and simply took over the land."*

55. In short then, I am satisfied that "the rights" of a person in actual occupation of land do not include alleged or claimed rights, only established rights. The right to occupy might arise in respect of a (mere) claimed custom owner if the declared custom owner expressly permitted occupation but clearly Chief Andrew Popovi gives no such permission to Mr Ishmael; any original permission, pursuant to the original invitation, has clearly long been revoked; at any rate Mr Timakata does not suggest his welcome has not been outstayed. To put it bluntly Mr Ishmael is a mere squatter, albeit one with aspirations to be entitled to occupy the land as a declared custom owner.

56. In the end then the present reality is that the third defendant's lease is not subject to *any* overriding right or interest that Mr Ishmael may have unless and until he establishes his right under customary law . That requires him to succeed with his appeal. If and when that

happens he will acquire rights which may include occupation, though there would be an issue as to whether occupation beginning (well) *after* the lease is acquired qualifies for protection under s 17(g) as against the third defendant's title. On that issue, not having had submissions, I make no comment, except to say that it is not merely the acquiring but the *holding* of a lease to which the section 17 liabilities, rights and interests are subject. It may therefore be open to Mr Ishmael to make the current claim after a successful appeal, but until then, in my view, it is not.

57. In the *William* case, the Court of Appeal found that Gladys William may have held a licence from her former husband Ezra arising from arrangements made after their separation which could attract the protection of s17(g). It therefore held the claim ought not to have been struck out and sent the matter back to the Supreme Court for the nature of her right to be explored at trial.

58. Returning to the striking out test, I am satisfied that, by contrast with *William*, this is a claim that cannot possibly succeed because Mr Ishmael's occupation is not associated with any *established* legitimate right or interest in the land. This proceeding cannot examine and determine Mr Ishmael's appeal; only the Joint Area Land Tribunal can change Mr Ishmael's status from aspiring custom owner to declared custom owner. No repleading can save the statement of case; the current one quite properly acknowledges the so far unsuccessful claim to custom ownership.

59. It follows that I am satisfied the claim against the third defendant too must be struck out. The third defendant is entitled to costs against the claimant which are be taxed if they cannot be agreed.

The future of this proceeding

60. The counterclaims remain to be determined. There will be a conference **at 3.00pm on Monday 11 August 2014** to discuss the future of this proceeding.

BY THE COURT