

**IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU**  
*(Civil Jurisdiction)*

Civil Case No. 228 of 2013

**BETWEEN: SAM TOARA**  
*Claimant*

**AND: RONIE MANSAL KALAKTAK**  
*First Defendant*

**AND: THE REPUBLIC OF VANUATU**  
*Second Defendant*

**AND: VANUATU POLICE FORCE**  
*Third Defendant*

**AND: PETER YAMAK**  
*Fourth Defendant*

**Hearing:** *Wednesday 27 May 2015 at 3.00 pm*

**Judgment:** *Friday 12 June 2015*

**Before:** *Justice Stephen Harrop*

**In attendance:** *James Tari for the Claimant (also present on behalf of Mr. Toara who could not attend, Jimmy Worwor)  
Daniel Yawha for the First Defendant  
No appearance for the other Defendants (earlier excused)*

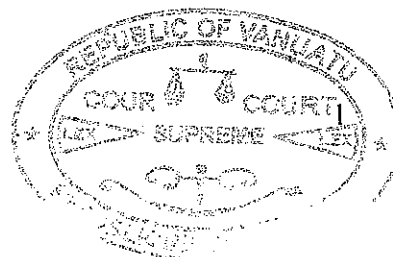
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**RESERVED JUDGMENT OF JUSTICE SM HARROP AS TO  
WHETHER RESTRAINING ORDER IN RESPECT OF AN  
ENFORCEMENT WARRANT ISSUED BY THE MAGISTRATE'S  
COURT ON 2 APRIL 2013 SHOULD BE LIFTED**

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**Introduction**

1. On 21 October 2013 Justice Spear granted, by consent, a pre-proceeding restraining order under Rule 7.5 of the Civil Procedure Rules. That order stayed the enforcement warrant which had been issued by the Magistrate's Court on 2 April 2013 for the eviction of the claimant and his family from certain land in Teouma area. They have been occupying the land since 1994 and had their gardens there.



2. The purpose of the order was to preserve the status quo until the application for the restraining order could be fully argued.

3. For various reasons which I need not enumerate, that hearing did not occur until 27 May 2015.

4. In the meantime the claimant filed his claim on 1 October 2014 which is as follows (any errors are within the document filed) :

1. *The Claimant is a Ni Vanuatu originating from the Island of Tongoa in the Shepherds Group.*

2. *The First Defendant is a Ni Vanuatu and originates from the Island of Efate and permanently resides at Eratap Village.*

3. *The Second Defendant is the State of the Republic of Vanuatu.*

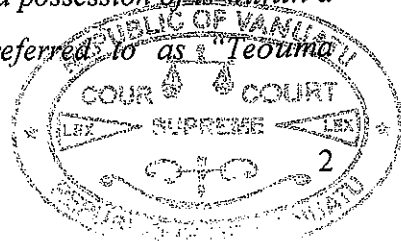
4. *The Third Defendant is an institution of the State and agent of the Second Defendant.*

5. *The Fourth Defendant is a Ni Vanuatu originating from the Island of Tanna, who operates a private debt recovery business and is an agent of the First Defendant.*

6. *The Claimant since 1994 has been permanently residing at Teouma land area, upon the parcel of land he is now in occupation and possession of.*

7. *The Claimant's occupation and possession of the parcel of land he now resides and cultivates gardens on arises from an agreement and payment of monies towards a disputing custom owner of the land boundary in which the parcel of land is situated within.*

8. *The parcel of land the Claimant is in occupation and possession of is within a disputed customary land boundary commonly referred to as "Teouma Rantapau Customary Land Boundary".*



9. *The disputing land claimant family Kalmet whom the Claimant entered into an agreement and including payment of monies for the right to occupy and possess the parcel of land is a disputing party which has been declared and recognized in the Efate Island Court Land Case No. 08 of 1993 along with Paramount Jif Kalpoilep as custom owners of the Teouma Rantapau Custom Land Boundary.*
10. *The First Defendants obtaining or acquiring of a lease over the parcel of land which the Claimant is in occupation and possession of was either by mistake by fraud or unlawful.*

#### PARTICULARS

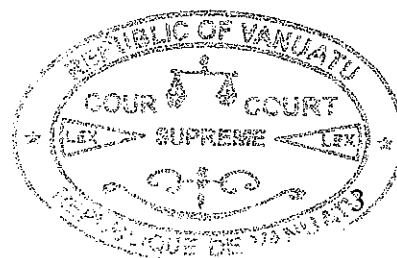
- (a) *The First Defendant's obtaining or acquiring of the lease and the creation, processing and granting of the lease by the Second Defendant was contrary to court orders restraining the creation and obtaining of leases within the disputed "Teouma Rantapau Customary Land Boundary".*
11. *The Claimant pursuant to the agreement and payment of monies for the parcel of land which the Claimant occupies and is in possession of has an overriding interest in the parcel of land.*

#### PARTICULARS

- (a) *Section 17(g) Land Leases Act pursuant to the agreement and payment of monies for the right to occupation and possession.*

*Accordingly the Claimant claims:*

12. **AND THE CLAIMANT CLAIMS:**



(1) *A Declaration that the lease obtained was obtained through mistake, fraud and unlawful contrary to interim orders restraining the creation and granting of leases.*

(2) *An order for rectification of the lease as consequence*

*Or in the alternative*

(3) *S 17(g) Land Leases Act overriding interest.*

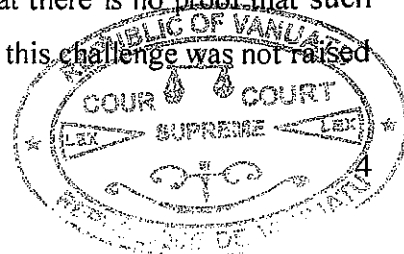
*Including*

(4) *Costs of and incidental to these proceedings.*

(5) *Any further orders the Court deems necessary.*

5. In outline, as expressed through the submissions made initially by Mr. Timakata and more recently by Mr. Tari, the claimant submits that the Magistrate's Court order was defective and that in any event there are genuine and seriously arguable issues which need to be determined, in particular whether the claimant and his family have by virtue of section 17(g) of the Land Leases Act a right of occupation to which the first defendant's otherwise indefeasible leasehold rights are subject. There is a further argument that the granting of the lease to the first defendant by the Minister of Lands on 17 October 2000 was in breach of an order of the Island Court preventing such a dealing with the land in question.

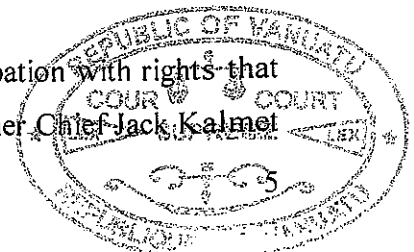
6. For the first defendant, who contends that the restraining order should be lifted, Mr. Yawha submits that the claimant is not able to pursue the Section 17(g) claim because he and his family are merely trespassers or squatters albeit of long standing. He also submits that the claimant is estopped from pursuing this issue, on the principle of res judicata, because of the striking out of a proceeding by Justice Dawson in 2009. As to the Island Court order issue, the first defendant says that there is no proof that such an order was known to the Minister and that in any event this challenge was not raised



for at least 13 years after the first defendant obtained his lease, despite the claimant having been an occupation since 1994.

### Discussion and Decision

7. The facts relevant to this case reveal a long history. I do not understand it to be disputed that Mr. Toara and his family (and it seems other families) have been in occupation of certain land at Teouma since 1994. They say that they went into possession of the land following an agreement with Chief Jack Kalmet Laau of Eratap village. In brief the arrangement was that Mr. Toara would pay 50% of the agreed purchase price of the parcel of land and that having taken possession, monthly payments would be made to complete payment of the purchase price. Mr. Toara says (and I accept his evidence for present purposes because any dispute about it can only be resolved, if the case continues, in the usual manner at trial) that he and his family have established homes and gardens on the land.
8. It is not clear to me from the evidence, or indeed the claim itself, *which* leasehold title or titles is occupied by the claimant. However I infer that at least in part it must be a leasehold title 12/0924/037 which is occupied because that is the title in respect of which the first defendant Mr. Kaltaktak obtained a lease from the then Minister of Lands (Maxime Carlot Korman), this being registered on 17 October 2000.
9. Of course on the face of the leasehold title a lessor such as Mr. Kaltaktak holding a registered lease has indefeasible rights to the land in question. However it is clear from Section 17 of the Land Leases Act [Cap163] that a proprietor's title may be qualified in some way. Section 17(g) provides that: "*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 -*  
.....(g) *the rights of a person in actual occupation land save where enquiry is made of a such person and the rights are not disclosed*".
10. Here Mr. Toara says that he and his family are on actual occupation with rights that derive from the agreement reached with the alleged custom owner Chief Jack Kalmet



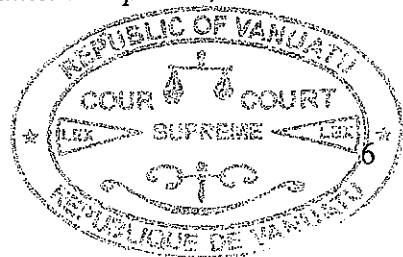
Laau in 1994 and that no enquiry was made by Mr. Kaltaktak, when negotiating for his lease, as to those rights.

11. In William v. William [2004] VUCA 16 the Court of Appeal discussed Section 17 at some length. In the course of that it said:

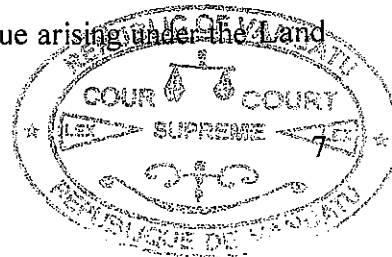
*"Fifthly, s. 17(g) operates in respect of "rights" that is rights recognized by the law of Vanuatu. A person in actual occupation who is a trespasser will have no "rights" which are protected by the provision. A right may arise under custom law, or it might be a right that derives from and through the 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 Section 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 Section 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."*



12. Mr. Yawha submits that my judgment in Ishmael v. Kalsev [2014] VUCA 27, which was upheld by the Court of Appeal, confirms that this kind of claim by Mr. Toara and his family cannot succeed. After careful consideration I have come to the view that this is not correct. In Ishmael v. Kalsev Mr. Ishmael was a trespasser unable to point to any particular right of occupation. He was claiming to be a custom owner but had not established that, indeed at the village land tribunal level he was unsuccessful in his attempt to do so.
13. Here, Mr. Toara is not claiming to be a custom owner but rather claims to have reached an agreement with a person he believed was the custom owner, or one disputing such a claim before the Island Court, to occupy the land by paying half of the purchase price and the balance by monthly instalments. If that is correct, and if it is also correct that when acquiring his lease Mr. Kaltaktak made no effort to enquire of the occupying families of the basis of their occupation, then there is at the very least an arguable basis for a declaration that Mr. Kaltaktak took his lease subject to the Section 17(g) rights of Mr. Toara and his family.
14. I therefore consider that the claim for a declaration which Mr. Toara seeks is deserving of a hearing. In order to protect his possible success the restraining order should for this reason alone continue in place. Self-evidently if he were evicted from the land but later succeeded in establishing his claim that would not only be most unfair but damages would arguably not suffice to compensate him.
15. That conclusion alone is sufficient to justify the continuation of the restraining order pending trial.
16. There are however other reasons. A fundamental point raised by Mr. Timakata in his submissions at the time of applying for the restraining order, but not subsequently the referred to in Mr. Tari's submissions, or those of Mr. Yawha, is the status of the Magistrate's Court eviction order. Mr. Toara challenges its validity in two ways: (a) the Magistrate's Court was wrong to make an order in respect of eviction from a leasehold title which was not the subject of the case; and (b) only the Supreme Court has jurisdiction to make such an order, as it relates to an issue arising under the Land Leases Act.



17. As to the first issue, in the Magistrate's Court claim filed by Mr. Yawha on behalf of the first defendant in Civil Case 273/2003 on 24 October 2003, paragraph 2 pleads:

*"The claimant is a registered lessee of land title 12/0924/034...."*

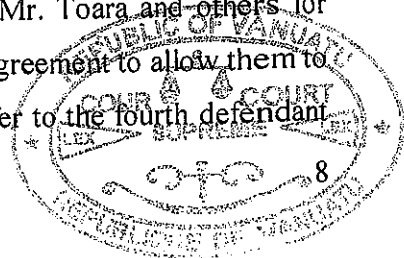
18. It goes on to allege that Mr. Toara and his family were *"illegal residents on the land title No. 12/0924/034"*.

19. The eviction order which led to this Supreme Court proceeding was made on 2 April 2013 by Magistrate Moses. This authorized the Sheriff of the Supreme Court to *"enter the premises and/ or lease title No. 12/0924/037 and remove by force the above defendants, their belongings and properties form (sic) the premises"*.

20. On the basis of this, it appears clear that Mr. Timakata's submission, that Magistrate's Court made an order for eviction from a leasehold title which had nothing to do with the substantive claim, is well-founded. It is possible that an application was later made to amend the claim as to the leasehold title referred to but amongst the papers with which I have been provided there is no evidence of this.

21. Even if that is not correct, there appears to be at least a respectable argument (I say no more in that because Mr. Yawha made no submissions on this point) that the Magistrate's Court case, which depends on the validity of Mr. Kaltaktak's lease, is one that ought to have been lodged in the Supreme Court based on the comments in Tawi v. Republic of Vanuatu [2012] VUCA 27. I emphasise however that I am making no finding upholding that submission given that I have not received submissions from Mr. Yawha nor given the issue any more than cursory consideration because it is not necessary to my decision to do so.

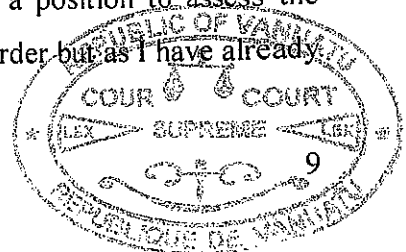
22. As to the argument forcefully raised by Mr. Yawha that the present proceeding is *res judicata* because of the striking out of Civil Case No. 29 of 2005, I am not persuaded that is correct. Although the drafting of the claim in Civil Case No. 29 of 2005 leaves a great deal to be desired, fundamentally it is a claim by Mr. Toara and others for damages against Chief Jack Kalmet Laau for breach of his agreement to allow them to purchase the land. The paragraphs in the claim wrongly refer to the fourth defendant





throughout when they appears to mean the third defendant; no fourth defendant is named. Mr. Kaltaktak is named as the second defendant but beyond being introduced at the start of the claim he is not thereafter mentioned, except that in paragraph 10 it is said that the fourth defendant failed to stop the second defendant from obtaining leases over the properties. However there is no relief sought against the second defendant and there is no challenge to the validity of his lease.

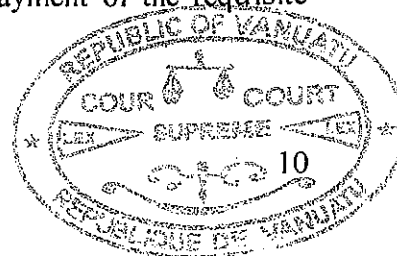
23. By contrast the present claim is a direct attack on the lease as being granted in breach of the Island Court order. Alternatively it seeks a declaration that, because of the pre-existing overriding rights that Mr. Toara and his family had as occupants of the land, Mr. Kaltaktak's leasehold interest is subject to those rights by virtue of Section 17(g).
24. I accept that it would have been possible for Mr. Toara to make the present claims in the context of the 2005 proceeding, so there is an argument that the well-known principle of Anshun estoppel prevents this claim; see *Family Farms v Nicholls* [2014] VUSC 93 and [2014] VUCA 28. However, as I read the 2005 claim Mr. Kaltaktak was merely a "passenger" in that claim and need not have been included as a defendant at all. No form of adjudication was sought in respect of him, to which the current claims could be logically have been supplemented. It is not necessary to decide the point here (and again I did not receive submissions on this form of estoppel), since I have already determined that the restraining order should continue. However, I incline to the view that this is not a res judicata situation.
25. Finally there is the issue of the lease to Mr. Kaltaktak having being granted by the Minister in breach of an order of the Island Court preventing dealings. On the information available to me, I am unclear exactly which Island Court order is referred to and whether such order encompasses the land in question. Unhelpfully the current claim does not refer to the leasehold title which is occupied by Mr. Toara, nor is the particular order of the Island Court referred to. These omissions, among others, will need to be remedied by the filing of the amended claim.
26. Based on the information before me at present I am not in a position to assess the strength of the argument based on breach of the Island Court order but as I have already



determined the restraining order must remain in place it is unnecessary to seek further submissions to assist me to do so.

## Conclusion

27. I am satisfied that the interests of justice require that the restraining order remain in place until the validity of the claims made by Mr. Toara are tested at trial. There are seriously arguable issues put forward and the balance of convenience clearly favours maintaining the status quo which is been in place since 1994 and well before Mr. Kaltaktak obtained his lease.
28. That said, it is in the interests of all parties that this case be progressed to trial as soon as possible. As the first step towards that I direct that **by 25 June 2015** Mr. Tari is to file and serve an amended claim which addresses at least following points which are absent from or inadequately pleaded in the current claim:
1. Should there be other claimants? I note that a number of other people and their families were claimants in the 2005 litigation for example.
  2. Whether or not others ought to be involved, what if any representation order should be made in respect of Mr. Toara? My understanding is he is representing his family, but who in particular? An order ought to be made under Rule 3.12 once it is clear exactly who he is representing.
  3. The claim is to include as precise a definition as possible of the currently pleaded "parcel of land" on which Mr. Toara and his family have been residing since 1994. The leasehold title or titles involved should be specified. The lessees of those title(s) should also be cited.
  4. The agreement referred to in paragraph 7 of the current claim should be fully particularised, as it was in 2005 claim. Confirmation that all necessary payments required of Mr Toara under it have been made should be pleaded, or if not, the extent of payment of the requisite instalments.



5. The alleged status in relation to the land of Chief Kalmet Laau as at 1994 (and since) should be pleaded and particularised, with reference to relevant court or tribunal decisions as to custom ownership. If the question of custom ownership of the parcel of land occupied by Mr. Toara and his family remains unclear then the stage at which resolution of that dispute has reached should be clearly pleaded.
6. Full particulars of the Island Court order which is said to have been breached when Mr. Kaltaktak was granted his lease by the Minister of Lands need to be pleaded, together with details of how the grant of that lease amounts to a breach.
29. On behalf of the first defendant, Mr. Yawha is to file and serve his defence to the amended claim by **22 July 2015**.
30. There will be a conference on **Monday 3 August 2015 at 9.30 am** to review the recently-filed pleadings and to make appropriate further directions.
31. I order that the restraining order made on an interim basis by Justice Spear on 21 October 2013 is to remain in place pending further order of the Court. In all probability this will be until either settlement of this proceeding by consent orders or determination of the issues following a trial.
32. In the circumstances it is appropriate that the costs of the hearing on 27 May be reserved as costs in the cause. For the avoidance of doubt I emphasise that in this judgment I have been considering merely the tenability and arguability of the points raised in the claim filed on 1 October 2014, rather than making any determination of any of them.

BY THE COURT



REPUBLIC OF VANUATU  
COURT SUPREME  
REPUBLICQUE DE VANUATU