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

Judicial Review No.11 of 2015

BETWEEN: JOHN TARI MOLBARAV
Claimant

AND: MINISTER OF LANDS
First Defendant

AND: ACQUIRING OFFICER
Second Defendant

Hearing: ***27th June 2016***
Before: ***Justice Chetwynd***

Counsel: ***Mr Laumae for the Claimant***
Mr Kalsakau for the Defendants

DECISION IN RESPECT OF RULE 17.8 OF THE CIVIL PROCEDURE RULES

1. The Claimant has filed a claim seeking a review of the decision of the First Defendant ("the Minister") concerning the compulsory acquisition of land on Santo. The Claimant asks the court to quash the Minister's decision to acquire all the land comprised in survey plan 04/2641/019. It seems to be common ground the land is the site of the Vanuatu Agriculture and Research Technical Centre. The Claimant also asks for a declaration that the First Defendant failed to consider his objections made pursuant to section 4(3) of the Land Acquisition Act [Cap 215] ('the Act") in respect of the acquisition. He seeks an order of Mandamus to "release those lands under survey plan 04/2641/019" and an order prohibiting the Minister from another further attempts at compulsory acquiring the land.

2. It is necessary to look at the process under the Land Acquisition Act. Sections 1, 2 and 3 deal with preliminary matters. At section 2 the Act stipulates:

> *(1) Where the Minister decides that land in any particular area is likely to be needed for any public purpose, he may direct the acquiring officer –*
>
> *(a) to cause not less than thirty days' notice in the prescribed form to be given in the prescribed manner to the custom owners and the persons interested in the land in that area; and*
>
> *(b) to cause a notice in the prescribed form to be exhibited in the prescribed manner in some conspicuous places in that area.*
>
> *(2) The notice referred to in subsection (1) shall be in the Bislama, English and French languages and shall state that land in the area specified in that notice is likely to be required for a public purpose and that all acts necessary may be done on any land in that area in order to investigate the suitability of that land for that public purpose.*

(3) After a notice under subsection (1) is given and exhibited in any area, any officer authorized by the acquiring officer may enter any land in that area together with such persons, implements, materials, vehicles and animals as may be necessary, and do all acts necessary to ascertain whether that land is suitable for the public purpose for which it is required:

Provided that no person, in the exercise of the powers conferred on him by this section, shall enter any dwelling house or any enclosed land attached to that dwelling house, unless he has given to the occupant of that house at least seven days' written notice of his intention to do so.

This is clearly an investigatory stage given the powers of the acquiring officer to go on the land as set out in subsection 3. The Minister is first establishing whether the land is suitable for the public purpose under consideration. This is reinforced by the provisions of section 3 which allow the acquiring officer to do whatever is necessary to complete his investigation subject to the proviso the land owner is entitled to compensation for any damage caused in that process..

3. Section 4 of the Act takes the matter one step further and it states:

(1) Where the Minister decides that a particular land is suitable for a public purpose, or that a particular easement over a particular land should be acquired for a public purpose he shall direct the acquiring officer –

(a) to cause a notice in the prescribed form to be given in the prescribed manner to the custom owners and the persons interested in the land in that area; and

(b) to cause a notice in the prescribed form to be exhibited in the prescribed manner, in some conspicuous places on or near that land:

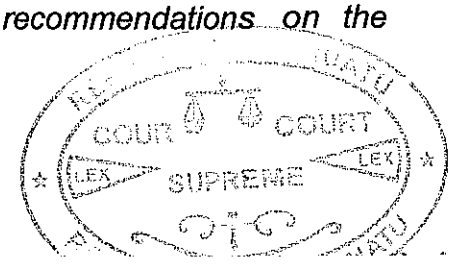
Provided however that it shall not be necessary to give such notice to any person whose name and address cannot be found or ascertained.

(2) The notice referred to in subsection (1) shall be in writing and shall –

- *(a) be in the Bislama, English and French languages;*
- *(b) describe the land or easement which is intended to be acquired, and be accompanied by a sketch plan;*
- *(c) state that the Government intends to acquire that land or easement for a public purpose and specify that public purpose and state that written objections to the intended acquisition may be made to the acquiring officer by the custom owners and persons interested in the land;*
- *(d) specify a period within such objections must be made, such period being not less than thirty days from the date on which such notice is given*

The act then goes on to say how objections are made:

(3) Where objections to the intended acquisition are made to the acquiring officer under subsection (2), the acquiring officer shall consider such objections. When such objections are considered any objectors shall be given an opportunity of being heard in support of such objections and after the consideration of the objections, the acquiring officer shall make his recommendations on the objections to the Minister.



After the objections have been dealt with as set out in section 4(3) the next step requires the Minister to consider the acquiring officers recommendations and make a decision:

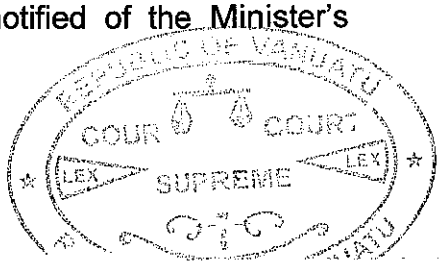
> *(4) Where the time allowed by a notice under this section for making objections to the intended acquisition of the land or easement referred to in the notice has expired and where any such objections have been made within such time, after the Minister has considered the acquiring officer's recommendations on those objections, the Minister shall decide whether that land or easement should or should not be acquired under this Act.*

4. The staged process is quite straight forward. The Minister decides he might want to acquire land for a public purpose and he gives the owner(s) notice of his intention to carry out investigations to see if the land is suitable (section 2). If he is advised it is suitable and he decides he does intend to acquire the land he must, through the acquiring officer, publish a notice of his intention (section 4). The notice of intention to acquire land invites objections to the acquisition which objections are to be made to the acquiring officer. The acquiring officer considers the objections and he has to give the objector "an opportunity of being heard". After hearing the objections the acquiring officer makes his recommendation to the Minister. After the time for objections has expired and after considering the recommendations of the acquiring officer the Minister decides whether or not to acquire the land.

5. When all that is done the next phase of the process takes effect. It is set out in sections 6 and 7 of the Act. In passing, section 5 prevents a custom owner, or person interested in the land, intermeddling in the land to either dispose of it or cause its value to alter. Moving on to section 6, it provides;

> *Declaration that a land or an easement is required for a public purpose*
>
> *(1) Where the Minister decides under section 4 that a particular land or easement should be acquired under this Act, he shall make a written declaration that such land or easement is needed for a public purpose and will be acquired under this Act, and direct the acquiring officer to cause such declaration in the Bislama, English and French languages to be published in the Gazette.*
>
> *(2) A declaration made under subsection (1) shall state the description of the land or easement which is to be acquired and shall be supported by an approved survey plan.*
>
> *(3) A declaration made under subsection (1) in respect of any land or easement shall be conclusive evidence that such land or easement is needed for a public purpose.*
>
> *(4) The publication of a declaration under subsection (1) in the Gazette shall be conclusive evidence of the fact that such declaration was duly made.*

6. The conclusion of the staged procedure involved in acquiring land is again straight forward and is set out in the Act. Another notice is issued (pursuant to section 6) which sets out the declaration by the Minister that the land is required for public purposes and that it will be acquired by the State. Section 7 of the Act prescribes how custom owners and/or persons interested in the land are notified of the Minister's intentions and how claims for compensation are dealt with:



7. Notice to custom owner and persons interested

(1) Where a declaration is made under section 6, the acquiring officer shall as soon as convenient –

(a) cause a notice in the prescribed form in the Bislama, English and French languages to be given in the prescribed manner to the custom owners and the persons interested in the land or easement; and

(b) cause a notice in the prescribed form in the Bislama, English and French languages to be published in the prescribed manner.

(2) The notice referred to in subsection (1) shall –

(a) be accompanied by a copy of the declaration made under section 6 and an approved survey plan, of the land;

(b) contain a description of the land or easement which is intended to be acquired;

(c) state that it is intended to acquire such land or easement under this Act and specify the public purpose for which it is intended to be acquired;

(d) state that claims for compensation for the acquisition of that land or easement may be made to the acquiring officer.

(e) (repealed)

(3) Where the acquiring officer is satisfied that the custom owner or any person interested in the land or easement is under the age of eighteen years or is incapable of managing his own affairs and has no person having care or custody or authority to act for him he may authorize a fit and proper person to act for that person.

From then on the Act is concerned with assessment of compensation to be paid to custom owners or others interested in the land and how to deal with disputes about the compensation.

6. According to the Claim as filed the Claimant wants to set aside the Minister's declaration under section 6 of the Act, notice of which is dated 1st August 2013. The grounds put forward are that neither the Minister nor the acquiring office considered the Claimant's objections under section 4, *"... submitted on 9th September 2013"*. The Defendants say in their defence a public notice was published on 2nd September 2009 *"...regarding the Minister's intention to acquire Sarautu land for research purposes"*. There is no more detail given about the public notice. The Claimant's sworn statement only serves to muddy the waters. He exhibits at JTM 2 a copy of a notice as published in the newspaper. Page 1 of the exhibit clearly relates to land on Eretoka Island to the northwest of Efate. Page 2 does relate to Sarautu land East Santo and what is exhibited is a newspaper version of the notice pursuant to section 6 of the Act. The notice sets out where the acquiring officer will hear claims for compensation pursuant to section 7. That is perfectly proper under the statutory framework set up by the Act.

7. I bear in mind that the hearing conducted today was dealing with the requirements of Rule 17.8 rather than the factual claim. However, it is necessary to

consider the statutory framework for compulsory acquisition when looking at the question under Rule 17.8(3)(c) of whether there has been any undue delay. Judicial review is concerned with the correctness of a decision. In very basic terms, did the person making the decision have to power to make it and did he exercise those powers correctly ? It is no part of the Court's function to substitute its own decision for that being challenged. In this case, if as the defendants say in their defence, the section 4 notice was issued in September 2009 the Claimant is well out of time to submit objections to the acquisition of the land. The Act specifies a maximum period to lodge objections of 30 days. That would mean objections should have been lodged sometime in October or November 2009. There is no obligation or requirement for an acquiring officer to consider objections in relation to the acquisition of land in the process set out in sections 6 and 7 of the Act. Under the provisions of those sections the acquiring officer is limited to dealing with compensation following the acquisition. On the basis that the notice published in 2009 was a section 4 notice there has clearly been undue delay by the Claimant and the Court would be unable to review a decision made in 2009. Considerations such as this go not only to the issue of whether there is an arguable case as is required by Rule 17.8(3)(a) but also whether there has been undue delay in relation to Rule 17.8(3)(c). It matters little that the undue delay has rendered the case unarguable.

8. Even if the above does not set out the Claim as being advanced and the Claimant is actually seeking a review of the Minister's decision to acquire all the land as set out in the notice published in August 2013, he still has serious problems. The operative date must be the date he was served with notice of or became aware of the decision. The question of service is dealt with by regulations issued under the Act. The Land Acquisition (Forms) Regulations provide for service at Regulation 8. There is no evidence about service of the 2013 notice. Although the Claimant exhibits a copy "as published" (see above paragraph 6) the date of publication is not actually stated. However the Claimant does say "*On 9th August 2013, pursuant to a direction of the Minister...*" the document exhibited as JTM 2 was published. Taking the 9th August as the operative date the Claimant should have lodged his claim by the 10th of February 2014. The Civil Procedure Rules require a claim for judicial review to be filed within 6 months of the decision (see Rule 17.5(1)). The Claim was not filed in court until over a year later on 27th February 2015. There is no explanation as to why there was a delay except that there is some mention by Mr Laumae that the Claimant was pursuing the matter by way of appeal when he was told he could not challenge the acquisition of the land that way, only the compensation. Section 12 of the Act deals only with appeals from a determination of compensation under section 9. It was only when the Claimant was told that, apparently by the Court, he filed this case. No other reason has been put forward for any delay.

9. As has been said before in this Court, *"the question of delay is always important..."* in judicial review proceedings [1]. In this matter there has no doubt been delay. Whilst the length of the delay in itself is not a reason to make a finding of undue delay, obviously the longer the delay the more difficult it is to persuade a court there has been no ***undue*** delay. However, other factors can make even a shortish delay an undue delay.

10. In this case it is clear the Claimant did not file his claim until 18 months after the publication of the notice in the newspaper in August 2013. There is an argument put forward by the Claimant that he was waiting to hear from the acquiring officer in connection with his submissions dated 9th September 2013. Part, at least, of those

[1] *Kalsakau v Wells* [2006] VUSC 79; CC 0972006 (19October 2006)

submissions appear to be exhibited as JTM 3. The first few pages deal with the Claimant's claim to ownership. The Claimant then deals with compensation. It is clear from the submissions that the Claimant knew the notice published in August 2013 was calling for claims about the amount of compensation. The Claimant says (at a page which has faint numbering of 34 at the bottom),"...*our client accepted the intended acquisition but objected to acquisition of the total land area...**for the reasons he provided in his claim***...", (my emphasis). This is a possible reference to exhibit JTM 4 but that document is not dated or otherwise identified so it is impossible say that for sure. JTM 3 goes on to say the acquiring officer is *"...required under section 4(3) to consider our client's objection..."*. This too may be a reference to an earlier document but again no date or other detail about that possible earlier document is set out. There is no clear averment that the Claimant objected in good time to any section 2 or section 4 notices. In fact the Claimant does not actually say the Minister and/or acquiring officer did not consider objections relating to a section 4 notice. He is quite specific and says the, "*Since 13th September 2013 the Second Defendant and or the Minister of Lands failed to decide on the objection made by the Claimant* " This is set out in ground 7 of the Claim for Judicial review. Ground 7 must be read in conjunction with ground 5 where it is said, "*On 9 September 2013, the Claimant **submitted his objection to the intended acquisition of whole of his land** under survey plan 04/2641/019 pursuant to section 4(3) of the Act and claim for compensation whereby he notified the Second Defendant of his customary right to the land*". (My emphasis). The Claimants action is predicated on the proposition that the Minister and/or the acquiring officer were obliged to consider his submissions of 9th September 2013 in connection with the acquisition as opposed to the question of compensation. That is clearly incorrect.

11. This conference is made more difficult because of an application to extend time filed by the Claimant pursuant to Rule 17.5. That application was filed on 23rd September 2015 at 11 am when the matter was listed for a Rule 17.8 conference. The Claimant had served the Claim on the defendants within time set in the Rules but not the sworn statement in support. That was not served on the defendants until late June. I had fixed a conference because there seemed to be a problem and the defence was delayed. As was said in the Court of Appeal case of *UNELCO v Republic of Vanuatu* [2]:

> *"When Rules 17.5 through to 17.8 are read together we think the steps anticipated by them indicate that the matters for consideration by the Court under Rule 17.5(2) are quite different from those arising under Rule 17.8. Rules 17.5 deals with the commencement of a claim, an event entirely in the hands of the claimant. Rule 17.6 requires service of the claim. Service introduces the defendant to the claim. Rule 17.7 requires the defendant to file a defence which details grounds for disputing or supporting a claim together with a sworn statement. These procedures are intended to put the interest of the defendant before the Court. Then follows, as soon as practicable, a conference called by the Judge under Rule 17.8. It is at that point that the matters listed in Rule 17.8(3) arise for consideration."*

In this case I am dealing with the provisions of Rule 17.8 because the defendants are obviously involved by reason of the service on them of the claim. It would not be equitable to consider the application to extend the time for the filing of a claim when the claim has already been filed and served. In simple terms we have gone past the time when an application for an extension of the time to file a claim can properly be made in judicial review proceedings. Even if I am wrong on that I would have to say, on the facts

[2] *Union Electrique Du Vanuatu Ltd v Republic of Vanuatu* [2012] VUCA 2; Civil Appeal 07-12 (4 May 2012)

disclosed and set out above, substantial justice would not be served by an extension of time.

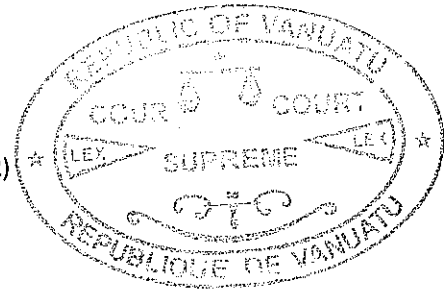
12. Since filing and service of the Claim the Claimant has delayed. The result is there was a further period when the defendants were left in the difficult position of having to defend a claim when only part of the Claimant's case was before them. This was because of the failure to serve all the documents required by Rule 17.6 within the time set out in the rule.

13. In all the circumstances I am not satisfied there has been no undue delay. Having come to that conclusion I must decline to hear the application for judicial review and in accordance with Rule 17.8(5) I strike out the claim.

14. Before I leave the case I have some concerns which played no part no part in my deciding there had been undue delay but which I feel I should mention. In order to deal with the Rule 17.8 conference it was necessary to look at all the documents. The survey plan 04/2641/019, which was exhibited to the Claimant's sworn statement, is said to show land comprised in old title 1500. As I understand previous cases 1500 is part title 479. Previous cases held that 479 was outside of titles 465 and 466. The case heard by Saksak J *Molbarav v Loy* VUSC 5; Civil Case 34-07 (30 January 2012) certainly said that. At paragraph j His Lordship referred to a land appeal heard by the Supreme Court where the court declared Mr Daniel Loy to be the custom owner of Sarautu land on part title 479. All of His Lordship's findings were confirmed by the Court of Appeal [3].

> *6. "Before dealing with these issues, a preliminary matter needs clarification to put into perspective the current proceedings. It is the decision by Cooke CJ of 28 July 1986.*
> *7. It is clear from that decision and the plan attached to it, that the Court was dealing with disputed Land which was part of title 479 called Sarautu. This was the subject of the appeal from the Santo/Malo Island Court, but titles 465 and 466 which were the subject of the lease in dispute were separate title's covering different areas from that in the present case.*
> *8. Saksak J confirmed this in his findings after a site visit to the area concerned and held that it was "abundantly clear that it (title 479) falls outside of the lands contained in the lease title granted to David* ***Livingstone****." This conclusion is inevitable when the Supreme Court judgment is carefully analysed and the original decision from the Santo/Malo Island Court is assessed alongside the maps which are on the file.*
> *9. This Court therefore need not concern itself further with Cooke CJ's decision. Mr. Laumae has recently filed a late Notice of Appeal in respect of that decision. We cannot understand why he would want to challenge that decision but all we need to say to that is it is irrelevant to the matter now before us. Mr. Laumae needs to take into account the time factor (26 years) which has lapsed since the handing down of that decision before trying to progress his appeal."*

In this case the Claimant seems to be saying he is the owner of part title 479 in direct contradiction to those earlier findings. Given the decision above I have no need to resolve that factual conundrum but it is something that the Claimant in this case should consider for the future.



[3] *Livingstone v Molbarav* [2012] VUCA 15; Civil Appeal Case 03 of 2012 (19 July 2012)

15. As regards this case, as I have indicated I am not satisfied that there has been no undue delay and so I decline to hear the claim and strike it out. Costs should, as is usual, follow the event and the Claimant will pay the Defendants' costs to be taxed on a standard basis if not agreed.

DATED at Port Vila this 1st July 2016

BY THE COURT

DAVID CHETWYND

Judge

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