IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU

(Civil Jurisdiction)

Judicial Review Case No. 14 of 2014

BETWEEN : RICKY TORO & TONY TORO

Claimants

AND: REPUBLIC OF VANUATU

Defendant

Coram: Justice Aru

Counsel: Mrs. M. G. Nari for the Claimants
Mr. K. Tari for the Defendant

RESERVED JUDGMENT

Introduction

1. This is a claim for judicial review. At the first conference pursuant to rule 17.8 of the Civil Procedure Rules, the defendant applied to have the matter struck out on the basis that the appellants lacked standing to bring the claim. The ruling was then appealed by the claimants. The appeal was allowed. The Court expressed its view when remitting the matter back to be heard as follows:-

> *"In our view the appellants interests as declared custom owners of part of Laviskoni land provides adequate justification and standing to the extent that they have an arguable case and as such they are entitled to have their day in Court."*

Background

2. The claimants namely Ricky and Tony Toro are brothers and are members of Family Toro Kaltanu who were declared on 30 November 2005 as custom

owners of part Laviskoni land at Blacksands area, Efate. They represent family Toro. The following chronology of events records the events leading up to the decisions being challenged:-

- 26 March 1999
  Lease title No 12/0633/410 (the 410 lease) was registered between the Minister of Lands acting under section 8 and 9 of the Land Reform Act [CAP 123] on behalf of the custom owners as lessor and Mr Simeon and Geanette Jackson as lessee.

- 2 January 2003
  Saksak J in Civil Case 154 of 2001 **Wesley Kwari v Simeon Jackson & Ginette Jackson** (CC154 of 2001) gave judgment in favour of Wesley Kwari.

- 14 July 2005
  An enforcement order was issued in CC154 of 2001 against Simeon and Ginette Jackson.

- 15 November 2005
  An enforcement warrant (non-money order) was issued to the Court sheriff authorising him to not only seize and repossess a red Hilux truck belonging to Simeon and Ginette Jackson and to sell it by tender but to also –
  "2. Repossess a commercial leasehold title jointly held in the Judgment debtors names (Simeon and Ginette Jackson) situated at Tagabe, Bladiniere estate and to procure the its sale and /or transfer to the claimant to satisfy the judgment in full ."

- 30 November 2005
  The Ifira Village Land Tribunal (IVLT) declared Family Toro Kaltanu as custom owners of part Laviskoni land. The form recording the decision of the IVLT records in part the following:-

".....

7a. kastom kraon we oli stap raorao from istap wea mo hemi bigwan olsem wanem

Part Laviskoni land

7c. Igat any lease title we register, o nogat. Attachem ane sovei plan sep[os I kat .

Nokat

8. Rikodem ol land mak blong kastom graon ia olsem olgeta rod , riva , lek, solwora, olgeta wud mo bigfala ston

Saed blong Tekapu River, behaen long Frouin Subdivision klosap national breweries Ltd.

JUDGEMENT

Afta we lan tribunal hemi tok baot graon ia folem fasin blong kastom . Mifala I biliv se ol stret kastom ona blong graon ia hemi olgeta ia

Nem: Vilij

Family Toro Kaltanu IFIRA

9. Desesen o ruling blong tribunal

Kraon we Toro Kaltanu emi klem emi stret kraon blong em mo em nao emi stret kastom ona folem declaration we counsil blong ol jifs blong Ifira ibin mekem sam 3 ia i pas.

10. I gat appeal o no gat

No gat

11. Nem blong ol pati we I appeal

No gat

...."

- The map attached to the decision shows the old title *57i* with a public road dividing it in two parts. The part to the east of the public road dividing title *57i* is marked out with signatures of members of the IVLT as part Laviskoni land declared to Family Toro Kaltanu.

- 5 May 2006

  The sheriff issued a notice of sale of Property 3 of 2006 (the 410 lease) the notice reads:-

"Following judgment in of the Civil Case 154 of 2001 on 15 November 2005 at Port Vila the office of the sheriff hereby advertised for sale land title No 12/0633/410 through tender submission in sealed envelopes and marked tender sale the sheriff of the Supreme Court PMB 9041Port Vila.

The property is located next to MCI with urban residential leasehold title No 12/0633/410 – area approximately 362 meter length by 60 meter width..."

- 23 October 2006
  The Director of Lands rectified the 410 lease by replacing the Minister of lands with Family Toro.

- 26 January 2007
  Family Toro served a notice of forfeiture on the lessee, Mr and Mrs Simeon Jackson for non-payment of land rent, improper use of land and allowing squatters onto the land.

- 28 March 2007
  Family Toro applied to the Valuer General to enforce the lessors right to forfeiture of the 410 lease pursuant to section 43(2) b) of the Land Leases Act [CAP 163] (the Act).

- 2 July 2007
  The Valuer General issued his determination enforcing the lessors right to forfeit the 410 lease pursuant to section 43 (2) b) of the Act. In his conclusion he says:-

" I hereby enforce the lessors right of forfeiture of the lease title no.12/0633//410 in accordance with section 43(2) (b) of the Act

pursuant to the lessee's breaches of paragraph 2 (a), 2(b), 2(g) and 2(j) of the lease agreement"

- 12 September 2007
  The Valuer General's determination of forfeiture was registered on the lease register.

- 6 November 2007
  Mr Kwari's Solicitor in CC154 of 2001 advised the Director of Lands by letter that the Valuer General's determination of forfeiture of the 410 lease was in contempt of the orders issued by the Court in CC 154 of 200.

- 5 June 2008
  The Director, Department of lands wrote to the Mrs Nari on behalf of the claimants and said in part that:-

  "The decision of the Valuer General was made with no knowledge of the Supreme Court order .We had talked with the Valuer General on this matter and it is really up to the Department of lands to take a decision on the matter. The Valuer General's office would go along with any decision taken by the Department. Again this will be based on the discretionary power of the Director of lands under the Land Leases Act The Cat also gives you that right to challenge the Director's decision if you are not happy with whatever decision taken by the Director .

  We are giving all the parties until 13 August 2010 to provide their response before we can proceed to deal with the rectification currently on foot ..."

- 22 July 2008
  The Director of the Department of lands by letter to Mrs Nari as Counsel for the claimants advised that:-

"...

We do not see any valid reason for you to isolate Mr Kwari's Court order from the Valuer General's determination. Why because they both have the connections with the same leased land. We are sorry but the order that comes first prevails and must be observed fully...."

- 2008

  Sometime in 2008 the Department of lands cancelled the registration of the determination of forfeiture of the 410 lease.

- 28 March 2011

  The Director of Lands issued a notice pursuant to section 99 of the Land Lease Act that he would be rectifying the 410 Lease by re instating the Minister of Lands as lessor His letter in part reads:-

  "Mrs Mary Grace Nari
  All Lessees
  All Customary Claimants
  Re : Rectification Notice under section 99 of the Land Lease Act CAP 163 – Leases within Laviskoni land :Re-instating former lessor
  ....
  This letter serves to inform you of our intention to rectify the lease register for those leases which were previously rectified to remove the current lessor and reinstating the former lessor. We are giving you until 6 April 2011 to provide any comments you may have regarding this matter
  .....
  Jean Marc Pierre
  Director, Lands, Survey and Records "

- 1 April 2011

  Mary Grace Nari on behalf of Family Toro responded to the Director's notice.

- 11 April 2011

The lessors name to the 410 lease was rectified by the Director of Lands .

- 8 July 2014
  Current proceedings are filed.

Claim

3. The claim is seeking two main orders:-

   1). A mandatory order enforcing the Determination of the Valuer General dated 2 July 2007 pursuant to section 43 (2) b) of the Land Lease Act in respect of the 410 lease; and

   2). A mandatory order requiring the Director to rectify the lessor's name by entering the claimant's name and removing the Minister's name as lessor on the register for the 410 lease.

   3). And costs.

Grounds

4. The claimant seeks that above orders on a number of grounds which in in brief can be summarised as follows:-

   (1) That the claimant was declared custom owner of Laviskoni land by the IVLT on 30 November 2011.

   (2) That Laviskoni land covers 6 leases namely: the 410 lease,12/0633/059, 12/0633/033, 12/0633/898, 12/0633/1077 and 12/0633/1062.

   (3) That on 23 October 2006 the Director of Lands rectified the 410 lease by changing the lessors name to the claimant.

(4) That on 26 January 2007 the claimant issued a notice of forfeiture on the lessees Simeon and Geanette Jackson for non-payment of land rents, improper use of the land and allowing squatters onto the leased property.

(5) That on 28 March 2007 the lessor applied to the Valuer General seeking enforcement of the lessors right to forfeiture pursuant to section 43(2) (b) of the Act.

(6) That on 14 June 2007 the Valuer General heard the claimants application as lessor with all parties present including Mr Jackson who was also heard.

(7) That on 2 July 2007 the Valuer General issued his determination enforcing the lessors right of forfeiture in accordance with section 43(2)b) of the Act.

(8) That the Valuer General's decision was given to the Director of Lands who entered the forfeiture against the 410 lease on the lease register.

(9) That on 28 March 2011 the Director gave notice under section 99 of the Act that he would be reinstating the former lessor, the Minister on the lease register for the 410 lease.

(10) That thereafter the Director proceeded to rectify the register by removing the claimant's name and replacing it with the Minister as lessor.

(11) That on 29 April 2014 notice was given to the defendant to register the forfeiture of the 410 lease but this was not done.

Defence

5. The gist of the defendant's defence in summary is:-

(1) That the determination of the Valuer General on the forfeiture of the lease was entered on the lease register by the Director of lands;

(2) That around March 2008 the Director of lands cancelled the entry in the lease register of the Valuer General's determination of the forfeiture of the 410 lease pursuant to section 7 of the Act for reasons that the Valuer General was not aware of Civil Case No 154 of 2001 when determining the forfeiture;

(3) That until such time as the boundary of Laviskoni land that was declared to the claimants are identified then a claim in this nature may be instituted so that the court can direct the Director of lands to exercise his powers under section 43(2)b) and section 100 of the Act as claimed;

(4) That the claimants are not entitled to the relief sought.

Evidence

6. The claimants filed the following statements which they rely on:-

(1) Sworn statement of Tony Toro in support of claim filed on 15 July 2014;

(2) Further sworn statement of Tony Toro in support of claim filed on 31 July 2015;

(3) Sworn statement of Ricky Toro in support of claim filed on 15 July 2015;

(4) Sworn statement of Kirikiri Bakokoto in support of claim filed on 28 July 2015;

(5) Sworn statement of Teriki Paunimanu Mantoi Kalsakau III in support of claim filed on 25 September 2015; and

(6) Sworn statement of Russell Nari in support of claim filed on 28 September 2015.

7. The defendant relies on the following sworn statements:-

(1) Affirmed sworn statement of Jean Marc Pierre for the defendant filed on 18 September 2014;

(2) Affirmed sworn statement of Peter Pata for the defendant filed on 3 December 2015;

(3) Affirmed sworn statement of Gordon Arnhabat for the defendant filed on 3 December 2015.

Issues

8. Issues identified by the parties and addressed in their respective submissions are as follows:-

(1) What is the legal basis for the Director's decision to cancel registration of the forfeiture entered on the register for lease title 12/0633/410 on 12 September 2007.

(2) What is the procedure for challenge to a lessor's name; and

(3) Can the Director of lands rectify a lessor's name by way of section 99 of the Land Leases Act.

(4) Whether or not the 410 lease is within part Laviskoni Land declared to Family Toro Kaltanu by the IVLT.

Law

9. The following provisions of the Land Leases Act are relevant:-

- Section 41

*"41. **Agreements implied** in **leases on the part of lessee***

Save as otherwise expressly provided in the lease and subject to any written law, there shall be implied in every lease the following agreements by the lessee with the lessor binding the lessee –

(a) to pay the rent reserved by the lease at the times and in the manner specified therein;

(b) (repealed)

(c) except where part only of a building is leased, or where a dwelling-house is leased furnished, to keep all buildings comprised in the lease and all boundary marks in good repair;

(d) where part only of a building is leased or where a dwelling-house is leased furnished, to keep the leased land except the roof, main walls, main drains, the common passages and common installations in good repair;

(e) where the lease is of furnished premises, to keep the furniture in as good a condition as it was at the commencement of the period, fair wear and tear only excepted, and to replace such articles as are lost, destroyed or so damaged as to be beyond repair with articles of equal value to those so lost, destroyed or damaged;

(f) to permit the lessor or his agent with or without workmen or others at all convenient times and after reasonable notice to enter on the leased land and examine its condition;

(g) to repair or otherwise make good any defect or breach of agreement for which the lessee is responsible and of which notice has been given by the lessor to the lessee, within such reasonable period as may be specified in the notice;

(h) not to dispose of the leased land or any part thereof or interest comprised therein without the previous written consent of the lessor but such consent shall not be unreasonably withheld;

(i) not to permit or suffer any part of the leased land to be used for any purpose other than that for which it was leased without the previous consent of the lessor but such consent shall not be unreasonably withheld;

(j) on determination of the lease peaceably and quietly to deliver up vacant possession of the leased land and all improvements thereon; and

(k) such other agreements as the Minister may have prescribed by Order prior to the execution of the lease.

- Section 43

*"43. **Lessor's right of forfeiture***

(1) Subject to the provisions of section 45 and to any provision to the contrary in the lease, the lessor shall have the right to forfeit the lease if the lessee commits any breach of, or omits to perform any agreement or condition on his part expressed or implied in the lease.

(2) The right of forfeiture may be –

(a) exercised, where neither the lessee nor any person claiming through or under him is in occupation of the land, by entering upon and remaining in possession of the land; or

(b) enforced by a reference to the Valuer-General.

(3) The right of forfeiture shall be taken to have been waived if –

(a) the lessor accepts rent which has become due since the breach of the agreement or condition which entitled the lessor to forfeit the lease or has by any other positive act shown an intention to treat the lease as subsisting; and

(b) the lessor is, or should by reasonable diligence have become, aware of the commission of the breach:

Provided that the acceptance of rent after the lessor has commenced a reference to the Valuer-General under subsection (2) shall not operate as a waiver.

- Section 45

*"45. **Notice before forfeiture***

Notwithstanding anything to the contrary contained in the lease, no lessor shall be entitled to exercise the right of forfeiture for the breach of any agreement or condition in the lease, whether expressed or implied, until the lessor has served on the lessee and every other person shown by the register to have an interest a notice in writing which –

(a) shall specify the particular breach complained of; and

(b) if the breach is capable of remedy, shall require the lessee to remedy the breach within such reasonable period as is specified in the notice; and

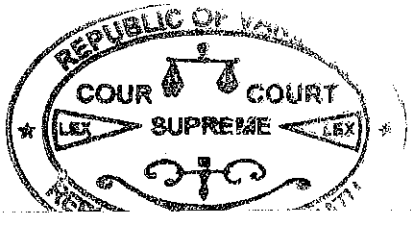
(c) in any case other than non-payment of rent may require the lessee to make compensation in money for the breach;

and the lessee has failed to remedy the breach within a reasonable time thereafter, if it is capable of remedy, and to make reasonable compensation in money if so required.

- Section 99

*"99. **Rectification by the director***

(1) Subject to section 100(2), if it appears to the Director that any register does not truly declare the actual interest to which any person is entitled under this Act or is in some respect erroneous or imperfect, the Director after taking



such steps as he thinks fit to bring to the notice of any person shown by the register to be interested his intention so to do, and giving every such person an opportunity to be heard, may as from such date as he thinks fit, rectify the register:

Provided that it shall not be necessary for the Director to take steps to bring the rectification to the notice of any person shown by the register to be interested nor to give any such person an opportunity to be heard in formal matters and in the case of errors and omissions not materially affecting the interests of any person.

(2) Upon the written application of any proprietor accompanied by such evidence as the Director may require, the change of name or address of that proprietor shall be recorded in the register.

(3) The Director shall rectify the register to give effect to an order of rectification of the register made by the Court.

Discussion

10. Grounds 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 relate to issues I, 2 and 3 and I deal with these together. On the question of whether the Director of lands can rectify a lessor's name pursuant to section 99 of the Land leases Act, the answer is yes.

11. This was confirmed by the Court of Appeal in **Turquoise v Kalsuak** [2008] VUCA 22 where the court said:-

"..section 99 1) empowers the Director to take steps to rectify the register where the register "does not truly declare the actual interest to which any person is entitled under this Act or is in some respect erroneous or imperfect". This is a very wide power."

12. Section 99 is specific to rectification by the Director. Under subsection 1), if it appears to him that any register does not truly declare the actual interest to

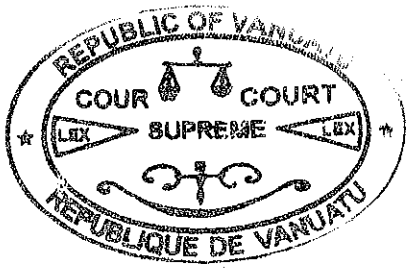
which any person is entitled under the Act or is in some respect erroneous or imperfect the Director has to notify any person on the register of his intention to rectify and give such persons an opportunity to be heard before rectifying the register.

13. The proviso to subsection 1) allows the Director to make rectifications of the register without notification in formal matters and in case of errors and omissions not materially affecting the interests of any person.

14. The other instance where the Director can also rectify a lessors name under section 99 is if there is an order for rectification issued by the Court.

15. In relation to the issue as to what is the legal basis for the Director's decision to cancel registration of the forfeiture entered on the register for the 410 lease, when the Valuer General issued his determination of forfeiture on 2 July 2007 he did refer to CC154 of 2001 which was already pending before the Supreme Court. Despite his reference to the case, the Valuer General proceeded to forfeit the 410 lease. Whether he was fully informed of the case or not, he made no reference to the fact the Supreme Court was seized of the 410 lease when Saksak J on 15 November 2005 issued an Enforcement Warrant non money order authorising the sheriff to reposes the commercial lease held by Simeon and Ginette Jackson. On 5 May 2006 the Sheriff advertised the sale of the 410 lease by public tender [**Annex 'JMP4'**].

16. There is no evidence that Saksak J's order for repossession of the 410 lease was appealed or set aside. The end result is that the forfeiture was a nullity and could not be enforced or registered. That gives the Director a legal basis to rectify the register once persons on the register are notified and heard. The Director notified the claimants and gave them opportunity to be heard in his letters of 5 June 2008 and 22 July 2008 [**Annex 'JMP10'** and **'JMP11'**]. That is the legal basis for the Director's rectification of the register by cancelling the registration of the forfeiture.



17. Grounds 1 and 2 relate to the fourth issue. A lessor in relation to custom land is the person declared as custom owner by a competent Court or tribunal. To change that, the decision has to be appealed. In Civil Appeal Case No 9 of 2015, the point was emphasised by the Court of Appeal in relation to the Claimants declaration of custom ownership of Laviskoni land by the IVLT that *"from the materials now before us it is apparent that since November 1999 when the declaration was initially made until November 2005 when it was reconfirmed and thereafter, there had (and still have been) no appeals against that declaration".*

18. The IVLTdecision of 30 November 2005 declared Family Toro Kaltanu as the declared custom owners of part Laviskoni land. On the question of whether the 410 lease is within part Laviskoni land declared to Family Toro Kaltanu, the chairman of the IVLT Chief Mantoi kalsakau III confirms in his sworn statement filed on 25 September 2015 that the "kastom ona blong graon fom" was not filled out correctly following the IVLT decision in November 2005. The IVLT on 22 May 2015 corrected the form [**Annex 'H'**] to reflect its decision which now states the following:-

"Nem blong Tribunal: Ifira Vilej Lan Tribunal

7.a Kastom graon we oli stap raorao from istap wea me hemi bigwan olsem wanem Laviskoni kastom land we emi stap olsem Pat old title 57i long pre independence survey map
7.b Raf plan blong graon- (yu save usum nara pepa)
Lukim atajmen Pat old taetel 57i long pre independence survey map
7.c I gat lis taetol we I register o I no gat . Ataj ane sovei plan sepos I kat
Yes igat ol lis olsem we mifala deklerem long 24 November 1999 lukim atajmen mo niu survey plan I kat lis taetol 12/0633/410, 12/0633/033, 12/0633/059, 12/0633/1077,12/0633/898 mo 12/0633/1062 "

19. This is also confirmed by Kirikiri Bakokoto who is a member of the IVLT in his sworn statement filed on 28 July 2015.

20. As the decision has not been appealed, the evidence of the chairman of IVLT and Mr Bakokoto confirms that the 410 lease is within Lavsikoni land declared to Family Toro Kaltanu.

21. To conclude I make the following orders in relation to the relief sought:-

Orders

1. A Mandatory order enforcing the determination of the Valuer General dated 2 July 2007 is - REFUSED.

2. A Mandatory order requiring the Director to rectify the register by removing the Minister's name as lessor and entering the claimants name instead as lessor for lease title 12/0633/410 is - GRANTED.

3. The Director is hereby directed to rectify the register accordingly forthwith without further delay.

4. The Claimants are entitled to costs to be agreed or taxed by the Master.

DATED at Port Vila, this 12 day of October, 2017

BY THE COURT

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D. Aru

Judge

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX REPUBLIQUE DE VANUATU