IN THE SUPREME COURT OF

THE REPUBLIC OF VANUATU

(Civil Jurisdiction) **Civil Case No. 11/163 SC/CIVL**

BETWEEN: JIMMY KAS KOLOU and JONAH KALENGOR

First Claimants

AND: STEPHEN DORRICK FELIX

JIMMY GEORGE LANGROS

MELES KALSILIK

SIAL KALSIIK

SONG KALSIKIK

GEORGE KALSIKIK

KALSEI KALOWI MASFIR

KALOPA KALSILIK

Second Claimants

AND: GILBERT TRINH

First Defendant

AND: REPUBLIC OF VANUATU

Second Defendant

AND: IRREPARABILE LIMITED

Third Defendant

AND: THE PROPRIETORS – Strata Plan No. 00085

Fourth Defendant

AND: ARABELLA LTD

Fifth Defendant

AND: TRAN NAM TRUNG

Sixth Defendant

AND: NATIONAL BANK OF VANUATU

Seventh Defendant

Date of Hearing: ***March 18th, 19th, 20th, 21st, 22nd and August 22nd and 24th 2016.***

Submissions: ***September 13th, October 10th, 21st and 25th and November 14, 2016.***

Date of Judgment: Tuesday March 14th 2017

Before: ***Justice JP Geoghegan***

Appearances: *Avock Godden for the Claimants*

Christina Thyna for the First Defendant

Hardison Tabi (SLO) for the Second Defendant

Felix Laumae for the Third Defendant

Copies: ***Garry Blake for the Fifth Defendant***

James Tari for the Sixth Defendant

Abel Kalmet for Seventh Defendant

RESERVED JUDGMENT OF JUSTICE JP GEOGHEGAN

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1. These proceedings involve a dispute in respect of land in lease title 12/1024/001 *("title 001")* located in Eton. The First Claimants are the Chief and Assistant Chief of the village of Eton *("Kas Kolou" and "Jonah Kalengor")*. The Second Claimants are members of the Eton community. They challenge the granting of a lease over the land to the First Defendant, Mr Trinh by the Minister of Lands in exercise of the Ministers powers under S.8(2) Land Reform Act.

2. The claimants also say that there were irregularities in the process leading to the issuing and registration of the lease which justify a rectification of the title.

3. In short, the Claimants want their land back.

4. The Third Defendant (*"Irreparabile Ltd"*) purchased the lease from Mr Trinh and then surrendered it to carry out a strata subdivision. It created a commercial/tourism lease title 12/1024/013 and subdivided it into twenty-one strata titles. Three lots were sold to the Fifth Defendant (*"Arabella"*) and a fourth to the Sixth Defendant *("Mr Trung")*. The Fourth Defendants are the proprietors of the strata plan and the Seventh Defendant (*"National Bank"*) holds a mortgage over the titles.

5. Since obtaining transfer of the strata titles the owners of those titles have been unable to deal with the land as the Claimants and their families continue to use the land and have taken steps to prevent any further development of it.

6. The claimants make the following claims against the defendants:-

a) That ownership of the land over which title 001 is registered has never been disputed and accordingly the Minister had no authority to act on behalf of the custom owners in effecting a registration of the lease.

b) That neither Mr Trinh or the Minister of Lands consulted with or negotiated with the custom owners as required, regarding registration of the lease.

c) That the lack of authority on the part of the Minister and the failure to properly consult the claimants has resulted in the lease being registered by fraud or mistake.

d) That Mr Trinh, the State and Irreparabile Ltd had full knowledge that the process is followed in the registration of title 001 and the subsequent transfer did not comply with the requirements of the Land Leases Act.

e) That Irreparabile Ltd and the subsequent strata lot purchasers did not purchase the lease and subsequent strata lots in good faith.

f) That any subdivision of the land is "invalid and void" as the claimants did not consent to it.

7. The claimant seek orders for rectification of the register and cancellation of lease 001, an order declaring that lease title 001 is void and invalid and cancellation of

subsequent title 013 and the strata titles. The claimants also seek an order that the first, second and third defendant pay damages as assessed by the Court.

8. In respect of the issue of damages there was no evidence led on that issue. I have assumed that depending on the outcome of this claim the issue of damages may need to be assessed further by the Court as the Court is certainly not able to assess that issue during the course of this judgment.

9. In response to the claimants, the position of the defendants may be summarized as follows:-

a) That the claimants are not custom owners of the land in question as there is no declaration of custom ownership and the land is alienated land governed by the provisions of the Alienated Lands Act.

b) That the land in question was in dispute and accordingly the Minister had every right pursuant to section 8 of the Land Reform Act to negotiate on behalf of the custom owners.

c) That the majority of the disputing parties had given their consent to registration of lease title 001 by deed dated 27 July 2009 for the Minister of Lands to exercise his power under section 8 of the Land Reform Act and had signed the lease on behalf of the custom owners.

d) That in the case of Mr Trinh he has done no more than to carry out his legal obligations and was acting in good faith at all times.

e) That in the case of the Minister of Lands, the Minister has undertaken appropriate consultation, has acted at all times in good faith and has acted lawfully pursuant to his powers under section 8 (1) Land Reform Act.

f) That in the case of Irreparabile Ltd it is a bona fide purchaser for value of lease 001 and has acted all times in good faith.

10. Worthy of note is the fact that while Mr Trinh and Irreparable Ltd raise an issue as to the standing of the claimants to issue this claim the position of the State as set out in its statement of defence is that it accepts that lease 001 covers a customary land area known as Eul which is located inside the boundary of Epuen under the jurisdiction of the first claimant, Chief Kas Kolou.

11. Arabella, Mr Trung and the National Bank took no active part in the hearing as they had previously entered into a deed of settlement regarding the proceedings.

BACKGROUND

12. The leased land is in respect of a number of parcels of customary land including land known as Eul. There appear to be a number of custom owners of the parcels of land however they are under the overall jurisdiction of the paramount Eton Chief, Kas Kolou. The boundaries of Epuen customary land were defined by the Efate Island Court in April 1989 in case 09 of 1984. The Court also emphasized that Kas Kolou was the representative of the custom owners of Epuen customary lands.

13. The Efate Island Court decision was appealed and that appeal is currently awaiting determination in the Supreme Court in Land Appeal Case No. 23 of 1997.

14. In late 2004, Mr Trinh applied to the Lands Department to lease some land described as *"Near Dry Creek"* near Eton village on Efate. His application was approved and he was advised by letter from the Ministry of Lands that the land was under the jurisdiction of Kas Kolou who was acting for and on behalf of the Eton community.

15. Mr Trinh was issued with a negotiator's certificate dated February 4th 2005.It was expressed to be valid for *"twelve months only"*. That certificate identified the custom owners as follows :

> *"Chief Jimmy Kass Kolou, Assistant Chief Jonah Kalengor, Eddie Karis, Edward Boblang and Kalsei Masfir-acting for and on behalf of the community of Eton".*

16. The negotiators certificate stated that the custom owners were :

> *"the authorized representative(s) of the custom owner for the purposes of negotiations under the Land Reform Regulations Cap 123."*

17. What was accordingly very clear from the outset was that Mr Trinh would need to negotiate with Kas Kolou together with others nominated by the certificate.

18. The evidence of Mr Trinh is that, in fact Kas Kolou, Jonah Kalengor and some other individuals whose names did not appear on the negotiation certificate came to see Mr Trinh at a resort he operated known as Sunset Bungalows. Mr Trinh knew Kas Kolou was the chief of Eton village and also knew that he was the chairman of the Epuen Trust (a Trust involved in the administration of land in Eton). Mr Trinh said that Kas Kolou clearly voiced his opposition to the lease to Mr Trinh at that time. Kas Kolou advised him that there was a dispute over the land and that he was not going to have any dealings with any other investor. Jonah Kalengor also voiced his opposition to any lease of the land. According to Mr Trinh, a few days later three other people came to see him, those persons being Akaou Kaltamat, Jack Boblang and Harris Boblang. He said that it was clear that they were aware that he had been speaking to Kas Kolou and they advised Mr Trinh not to deal with the Epuen Trust, which administered the land, as the three individuals were the rightful owners of the land Mr Trinh intended to lease. Mr Trinh's evidence is that those individuals supported the lease because they wished to see some development for the village. None of those persons gave evidence in these proceedings.

19. Mr Trinh did not speak with any of the other persons named in the negotiating certificate. He did, however, receive a letter dated September 12th, 2005 written on behalf of all of the persons named in the negotiating certificate. It was from their lawyers and advised Mr Trinh that the group did not wish to negotiate with him in respect to the land in question, and that in the event of Mr Trinh persisting with the matter they reserved their right to pursue *"any further avenues to protect their interest".*[1]

20. Their position could not have been clearer.

21. Mr Trinh gave evidence that he reported to the Ministry of Lands and Department of Lands that Kas Kolou and his assistant were opposed to dealing with Mr Trinh but also that a second group had indicated their support.

22. I have referred earlier to the Epuen Trust. It appears that the land under the jurisdiction of the Eton Paramount Chief was administered and managed by that Trust. The Trust had been established by the Minister of Lands for reasons which are not entirely clear. On February 16, 2006 the then Minister of Lands, Mr Maxime Carlot wrote to a Port Vila solicitor, Mr Lawson Samuel setting out his position regarding the trust as follows:

> *"1) Epuen Trust will continue to manage, including collecting land rent for areas that have been signed by them over the years until such time as the land owners are declared through the appropriate course;*
>
> *2) Areas under dispute will continue to be signed by me as the Minister responsible for land as provided in the Land Lease Act, and money will be paid into the Government Trust Fund. The money will be released to the declared custom owner(s) once the declaration is done by one of the appropriate court;*

[1] See Exhibit "JKK2" to sworn statement of Jimmy Kas Kolou dated 21/01/13.

3) *Funds currently held in government trust will not be released to the Epuen Trust but to the land owners when they are declared, and if they wish to enter into a trust arrangement, then, they may do so; and*

4) *The issue of fair sharing of benefits deriving from the use of land within the Eton's jurisdiction is a matter for the people and Epuen Trust".*

23. It is not clear what the *"areas under dispute"* referred to by the Minister were. It is the position of the claimants however, that the land which is the subject of the lease in these proceedings has never been the subject of dispute at any time. Why the claimants, one of whom was the Chairman of the Epuen Trust, never challenged this assertion by the Minister was not explained or examined in evidence.

24. Apparently things did not run smoothly regarding the Trust, and by letter dated June 9th 2006[2], the Ministry of Lands advised Kas Kolou of numerous complaints *"from various custom owners of Eton village"* that the Epuen Trust *"did not represent all the custom owners of Eton."* The Minister revoked the appointment of the Epuen Trust and stipulated that Eton undisputed lands would be under the management of the chief of Eton and his council, while disputed lands would be under the management of the Minister of Lands. Again, what was disputed and what was undisputed appears entirely unclear.

25. The position of the Trust was further explained in a letter from the Minister of Lands, dated June 29th 2006 to Mr Ronald Warsal, a lawyer in Port Vila. Mr Warsal had written to the Minister taking issue with the decision to dissolve the Epuen Trust. In the letter from the Minister to Mr Warsal the Minister stated:

> *"Epuen Trust may continue to exercise as a registered entity within the Vanuatu Financial Services Commission, but it will not deal with the land issues on behalf of the community members. All the current leases under the Epuen Trust custody will be managed by the Minister of Lands until such time when the land*

[2] See Exhibit GT2 to sworn statement of First Defendant dated 20/12/12.

ownership determination are completed and declared through a competent Court of law".

26. Because of the significant delays encountered in the process it had been necessary for Mr Trinh to apply for a new negotiators certificate. Mr Trinh's evidence was that because of apparent disputes in relation to the land he approached the Lands Department and was advised to apply to the Minister of Lands to change his negotiator's certificate which he subsequently did. A further negotiator's certificate was issued on July 13th 2006, with the custom owners described as :-

"Disputed – Several families of Eton village".

27. Shortly after this, a lease was signed by the Minister as lessor in favour of Mr Trinh, that lease having been signed by Mr Trinh on July 3rd and by the Minister on July 14th 2006, one day after the issue of the negotiators certificate. Mr Trinh paid the necessary stamp duty and land registration fees together with a premium of Vt 12,300,000.

28. The lease was signed despite the clear opposition of Kas Kolou, despite the required negotiation stipulated by the original negotiators certificate issued to Mr Trinh, and depite there having been no consultation with the custom owners.

29. Problems with the lease continued. By letter dated July 17th 2006, a number of persons alleging to be custom land owners of custom land in the Eton area wrote to the Acting Director of the Department of Lands in opposition to the registration of the lease[3]. The contents of that letter are instructive and significant and the letter begins by stating:-

"We the custom land owners of Eul Land of Eton village, we are writing this letter to you concerning the above mentioned matter [lease title 12/1024/001]."

[3] Exhibit "G11" to sworn statement of Gilbert Dinh dated 20/11/12.

30. The relevant points made in the letter are as follows:-

a) That the authors expressed disappointment that they had not been informed or made aware, from the beginning, of Mr Trinh's interest in taking a lease over custom land *"without a single consent from us."*

b) That there had been no consultation with the custom land owners of Eul in Eton village.

c) That the authors of the letter understood that there had been significant pressure to process the lease through to registration *"knowing very well that the custom owners of Eul custom land in Eton village have not given any single consent".*

d) The letter stated:

> *"We would like to inform you that THERE IS NO and THERE HAS NEVER BEEN any dispute over our Eul Custom Land in Eton village. We each custom owners who have our names and signature on this letter have our respective portions of land inside the Eul land covered by the land lease title 12/1024/001 which is the area in Eton surveyed by Geomap on the instruction of Mr Gilbert Trinh. Any person from Port Vila or Efate who passes through Eul to Eton will be able to see for themselves that the gardens and coconut trees that we have planted and have been using for our daily living and for selling at the market to help us to pay for school fees. We also have tourists who have been coming to visit and giving us money to help our living".*

e) The letter contained an unequivocal demand from the authors of the letter that the dealing with and processing of land lease title 001 should stop immediately and not be registered failing which further action would be taken.

31. The letter was signed by Jim Kalsaopa, Bob Kalsaopa, Edward Kalsapoa, Pierre Boblang, Eri Boblang, Richard Boblang, Kaltap Boblang, Supu Boblang, Billy Boblang and Morsen Felix.

32. As a result of that letter those claimants, known as Family Boblang met with the then Director General of Lands, Mr Russell Nari, the Acting Director of Lands, Mr Peter Pata and Mr Jean Marc Pierre, who was shortly to become the Director of Lands. The meeting took place on August 3rd 2006. The complaints referred to at the meeting were that the alleged customary land owners were never made aware of the lease, that there was no consultation with them and that the land area surveyed covered their entire gardening land and plantation. A decision was accordingly made that the lease would not proceed to registration.

33. Mr Pierre, gave evidence that on December 24th 2007, he met with the then Minister of Lands, Mr Maxime Korman and briefed him on the meeting with the alleged custom owners. He said that he and the Minister agreed that Mr Pierre meet with the custom owners and that they would also have to see the Minister before the current lease could be dealt with further. It is not clear why there was a gap of some 17 months between the meeting of August 3rd 2006 and Mr Pierre's briefing of the Minister.

34. A meeting was held between Mr Pierre and the alleged custom owners on December 27th 2007. The same complaints were voiced at that meeting and Mr Pierre briefed the Minister of Lands in respect of that meeting by letter dated December 27th 2007.

35. Mr Pierre had very real concerns regarding the matters raised by the alleged custom owners in respect of how the lease had come about. He accordingly gave oral instructions to his officers not to register the lease.

36. Mr Trinh was clearly unhappy with this state of affairs and accordingly in June 2008 he filed an application for judicial review in the Supreme Court seeking an order requiring the Director of Lands to register his lease. Mr Trinh also approached the new Minister of Lands, the late Mr Harry Iauko to discuss his concerns regarding the delays in the matter. At this point, and to further complicate matters, the lease dated July 3rd 2006 which had not yet been registered, was lost by the Department of Lands. It was therefore apparently necessary to have a new lease prepared.

37. On July 5th 2009, the Minister of Lands wrote to the Acting Director General of the Ministry directing that any application for a rural land lease submitted to the Department of Lands must first obtain prior approval of the Eton Chief and his full village council. The letter stated:

> *"I have discovered and after several months within my office, it has come to my knowledge that lands at Eton area has been of serious concern and there are dealings that is not accepted and lands that should not have registered. As Minister Responsible I am advising that any land from today and onwards that comes before the department must have the approval of the Eton Chief and or full Council of Eton.*
>
> *Should any Lease that comes before the attention of the Minister without the approval of the Chief or the Council is subject to serious disciplinary and that disciplinary action may be taken against him or her."*

38. The letter while general in its terms is instructive for two reasons. First, it appears to accept that the land in the Eton area is undisputed. It does not refer to *"consultation"* with the Eton Chief but *"approval"*. Second, it recognizes the absolute need to get the approval of the Eton Chief or the Council.

39. Clearly, some pressure was being applied by the Minister to resolve the matter. Mr Trinh gave evidence that towards the end of July 2009, *"with the advice of the State Law office, the Minister of Lands requested me to join him to consult people who disputes (sic) the land to get their consent for the Minister of Lands to sign the lease on behalf of the custom owner"*. No details were provided of the *"advice"* received from the State Law Office.

40. In a sworn statement in support of his statement of claim Mr Trinh annexed a copy of a document dated July 27th, 2009 which he claimed to be signed by *"people of Eton village who claimed custom right over the land which have consented from me to obtain lease over the land"* (sic).

41. The document refers to Mr Trinh claiming rights as the true lessee and proper legal owner of the land and title 12/1024/001. The document refers to named *"land owners"* and at paragraph (c) of the recitals records:-

> *"The Minister of Lands has made tough enquiries and satisfied himself that the owners are or represent all claimants to be land owners of the land within the land lease title".*

42. The agreement then records:-

> *"Wherefore the parties agree:*
>
> *2.1) The consent customary land owner hereby agrees to grant the lease and the lessee agrees to accept the grant of the lease from the Minister of Lands acting on behalf of the custom owners, from and (sic) including the commencement date and on an (sic) subject to the terms and conditions and any special conditions of the lease including the payments of the lease.*
>
> *2.2) The consent customary land owner hereby agrees to withdraw any cautions, restraining orders, advice given by letter or whatsoever actions and stopping the lease from being register (sic) by the Lands Department and as pursuant to law.*
>
> *2.3) The consent customary land owner hereby agrees to grant the lessee the lease and that the government of the Republic of Vanuatu act as the lessor until such time the customary land ownership is fully determined.*
>
> *2.4) That we the consent customary land owners have been witnesses in the civil case no. 97 of 2008 for the Director to stop any registration and as pursuant to the letter, to the Director of Lands have now consent that the lease be registered and that development commences as pursuant to the terms of the lease.*
>
> *2.5) Whereas the lessee has sought registration of the lease and that the customary land owners have withdraw (sic) all the proceeding and that the lessee proceeds".*

43. Mr Trinh's evidence was that he had nothing to do with the signing of the document or any negotiations relating to it. The document appears to contain the signature of Mr Louis Carlot as witness to the signature of the Minister but in the absence of specific evidence as to how it came about I decline to speculate as to how the document came into existence. Evidence in relation to this matter was filed by way of sworn statements of Mr Carlot however for reasons referred to later in this judgment that evidence has not been considered.

44. More importantly however, there are 14 named "customary land owners" in the agreement. Only 9 of those land owners have signed the agreement. Neither of the First Claimants in this proceeding are named in that agreement or signed it. Some of the Second Claimants are named.

45. Given the unequivocal view expressed by the Minister on July 5th that any lease must have the full approval of the Eton Chief and or the full Council of Eton and given Mr Trinh's evidence that he had been requested by the Minister of Lands to join him in consultation it seems extraordinary that the document does not mention either Kas Kolou or the full Council of Eton.

46. There is also the irony involved in Mr Trinh seeking to rely upon this document as an agreement with the custom owners while at the same time, arguing through his counsel that no declaration of custom ownership had ever been made in respect of the land in dispute and that accordingly the claimants have no standing.

47. In the circumstances I can attach no weight or significance to that *"agreement"* at all.

48. It appears that there was a clear disagreement between the Attorney General and the Minister of Land, Mr Iauko regarding what was to happen with Mr Trinh's lease. That is evidenced by a letter from the Minister of Land to the Attorney General dated July 27th 2009, in which the Minister referred to unsuccessful attempts to *"repossess"* the file regarding Mr Trinh's lease and to the Attorney General's advice to the Minister

that the file would not be released to the Minister until the Ministry of Land had undertaken some consultation with the custom owners of land lease title 12/1024/001.

49. The letter from the Minister then went on to say:

> *"Until now, my office is still waiting for office response to my request. Hence, it is my priority during my current mandate to solve all unnecessary land issues so as to avoid any law suit and further expenses out from the tax payer's monies. So, I have taken steps to consult with all disputing parties as follows:*
>
> - *I personally make extra efforts to talk with land owners of Eton village on that particular land area.*
> - *Consult with Chief Kas Kolou and his council at my office.*
> - *Consult with Chief Eddy Karis, Kaltamat and his group at my office.*
> - *Consult with Jack Boblang leader of the Family Boblang at my office.*
>
> *After the consultation process has been done accordingly at my office, all parties agree that the lease title 12/1024/001 is now resolved.*
> *Since, I am now satisfy (sic) with the consultation process being done I now request you to release the file for land lease title 12/1024/001 to the Department of Land for registration".*

50. The Attorney General was not called to give evidence in these proceedings and there is no sworn statement from the now deceased former Minister of Land.

51. The evidence establishes to my satisfaction however that the letter from the Minister to the Attorney General was not correct in a number of important areas:

a) There was no evidence of any personal *"extra efforts"* on the part of the Minister to talk with land owners of Eton village.

b) While there was some consultation with Chief Kas Kolou through Mr Carlot, what was clear from the evidence is that Chief Kas Kolou voiced his complete disagreement to any lease being granted.

c) The evidence would suggest that not only was there a completely inadequate consultation process but that the Minister's assertion that all parties had agreed that the lease title was now resolved, was completely wrong. It is difficult to understand how such an assertion could be made.

52. Despite all of this, the Minister signed the lease on July 28th 2009. Those actions appear completely contrary to the Minister's own forceful instructions to the Acting Director of Lands in his letter of July 5th, only three weeks earlier.

53. When the claimants became aware of Mr Trinh's attempts to register a lease one of the claimants Mr Stephen Felix wrote to the Minister of Lands by letter dated August 11th, 2009 expressing concerns regarding the lease application and asking that it be referred back to the Eton Council of Chiefs for consideration. By this time, the lease had been registered, registration having occurred on August 4th, 2009.

54. By the time Mr Trinh's lease was registered he had already been in discussions with Mr deMontgolfier, a director of the Third Defendant Irrepairable Ltd regarding the sale of the lease to Irrepairable. The necessary consents to the transfer were signed and the transfer of lease 001 was registered on August 14th, 2009.

55. Irrepairable Ltd subsequently carried out a strata subdivision creating 21 strata lots. Registration of a surrender of old lease title 001 occurred on November 7th, 2011 and the transfer of three strata titles to Arabella was registered at the same time. Those strata titles were sold for VT 2,000,000, VT 3,000,000 and VT 5,000,000 respectively.

56. On December 14th, 2011 a further strata title was sold to the Sixth Defendant, Mr Trung for VT 3,000,000.

57. The evidence of Mr deMontgolfier is that he purchased the lease in good faith and for valuable consideration. He denied having any knowledge of the difficulties that Mr Trinh had encountered or the ongoing concerns of the Claimants.

58. Under cross-examination Mr deMontgolfier stated that he had not spoken with Mr Trinh about the lease prior to becoming interested in the purchase of it. Mr deMontgolfier carried on a business representing investors. He could not recall exactly when he first spoke to Mr Trinh regarding the matter but said that it had probably been a few months prior to the deal taking place.

59. He said that Mr Trinh had approached him previously *"a few times"* when he had land to sell. When he approached Mr deMontgolfier regarding this land one of Mr deMontgolfier's clients went to the land to have a look at it. That person was one of the beneficiaries of Irrepairable, Mr Charlie Ah Po.

60. Mr deMontgolfier confirmed that he had set up both Irrepairable and Arabella as vehicles for friends to invest in leasehold titles in Vanuatu. Mr Trinh did not hold any shares or office in either company.

61. When it was put to Mr deMontgolfier that the registration of the lease on August 4th followed by the signing of a transfer to Irrepairable on August 10th was *"suspicious"* in its haste, Mr deMontgolfier simply replied that he wished to make sure that the lease was registered before the transfer proceeded. He had checked with the Department of Lands to ensure that it had been. That was all that he was required to do. He acknowledged having paid VT 15 million to Mr Trinh which was paid when the transfer was signed and delivered.

62. Mr deMontgolfier regarded himself as experienced in the acquisition of lease titles estimating that he had been involved in the acquisition of approximately 130 lease titles during the thirteen years he resided in Vanuatu (he now residing in France).

63. Having heard the evidence of Mr deMontgolfier I consider that there is no reason to doubt that evidence. It was given in a straightforward manner and there is simply nothing which establishes to the requisite standard that he had any knowledge of anything untoward in respect of the land dealings or registration of the lease.

64. Equally, there is no evidence which establishes that any of the subsequent purchasers had knowledge of what had occurred in the previous years regarding Mr Trinh's efforts to have a lease registered.

THE EVIDENCE OF LOUIS CARLOT

65. Before turning to the issues which require resolution I wish to clarify the position regarding a sworn statement by Louis Carlot which was contained in the trial bundle provided to me by counsel. Mr Carlot swore one sworn statement dated July 19th 2012.

66. It appears that in July 2009, Mr Carlot was working for the second defendant as a political advisor to the then Minister of Lands, Mr Harry Iauko. The same sworn statement was included in both the claimants and third defendant's set of documents in the trial book. Mr Carlot was not cross examined and at some stage during the course of the trial I had made a hand written note of the fact that Mr Carlot did not give evidence and that his affidavit had apparently been removed from the file by his Lordship Justice Spear after an application in respect of it. No record of such a decision was on the file. The issue of Mr Carlot's evidence was not the subject of any submissions by counsel and accordingly I was left in a position after the hearing of not knowing the precise status of his evidence.

67. In hindsight this is perhaps an unfortunate consequence of the fact that these proceedings have been the subject of two previous aborted trials. On the face of it, the fact that a judge in a previous aborted trial may have made a direction regarding evidence, would not necessarily have a binding effect on a Judge in a subsequent trial.

For that reason I circulated a Minute to all counsel requesting *"that counsel immediately confirm whether Mr Carlot's evidence forms part of the evidence to be taken into account in these proceedings or whether it was removed by reason of a previous decision. If it has been excluded by reason of a previous decision I would be grateful if counsel would furnish a copy of the appropriate decision or Minute so that this may be placed on the Court file".*

68. The only counsel to respond to that request were Mr Godden for the claimants and Mr Tabi for the State.

69. Mr Godden's advice was that Mr Carlot's evidence was originally part of the claimant's evidence and Mr Carlot was requested to appear before the Court for cross examination when the matter first went to trial before Justice Spear. Mr Carlot refused however to attend Court and instead submitted *"another sworn statement"* in support of the first and second defendant's case. Mr Godden had consulted Mr Kapapa who was the claimant's former counsel who advised that the Court had made an oral ruling excluding all of the evidence given by Mr Carlot on the basis that the statements were unreliable.

70. Mr Godden advised that Mr Carlot's evidence therefore no longer formed part of not only the claimants' evidence but also the evidence of the defendants as well. That was the reason why Mr Carlot was not called to be cross examined. I would add at this point that I could not locate any sworn statement of Mr Carlot in addition to the one which was in the trial bundle.

71. For the State, Mr Tabi advised that the State could not locate any decision or Minute which directed that Mr Carlot's evidence was not part of the proceeding but that since Mr Carlot was one of the claimants' witnesses, the claimant would be in a better position to advise the Court as to how Mr Carlot's evidence is to be treated.

72. This is an entirely unsatisfactory situation. Given the background of this matter the Court is entitled to expect greater assistance from counsel in the clarification of such matters. It should not be for the Court to raise these matters with counsel and counsel should have addressed this either prior to the trial or during the course of it. In the circumstances however, and taking into account the memoranda filed by Mr Godden and Mr Tabi I do not consider that it would be appropriate to place reliance on Mr Carlot's evidence as it would appear that counsel approached the trial on the basis that his evidence did not form part of the evidence before the Court.

DISCUSSION

73. A number of issues are raised in the submissions by counsel and these may be listed as follows:-

a) Are the claimants, the custom owners of the land and if not do they have standing in these proceedings?

b) Was the land in dispute?

b) Has fraud and/or mistake been established.

c) If fraud and mistake are established what are the consequences that flow from such a finding.

CUSTOM OWNERSHIP AND STANDING

74. For the third defendant Mr Laumae submitted that the lands covered under lease 001 were part of pre-independence title 593. There does not seem to be any dispute regarding this. Mr Laumae submits that there is simply no evidence adduced by the claimants of any declaration or decision made by the Island Court or Land Tribunal granting custom ownership of the land under pre-independence title 593 to them.

75. On this issue Mr Laumae refers to Articles 73 to 78 (inclusive) of the Constitution, the collective effect of which is to vest all land in the Republic of Vanuatu post-independence in the indigenous custom owners and their descendants. Article 74

provides that the rules of custom shall form the basis of ownership and use of land. Article 78 provides where there is a dispute concerning the ownership of alienated land as a consequence of the relevant provisions of the Constitution then the Government shall hold such land until the dispute is resolved.

76. In order to assist with the transition of pre-independence land to the indigenous people of Vanuatu, Parliament enacted the Alienated Land Act [Cap. 145]. Section 3 (1) of that Act provides that:-

> *"(1) Any person who claims to be an Alienator shall apply either personally or through an agent to be registered as such within 3 months of the coming into force of this Act."*

77. Section 24 of the Act provides that:-

> *"(1) Subject to subsection (2) a person shall vacate and surrender to the Minister land occupied or claimed by him as an alienator either in person or through agents:*
>
> *(a) If he does not make application under section 3 (1) in which case he shall vacate and surrender up the land not later than 3 months after the coming into force of this Act."*

78. It is Mr Laumae's simple submission that the land in question in these proceedings is alienated land and that the alienator of the land did not apply pursuant to section 3 (1) of the Alienated Land Act and accordingly by virtue of section 24 of the Act the land is surrendered to the Minister of Lands. Under section 8 of the Land Reform Act [Cap. 123] the Minister was then mandated by law to manage and control the land on behalf of the unidentified custom owners.

79. The term *"alienator"* is defined under the Land Reform Act [Cap. 123] at section 1 as:-

> *"Alienator" means a legal or natural person or persons who immediately prior to the day of independence and whether or not their rights were registered in the registry of land titles provided for in the Anglo-French protocol of 1914 –*

a) *Had free hold or perpetual ownership of land whether alone or jointly with another person or person; or*

b) *Had a right to a share in land by inheritance through Will or operation of law whether where no formal transfer of that land had taken place; or*

c) *Had a life interest in land; or*

d) *Had a right to land or a share of land at the end of a life interest; or*

e) *Had a beneficial interest in land."*

80. It is clear that the purpose of the Alienated Land Act is to assist in the orderly return of land to custom owners post-independence and to enable continued negotiation and compensation where appropriate to occur to those who had been occupying land pre-independence.

81. As to the issue of standing, however, I do not consider that there is any merit to the suggestion that the claimants in this case somehow do not have standing. In Efate Island Court Case No. 09 of 1984, the Court referred to the rightful custom owner of Eruiti Island as being Kas Kolou. Although there is a lack of clarity around the exact boundaries of the land which is the subject of dispute in Case 09 of 1984 the evidence in this case establishes a clear right on the part of Kas Kolou to claim custom ownership. It is not for this Court to determine the issue of custom ownership however the standing of the claimants in this case cannot, in my assessment be disputed. If anything that was recognized by the State itself when it issued the first negotiating certificate to Mr Trinh which required him to negotiate with the custom owners identified in that certificate. In the face of that, I take the view that it is not open to argue that the Minister had acquired rights under section 8 of the Land Reform Act.

82. Accordingly, while I make no finding as to custom ownership (and could not do so anyway) and acknowledge that the decision of the Efate Island Court in Case No. 9 of

1982 has still not been determined on appeal I find that the claimants have very clear standing to make this claim.

WAS THE LAND IN DISPUTE ?

83. The evidence does not support the conclusion that the land was in dispute at the time of the issuing of the first negotiator's certificate.

84. Having considered the terms of the Efate Island Court judgment in Case No. 9 of 1984 it appears clear that that case was not a case involving the land which is the subject matter of this dispute. At page 2 of the judgment headed *"Court's views"* the judgment records that:-

> *"In regards to each boundary that each parties shows in the map, the court would like to make clear to all four parties that the Court decision is just to make known of the rightful land owner of the land where Eruiti Island is in and also to make known of the straight boundary of Epuen, whether it is Rentapau river or Enam Bay in regards to the claimant's claim."*

85. The evidence satisfies me that the land in dispute in this case is some distance from the land which was the subject of the Efate Island Case.

86. The consistent evidence of the claimants with reference to the land which is the subject of these proceedings, was that there has never been any dispute of any kind. While the Epuen Trust was established to manage certain land it is not entirely clear what that land was. Any dispute in relation to the Epuen Trust however, appears to have been one relating to its management and, as recorded at paragraph 24 of this judgment the Minister revoked the appointment of the Epuen Trust by letter dated June 9th 2006 and stipulated that Eton *"undisputed lands"* will be under the management of the Chief of Eton and his council, while disputed lands will be under the management of the Minister of Lands.

87. What appears clear however is that by July 2006, disputes were arising.

88. It was submitted on behalf of the State that the letter dated July 27th 2009 from the Minister shows that Kas Kolou and his council, Eddy Karis, Kaltamat and his group and Jack Boblang, leader of Family Boblang agreed to the lease. I consider that that submission is simply not sustainable. It is not sustainable because the evidence does not support the Minister's contention that agreement had been reached.

89. Having heard the evidence in respect of this matter it is difficult to see any proper basis upon which the Minister could have reached the view that custom ownership of the relevant parcel of land contained within lease 001 was disputed. While it is true that Mr Trinh received representations from various people I consider that those representations were with reference to a clear disapproval of any proposal which involved the land being subject to a lease. On behalf of the second defendant it was submitted that while it may transpire that land case 09 of 1984 concerns the issue of custom ownership over Eruiti Island and the boundary of Epuen Land, the land subject to lease 001 is located inside Epuen Land boundary and its determination as to ownership was never the subject of a Court proceeding. While that may be so, it would appear that land case 09 of 1984 touches on issues of ownership which have no effect upon and no application to the land which is the subject of lease title 001.

90. In addition, while Mr Tabi referred in his submissions to cross examination of witnesses Sial Kalsilik and Billy Kalangis referring to the fact that Family Boblang did not own any part of the land where lease 001 was located (something which was asserted by Family Boblang) I do not consider that there was any evidence of the kind before the Minister at the time which could properly justify his declaring that the land was in dispute and accordingly entitling him to take control of the negotiations. Accordingly I do not consider that the Minister was correct in his declaration of the land as disputed land.

91. Mr Laumae submits that the custom owner of the land in question was not identified and that by operation of section 8 of the Land Reform Act, the Minister is mandated by law to manage and control the land on behalf of the identified custom owners.

92. The reality in this case is that the custom owners were clearly identified in the first negotiating certificate. There has been no suggestion that that was a mistake. No evidence has been given to explain why the second negotiating certificate referred to the land being in dispute while only some 18 months earlier a negotiating certificate was issued, clearly identifying the persons whom Mr Trinh was to negotiate with. The difference is not explained either by events relating to the Epuen Trust. Mr Laumae's submissions really revolve around the contention that custom ownership was disputed. However for the reasons already referred to I do not accept that that was the case.

93. Mr Laumae also places reliance on the decision of the Court of Appeal in Worwor v. Pio (Appeal Case 26 of 2010) where at paragraph 31 the Court of Appeal stated:-

> *"Whilst we can sympathize with the sentiments expressed, we do not accept either the assumption or the validity and significance of the consent of the Erakor people. The fact remains that in the absence of a declaration of customary ownership by an Island Court or Customary Land Tribunal recognizing the chiefs and people of Erakor as the legitimate custom owners of the land over which lease title No. 12/0912/509 is registered, the land remains "disputed lands" under the Land Reform Act within the exclusive control and management of the Minister of Lands".*

94. There cannot be any doubt that in the event of a dispute the Minister is legitimately empowered by virtue of section 8 of the Land Reform Act to exercise control and management of the disputed lands. However the circumstances in Worwor were not the same as the circumstances here.

95. As referred to by the Court of Appeal in Worwor the historical background to that action was that both parties were permitted to occupy plots of land that had been alienated by the Catholic church at Montmartre. After independence, the land reverted to the custom owners but, as ownership was disputed, the general management and control of the land was vested in the Minister of Lands in terms of section 8 of the Land Reform Act. The difference in Worwor therefore was the fact that ownership of the land was undeniably disputed. In this case the consistent position of the claimants, a position which I accept, is that custom ownership of the land was not disputed. In those circumstances the Minister assumes no right of management or control.

96. Mr Laumae also relies on the judgment of his Lordship Justice Harrop in Tunala v. Tabir and Republic of Vanuatu (Civil Case No. 313 of 2014). In that decision at paragraph 23 Harrop J stated:-

> *"In summary, the position is that Mr Tunala and his family may well be, in truth, the custom owners of Samansen Land which includes the lease land. But at present he is no more than the claimed custom owner. His claim is disputed. The way in which the land system works in post-independence Vanuatu, pursuant to the Constitution and the subsequent establishment of the Island Courts in Customary Land Tribunals, and most recently of the process under the Custom Land Management Act 2013, is that it is for the Courts or tribunals empowered under that legislation to determine customary ownership. Appeal rights are provided. Unless and until that process is completed, nobody is a finally declared custom owner with standing to challenge a registered lease of the land in question".*

97. I would distinguish this case from the case of Tunala on the basis of the view which I have reached that there was no dispute regarding ownership of that land. There was a clear expectation that there would be a negotiation with Kas Kolou as the recognized custom owner. The case of Tunala involved a clear dispute as to custom ownership and in those circumstances it is clear that that dispute must be resolved

before someone can legitimately claim to be the custom owner. In the interim of course, the Minister is provided with powers under Land Reform Act. That is not the case here.

THE EXERCISE OF THE MINISTERS POWER UNDER SECTION 8

98. In this case it is claimed on behalf of the Minister that there was appropriate consultation before a lease was granted to Mr Trinh.

99. It is clear that the Minister does not have unfettered power to grant a lease. This was recognized by the Court of Appeal in Ifira Trustees Ltd v. Kalsakau and Ors. [2006] VUCA: CAC 5 of 2006 (6 October 2006) where the Court said:-

> *"When parliament grants a power to make decisions, the decision maker must undertake the task conscientiously and independently weighing all matters which are relevant and ignoring those which are irrelevant and the decision maker must faithfully apply fear and proper processes and procedures.*
> *Section 8, as an example, is not a license for the Minister to make any decision that he likes about the care and control of disputed land pending the resolution of that dispute. A Minister exercising this power can only reach a proper and lawful conclusion after he has weighed and assessed all matters which are relevant".*

100. In Roqara v. Takau [2005] VUCA 5 the Court referred to the practice adopted by the Department of Lands of issuing negotiator's certificates in respect of land, the ownership of which is disputed. It was said that this is done as the Department requires the claimants to custom ownership to be consulted and their consent sought by the applicants for a lease.

101. That practice was referred to in the decision in Solomon v. Kalsuak and Turquoise Ltd and others (CC 163 of 2006 and CC 29 of 2007, 8 August 2008) where Tuohy J commented at paragraph 58 that,

"This is a sensible and just requirement to protect the basic rights of custom owners not to have their land alienated without their views being heard".

102. In considering the balance between the Minister's duties and the rights of custom owners Tuohy J further stated at paragraph 60 that:-

"This does not mean that all disputing custom owners have a power of veto on the Minister's exercise of his powers under section 8. What it does mean is that when exercising those powers, the Minister must consult the disputing owners and must carefully consider their views and the reasons for them before acting. This is part of the Minister's duty to follow fair and proper processes and to act only after he has weighed and assessed all relevant matters. Here he did not and could not do so without ascertaining Kalsuak's wishes and the reasons for them. In deciding whether it is probable that he would not then have granted the lease, the Court has assumed, as it must, that the Minister would then have acted reasonably and not arbitrarily."

103. Mr Tabi on behalf of the State submits that there was consultation with the claimants by the Minister. He refers to the evidence of Kalsei Masfir regarding his meeting at the Department of Lands, that meeting having been with Mr Carlot. Mr Tabi referred to the evidence of Kas Kolou that he had never attended any meeting. He submitted that Mr Masfir's evidence established that Kas Kolou was lying on oath. I reject such a submission. I found Kas Kolou to be a genuine and straight forward witness. While he may have been mistaken about attending a meeting I do not accept that he was being untruthful. In addition, Mr Masfir's evidence was not put directly to Kas Kolou in cross-examination.

104. In this case the process of consultation has been random, confused and disorganized at best and highly questionable at worst. What is clear however is that the Claimants were completely sidelined in that process. The very persons identified at the start of the process as central to negotiations became mere bystanders whose position seemed to be given no consideration or weight. I consider that the Minister of Land

breached his very clear duty to consult in a genuine and meaningful way and has acted both unreasonably and arbitrarily in the granting of the lease. The evidence strongly suggests that the Minister's sole focus was on resolving the dispute between the State and Mr Trinh as opposed to a careful and measured consideration of the views of a significant number of persons affected by the proposed lease who had voiced clear and stringent opposition to the proposal. In addition, I consider the Minister's actions to stand in complete and stark contrast to the views expressed in his letter of July 5th 2009 that *"the department must have the approval of the Eton Chief and or full Council of Eton"* and that *"serious disciplinary"* action could be in store for anyone who did not comply with that direction. At the very least, the Ministers failure in his duty is a mistake, the direct result of which has been the registration of the lease in favour of Mr Trinh.

105. Accordingly, even if I am wrong in my finding that the land in question was not in dispute and that accordingly the Minister had the power to negotiate on behalf of the *"disputing custom owners"* I find that the process of consultation was fatally flawed and that that flaw led directly to registration of the lease.

CLAIM OF FRAUD AND MISTAKE

106. Sections 100 and 101 of the Land Leases Act Cap. 163 provide as follows:-

*"**100. Rectification by the Court***

(1) Subject to subsection (2) the Court may order rectification of the register by directing that any registration be cancelled or amended where it is so empowered by this Act or where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the interest for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of

which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

101. Indemnity

(1) Subject to the provisions of this Act and of any law relating to the limitation of actions any person suffering damage by reasons of –

(a) any rectification of the register under this Act;

(b) any mistake or omission in the register which cannot be rectified under this Act; or

(c) any error in a copy of or extract from the register or any copy of or extract from any document or plan in each case certified under this Act;

shall be entitled to be indemnified by the Government.

(2) No indemnity shall be payable under this section –

(a) to any person who has himself caused or substantially contributed to the damage by his fraud or negligence or who derives title, otherwise than under a registered disposition made bona fide for valuable consideration, from a person who so caused or substantially contributed to the damage;

(b) in respect of any loss or damage occasioned by the breach of any trust; and

(c) in respect of any damage arising out of any matter into which the Director is exonerated from enquiry under section 24."

107. The effect of those two sections, for the purposes of this case, is that the third and subsequent defendants are protected by section 100 (2) if they have acquired their titles for valuable consideration and without knowledge of the *"omission, fraud or mistake"* in respect of which the rectification is sought. Section 101 entitles the parties to be indemnified by the Government for any damage caused by reason of required rectification or, in respect of any mistake or omission in the register which cannot be rectified.

108. It is submitted on behalf of Irrepairable Ltd that the claimants must provide evidence that it was not a bona fide purchaser. Mr Laumae submits that the claimants must establish that Irreparable Ltd had knowledge of the omission, fraud or mistake and consequence of which the rectification is sought or has cause such an omission, fraud or mistake or substantially contributed to it by its Act, neglect or default.

109. Having considered the evidence I am of the view that with respect to this matter the claimants face an insurmountable hurdle. As I have already said earlier, there is simply no evidence which establishes to the requisite standard that Mr deMontgolfier or any of the subsequent purchasers had any knowledge of anything untoward in respect of the land dealings or registration of the lease. While Mr Godden referred to the timing of the registration of the transfer of lease to Irreparable as being *"suspicious"*, suspicion is not evidence and that in itself does not permit me to draw an inference as to Mr deMontgolfier's knowledge of any difficulties in negotiation of the lease.

110. It follows from this that the Court is unable to grant the primary relief sought by the claimants which is cancellation of the leases in the names of the First, Third, Fourth, Fifth, Sixth and Seventh Defendants.

111. For these reasons the claim against the First, Third, Fourth, Fifth, Sixth and Seventh Defendants must fail and is dismissed accordingly.

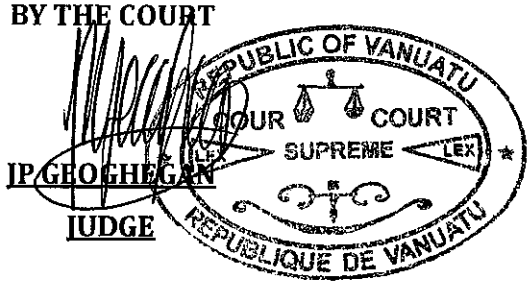
112. Given however, that I have clearly found that there was a mistake which led directly to the registration of the original lease, I consider that the claimant should be entitled, at least on the face of it, to indemnity from the State pursuant to section 101.

113. While the State filed very brief submissions regarding whether or not the claimants were entitled to any damages pursuant to section 101 this matter was not addressed fully either by way of evidence or submission. Accordingly I am of the view that the issue of the State's liability to the claimants under section 101 of the Land Leases Act together with the issue of quantum should be the subject of a further hearing.

114. I accordingly direct that there will be a conference held on Monday April 10th at 11 am to discuss how this issue will be determined and to make appropriate timetabling directions. For obvious reasons that conference need only involve counsel for the claimants and the second defendant.

Dated at Port Vila this 14th day of March 2017

BY THE COURT



JP GEOGHEGAN

JUDGE