IN THE SUPREME COURT

OF THE REPUBLIC OF VANUATU

~~(Civil Jurisdiction)~~

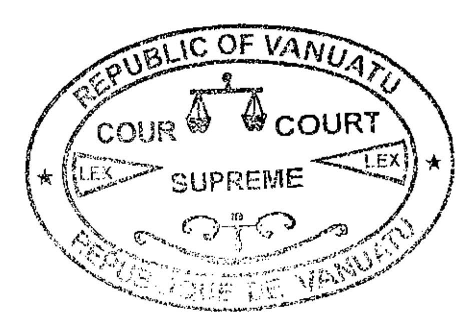
Civil

Case No. 17/600 SC/CIVL

BETWEEN:	**Kalsaf Tangraro** and **Russell Bakokoto** and **Kalperes Bakokoto**
	First Applicants
	Steven Kalsakau and **Chief Nmak Kalmet Pomal**
	Second Applicants
	Erick Gorrytal and **Kalkot Kaltabang**
	Third Applicants
	Berry Kalopong
	Fourth Applicant
AND:	**The Republic of Vanuatu**
	Respondent

Date of Hearing:	29 - 31 May 2018, 1 and 6 June, and 23 July 2018
Before:	Justice G.A. Andrée Wiltens
In Attendance:	Mr R. Kapapa for the First Applicants
	Mr W. Iauma and Mr G.Takau initially for both the Second Applicants – later only Chief Pomal
	Mr L. Napuati for Mr Kalsakau – as from day two
	Mr J. Kilu for the Third Applicants
	Mr S. Aron for the Respondent
	Mr C. Leo, and on day three Mr J. Vohor, for Mr Berry Kalopong, proposed Party, later Fourth Claimant
Decision:	14 September 2018

JUDGMENT



A. Introduction (Background)

1. Following Independence, the Republic of Vanuatu set about establishing a governance structure, taking into consideration the provisions of the newly created Constitution of the Republic of Vanuatu. Part of establishing the township of Port Vila as the Capital city included the Government, as permitted by the Land Reform Act [Cap 123], on suitable notice, declaring certain lands in and around Port Vila to be public land – to be used for development or public purposes.

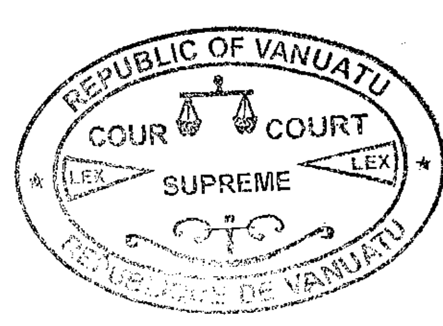
2. The relevant document, which clearly identifies all the land involved, is Land Reform (Declaration of Public Land) Order No. 26 of 1981("Order No. 26 of 1981"), dated 26 January 1981. That followed a Cabinet meeting in December 1980, at which the decision to designate the land as public land was debated and passed. According to the Cabinet paper, this had followed a number of prior meetings between the then Minister of Lands and custom owners.

3. The Land Reform Act enabled the Government to so act, but it imposed on the Government a corollary obligation - namely that under section 11(2) of that Act, the Government was required to agree compensation with the custom owners for "...the loss of use of the lands and loss of any improvements thereon". The section further provides a number of means by which the agreed compensation is to be paid.

4. The Claimants say the Government has not, at any time since 1981, met this obligation. Although there is acknowledgment that in 1994-5 the Government had paid some money (VT 275.4 million) to certain individuals of the claimant communities, the allegation is that such payments were not compensation for the compulsory acquisition of the land. Those payments are said to be "good will payments" made in acknowledgement of its default between the years 1981 and 1992 – to make good the loss of enjoyment of the land and income over that period of time only.

5. The Claimants go further and suggest that the funds paid out by the Government at that time were not actually Government funds, but were funds accumulated in the Port Vila Urban Land Corporation ("VULCAN"), which had been established in February 1981. The Claimants allege that the VULCAN was essentially a trustee for the customary owners which would provide payments to them of "surplus funds held in trust" as provided for in the Order establishing this entity. The Claimants maintain that the Government paid out money already owed from VULCAN to the custom owners – that no Government funds actually changed hands.

6. The Republic says, on the other hand, that full and final settlement of compensation for loss of use of the land was agreed between the Government and the people of Ifira, Erakor and Pango (the claimants in this action) as recorded in 3 Agreements dated 17 July 1992 ("the 1992 Agreements"). Evidence of this being the Government's intention can be seen from the earlier Secret Council of Ministers Paper dated 11 February 1992; and confirmation from the various receipts signed by individuals from the Claimants' communities which state the payments were in full and final settlement of any and all claims in relation to the Port Vila land compulsorily acquired by means of Order No. 26 of 1981.



7. The issue regarding whether or not compensation has been paid for the land compulsorily acquired in and around Port Vila has twice previously been the subject of Supreme Court proceedings by other Claimants. Both those claims were dismissed, for the reasons set out in the Court judgments; and those two decisions were later ratified by the Court of Appeal.

8. This case is said to be different – it is cast as a constitutional application.

9. There were 4 preliminary aspects of this case that required determination before any evidence could properly be heard. They were dealt with on day one of the trial. I reserved my decisions on all these issues and continued on with the hearing. The preliminary issues involved the following matters, and I now release my decisions on these aspects of the case:

   - (i) Mr Kalopong's opposed application to be joined as a party to the proceedings;

   - (ii) Whether the case should be stayed, pending final resolution of all custom land ownership claims;

   - (iii) Whether the case is time-barred; and

   - (iv) Whether the two previous related Court of Appeal decisions are binding on this Court, thereby preventing this Court from granting the relief sought on the basis of *stare decisis.*

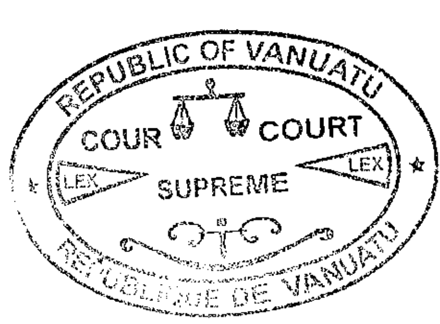
B. Pre-trial Issues

(i) Joinder

10. Mr Leo's application to join Mr Berry Kalopong as a party in the proceedings was filed on the morning of trial. The basis for the application is that Mr Kalopong has an ongoing appeal (against the Consent Orders of 2014 whereby the Claimants are declared to be custom owners) as to his alleged custom ownership in respect of part of what is known as old Title 81; and he therefore has a valid interest in the case. He relied on Rule 3.2 (1), (3) and (4) of the Civil Rules of 2002 as providing authority for his application.

11. Although there was objection to the application by all the other Applicants, Mr Aron consented.

12. No counsel was able to point to any prejudice to their clients should the application be granted, nor justify any other basis on which the application ought not to be granted. Mr Kapapa strongly argued the possibility that Mr Kalopong's appeal was filed out of time, and that as a result he could not have any interest in this case. Mr Kilu advanced the proposition that as Mr Kalopong was not a declared custom owner he should not be a party to this litigation. Mr Iauma complained of the lateness of the application. Mr Kapapa then sought a short adjournment to try and resolve the issue between counsel and those instructing them – this was not achieved.



13. The telling points for me were: (i) the complete absence of prejudice to any of the Claimants; (ii) the consent to the application by the Respondent; and (iii) that on the information available at the time, Mr Kalopong appeared to have a valid appeal underway. If he were to succeed with his appeal, he would then be in precisely the same position of the other Claimants.

14. It is ironic that the Claimants were seeking substantial amounts of money from the Government, but they were not prepared to countenance having to share with others possibly equally aggrieved.

15. I granted the application to join as a party.

16. Although Mr Leo was ambivalent about being joined as the Fourth Claimant or the Second Respondent, it seemed more appropriate for Mr Kalopong to be joined as the Fourth Applicant. I ordered accordingly, and indicated that if counsel wanted further justification for the decision that would be forthcoming. This was not sought by counsel.

(ii) Stay

17. There was an oral application to stay the proceedings advanced by Mr Leo and supported by Mr Aron. This was on the basis that before this case was heard, final conclusive decisions needed to be made as to whom the entire group of custom landowners comprises. I understood Mr Leo's position and the reason he advanced the application. I suggested however that the identification of all the beneficiaries could be dealt with after the hearing of this case. This would avoid further delay. Mr Leo eventually agreed.

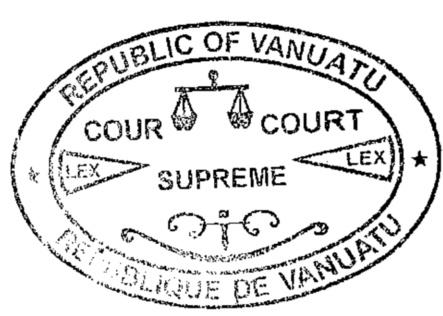
18. Mr Aron's support for the stay application surprised me. As I understood his position, he maintained that the entire Claimants' application had no valid basis and could not succeed. If that were so, why seek to delay? Mr Aron then advanced the "opening of the floodgates" argument. To me, that argument holds little attraction. If this current case is dismissed it will likely be with a significant award of costs. This takes into account that two previously similar claims have failed. If this claim also fails, it follows that yet further unsuccessful claims will invite even greater costs to be awarded. That is sufficient deterrent in itself.

19. I did not need to hear from any of the applicants' counsel as to the stay application.

20. The stay application was dismissed as being without merit.

21. This matter was scheduled as a 5-day trial; and the Claimants' issues needed to be aired and hopefully finally resolved without yet further delay – after all, the causal basis for the application dated right back to either 1981 or 1992. Further delay would be simply unjust in my view.

22. Interestingly, Mr Leo alternatively submitted that the Claim be struck out, presumably as being premature, although this was not articulated. The issue of a strike-out application was



something previously raised by Mr Aron, well before the matter was set down for trial. Despite having filed a formal application, Mr Aron was prevented from advancing his application due to non-compliance with Justice Geoghegan's time-tabling orders.

23. It seemed inconsistent to me for Mr Leo to now be able to advance the argument, he having just joined the fray. In any event, as I've already stated, it was time for the matter to be heard, not yet further delayed.

(iii) Time-Barred

24. The Limitation Act [Cap 212] requires most civil claims and/or applications to be filed in Court within a set time frame. Commonly that is within 6 years of the causal event. The 1992 Agreements have been considered by both the Supreme Court and the Court of Appeal twice previously in *Kalomtak Wiwi Family v The Minister of Lands* CAC 04/22 and *Michel Kalnawi Kalourai v Republic of Vanuatu and Others* CAC 15/3. In respect of both cases, the Supreme Court considered *inter alia* that the claims were time-barred; and that was endorsed by the Court of Appeal.

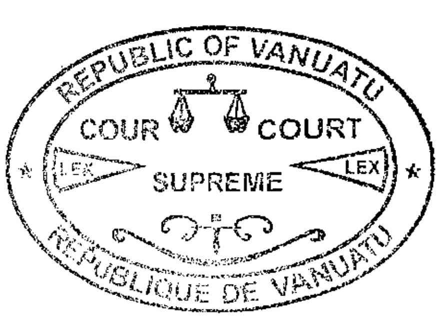
25. The Claimants' arguments as to this were straight-forward:

    (i) This is a constitutional application, and as a result the Limitation Act has no application as it makes no reference to constitutional applications. Not only is the Constitution the supreme law of Vanuatu, but by Parliament not including constitutional applications in the Limitation Act, it's clear intention must be to exclude such matters from being time-barred.

    (ii) (ii) Further, even if the Limitation Act did have application, as the breach of the Claimants' constitutional rights are on-going, or continuing, time cannot have commenced to run.

26. Mr Aron submitted that the Claimants' were merely cloaking their real grievance as a constitutional application – in reality, their true position was that the 1992 Agreement was inadequate, and the Claimants were merely attempting to gouge more compensation from the Government as in the previous two cases, both of which failed at least in part due to being time-barred. Mr Aron submitted that section 3 of the Limitation Act was applicable; in particular subsections (1)(a) and (d). No matter whether the commencing causal event was 1981 or 1992, this Constitutional Application, first filed on 14 March 2017 but later amended on 5 and 19 May 2017 was well outside the 6 year time limit for commencing a case founded on contract or for recovery of a sum of money.

27. Mr Aron submitted the case should be dismissed accordingly, with an order for costs.



28. Again interestingly, although recently joined as Fourth Claimant, Mr Leo argued that the action was merely seeking compensation, and it was therefore out of time. I'm unsure if Mr Leo had had sufficient time to fully understand his client's case, as this submission appeared to me to be out of step with his client's interests.

29. I noted that pursuant to Article 6(i) of the Constitution anyone may, "...independently of any other possible legal remedy"..., apply to enforce his/her guaranteed rights. That to my mind, answered Mr Aron's submission of this case being put forward merely as a constitutional case in order to get around the time bar issue. Any Claimants is entitled to apply if "...they consider any of their rights has been, is being or is likely to be infringed...". Whether or not they can establish their grievance and achieve redress is a question that can only be answered after hearing all the evidence.

30. Accordingly, in my view this case, framed as it is as a constitutional application, is not time-barred.

(iv) *Stare Decisis*

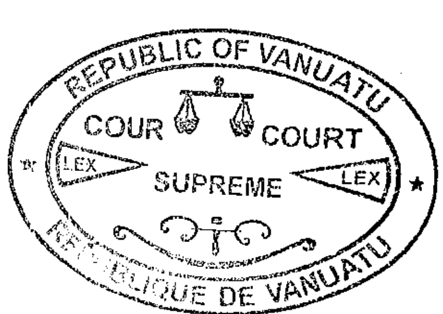
31. After a lengthy discussion, it transpired that the nub of Mr Kapapa's submission as to this aspect was that the Court of Appeal's considerations of the 1992 Agreements did not involve, on either occasion, the proposition now being put before me.

32. Mr Kapapa's case is that the 1992 Agreements do not deal with compensation for the loss of the land in question. Instead, it dealt with compensation to the custom land owners for the loss of use of the land between the events of 1981 and 1992. Not only was he intending to call evidence to support his submission, but he pointed to the wording of the 1992 Agreements itself, which he submitted should be interpreted in the way he emphasised, namely:

> "1. As compensation for the *loss of use of the said Land by the former custom owners prior to the signing of this agreement* the Government...." (Mr Kapapa's emphasis)

33. Mr Kapapa maintained that the Government has yet to deal with the compensation for the loss of the land – and further, that the Government has to date only dealt with the Erakor claim; not the claims of Ifira and Pango. In support of this contention he pointed to the 1992 Agreement produced with the deletions of Ifira and Pango in two places; and he maintained that all four signatories were Erakor persons, and that no one from Ifira or Pango had either signed the document or given authority to anyone else to do so on their behalf.

34. Following this clear statement of differing interests between the various Claimants and Mr Iauma acting for Claimants from both Ifira and Erakor, I queried how it was that Mr Iauma was able to act for two parties whose interests must be at odds with each other. Mr Iauma was to consider his position overnight. As a result, the second day of trial found Mr L. Napuati acting for Mr Kalsakau from Ifira; and Mr Iauma and Mr Takau continued to act for Chief Pomal of Erakor.



35. Mr Iauma submitted that the 1992 Agreements were valid compensation agreements, and he therefore did not quibble with the previous Court decisions. However he maintained that his client's fundamental rights were breached regardless, and the constitutional application must accordingly be heard.

36. Surprisingly, Mr Leo again argued against this submission. His position it appears is that the Court of Appeal is correct in the analyses adopted in the 2 cases in question – resulting, in his submission, that it should logically follow that this case must be dismissed as the various *obiter dicta* and the *ratio decidendi* are binding on this Court and the earlier case cannot be distinguished.

37. Mr Aron submitted that the previous Court of Appeal decisions were binding on the Supreme Court; that the 1992 Agreements were therefore valid compensation agreements, and that this Court therefore had to dismiss the Claim.

38. I accept Mr Kapapa's arguments. The present case is dissimilar to the previous cases, although the basic subject matter is the same. The validity of the 1992 Agreements is not necessarily the key issue to be determined. The Claimants are advancing a number of issues for determination, alleging that the compensation paid in 1994 were "good will" payments, made to numerous individuals who were not necessarily custom land owners, and without any valuations to establish the true value of the land compulsorily acquired. Mr Kapapa maintained that in fact the custom land owners were not properly identified at that time, and after subsequently being declared to be custom owners, they have, to date, never received compensation for the land taken.

39. I noted that Mr Aron had filed a memorandum as to agreed facts and issues. The first issue is whether or not the 1992 Agreement was in breach of Article 77 of the Constitution. Secondly, whether the 1992 Agreement infringed Article 5(1)(j) of the Constitution. And later in the document, whether the VT 245.4 million paid out was full and final settlement for the land acquired pursuant to Order 26 of 1981.

40. There seems to me to be an acceptance by Mr Aron in those statements that there are real issues for this Court to determine, which are yet to receive the scrutiny of either this Court or the Court of Appeal.

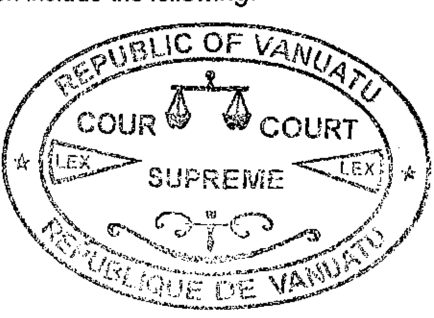
41. I therefore find that the previous decisions of the Court of Appeal are not necessarily binding on this Court in relation to this current case. I considered I needed to hear evidence in order to do justice.

(v) Conclusion

42. However I was very much alive to the fact that some of these preliminary matters might need to be re-visited in light of the evidence.

C. The Claim

43. The orders sought in the further Amended Constitutional Application include the following:-



(i) a declaration that the 1992 Agreement was in breach of Article 77 of the Constitution, in breach of the applicant's constitutional rights under Article 5 (i)(j) of the constitution and is invalid, void and of no effect;

(ii) an order that the applicants be paid Vt 10m each for the breaches of their Constitutional rights pursuant to Articles 6 (1) and (2) of the Constitution;

(iii) a declaration that all "compensation payments" made pursuant to the 1992 Agreement are unlawful and in breach of Articles 5 (i)(j) and 77 of the Constitution and do not constitute compensation payments for Port Vila public land;

(iv) an order that the Republic of Vanuatu must enact proper legislation through Parliament to prescribe the proper criteria for the assessment of compensation and the manner of its payment to those whose custom land has been compulsorily acquired pursuant to Order 26 of 1981 as part of Port Vila public land;

(v) an order that the applicants must be paid their fair and proper compensation for customary land acquired by the Republic of Vanuatu in 1981 as part of Port Vila public land;

(vi) an order that interest be paid on the compensation payments due, from 26 January 1981 until fully settled at 10% per annum; and

(vii) an order for costs.

D. Relevant Legislation

44. There are numerous Articles of the Constitution that require consideration:-

Article 73: "**Land belongs to custom owners**

All land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants."

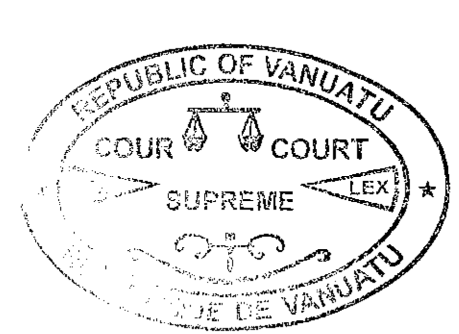
Article 74: "**Basis of ownership and use**

The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu."

Article 80: "**Government may own land**

Notwithstanding Articles 73 and 74 the Government may own land acquired by it in the public interest."

Article 77: "**Compensation**



Parliament shall prescribe such criteria for the assessment of compensation and the manner of its payment as it deems appropriate to persons whose interests are adversely affected by legislation under this Chapter."

Article 5(1)(j): "**Fundamental rights and freedoms of the individual**

(1) The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health –(j) protection for the privacy of the home and other property and from unjust deprivation of property;....."

Article 6 (1) and (2): "**Enforcement of fundamental rights**

(1) Anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or is likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right.

(2) The Supreme Court may make such orders, issue such writs and give such directions, including the payment of compensation, as it considers appropriate to enforce the right."

45. As well, the provisions of sections 11 and 12 of the Land Reform Act are relevant:-

Section 11: "**NOTICE BY MINISTER OF USE OF PUBLIC LAND**

(1) The Minister shall give the custom owners not less than 6 months' notice of the intention of the Government to use public land described in the notice for development or public purposes.

(2) The Government shall agree compensation with the custom owners for the use of the land and loss of any improvements thereon which, depending on the nature of the intended use of the land, may be in the form of:

(a) a lump sum payment which may be paid in instalment over not more than 30 years;

(b) the transfer of them of other public land;

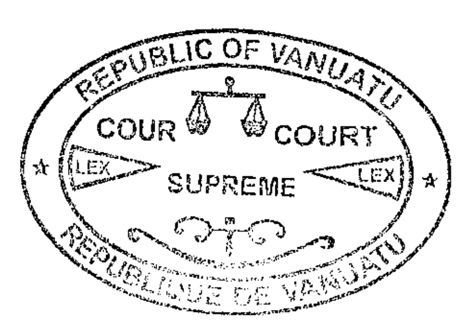
(c) the provision of free services of specially agreed rates by the Government, public utilities or municipalities;

(d) shares in a company established by the Government alone or with other persons for developing the land;

(e) an agreed share of net income received by the Government from the land;

(3) In addition to the compensation referred to in subsection 2, the Government may give the custom owners such minority representation on bodies that may manage the land as shall be agreed.

(4) The Government may at any time, pay a sum to custom owners in commutation of the custom owners' share of income under subsection (2) (e)."



Section 12: "**DECLARATION OF LAND AS PUBLIC LAND**

The Minister may at any time on the advice of the Council of Ministers and after consultation with the custom owners declare any land to be public land."

46. The applicants point, by way of comparison to the provisions of the Land Acquisition Act 1992, and also to sections 9B, 9C and 9D of the Land Reform Amendment Act 2000 regarding the issue of how compensation is to determined:

"**Government to determine compensation**

9B (1) The Government is to determine the amount of compensation payable to the custom owners of the land.

(2) In determining the amount of compensation, the Government must take into account the market value of the land and any other matters that it considers relevant.

(3) A determination must be in writing and a copy of it must be given to the custom owners of the land.

Market value of land

9C The market value of land is to be determined by the Government valuer who is to carry out such investigations as are necessary to determine the market value.

Identity of custom owners and payment

9D (1) A compensation payment must not be made to a person unless the Minister is satisfied that he or she is a custom owner of the land.

(2) A compensation payment may be made to a particular custom owner on behalf of the other custom owners of the land.

(3) A compensation payment is to be made as soon as practicable after the appeal period under section 9E expires."

47. As well, the provision section 3 of the Limitation Act [Cap 212] are relevant:

"**3. Limitation of actions of contract and tort and certain actions**

(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say –

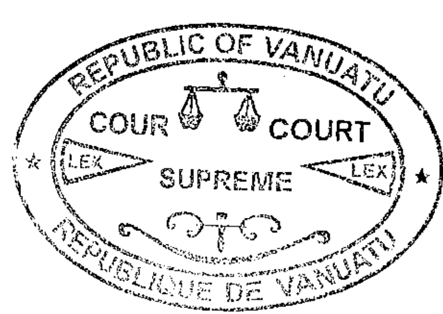
(a) actions founded on simple contract or on tort;

(b) actions to enforce a recognizance;

(c) actions to enforce an award, where the submissions is not by an instrument under seal;

(d) actions to recover any sum recoverable by virtue of any Act, other than a penalty or forfeiture or sum by way of penalty or forfeiture:

Provided that –



(i) in case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contact or such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years; and

(ii) nothing in this subsection shall be taken to refer to any action to which section 5 applies.

(2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.

(3) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued:

Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

(4) An action shall not be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

(5) An action to recover any penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any Act shall not be brought after the expiration of two years from the date on which the cause of action accrued:

Provided that for the purposes of this subsection the expression "penalty" shall not include a fine to which any person is liable on conviction of a criminal offence.

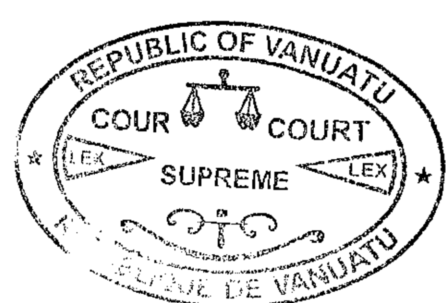
(6) Subsection (1) shall apply to an action to recover seamen's wages, but save as aforesaid this section shall not apply to any cause of action within the jurisdiction of the Supreme Court which is enforceable *in rem*.

(7) This section shall not apply to any claim for specific performance of a contract or for any injunction or for other equitable relief, except in so far as any provision thereof may be applied by the court by analogy in like manner as has, prior to the commencement of this Act, been applied."

E. <u>The 1992 Agreements</u>

48. At pages 206, 206A and 207 of the bundle of the agreed documents at trial one version of the entire document is available. It is dated 17 July 1992 and headed "Agreement between the Government of the Republic of Vanuatu and the former custom owners of Port Vila Urban Land Relating to Compensation Payment". The words "Representatives of"... have been hand-written ahead of .... "the former custom owners".

49. The recitals record that the Government has compulsorily taken the land shown in the schedule, that the former owners have been deprived of the use of the said land, that the



former custom owners accept the Government's compulsory acquisition, and that both parties are desirous of agreeing compensation for loss of use of the land in accordance with the Land Reform Act.

50. The agreement goes on to record that it is agreed "as compensation for the loss of use of the said land by the former custom owners prior to the signing of this agreement the Government pays and the Representatives accept on behalf of the former custom owners ..... the sum of Vt 275,400,000 in full and final settlement for the said loss "payable by Vt 110,160,000 to Erakor, Vt 110,160,000 to Ifira and Vt 55,080,000 to Pango.

51. The Representatives, the custom owners, their issues, successors in title, their personal or legal representatives howsoever appointed or authorised "shall indemnify the Government from any claim that the money has not been properly paid out or further claims by others to such payment or to the said land.

52. The agreement was signed by the representatives and witnessed; and signed by the Minister of Natural Resources, Paul B Telukluk, on behalf of the Government.

53. The 1992 Agreements came about following a Council of Ministers meeting of 11 February 1982 which considered a paper on "Compensation – Previous Land Owners – Port Vila and Luganville Urban Areas" presented by Mr Telukluk, the Minister of Natural Resources. It recorded the fact that land had been compulsorily acquired by the Government under Order 26 of 1981 but although the former owners were entitled to compensation "so far the government has not paid this". The document then recited that the Minister would open negotiations with the previous land owners "with a view to reaching agreement on the amount of compensation to be paid which will be calculated on a formula based on the value of the land" as at 26 January 1981. Interest on the compensation amount was also be taken into account.

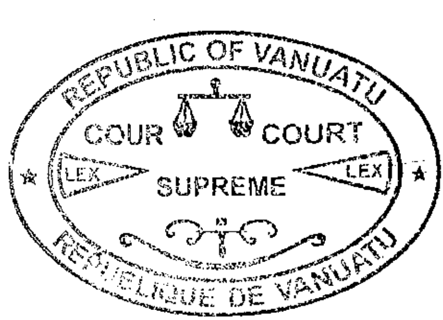
F. The Evidence

(i) By the Applicants

54. Mr M Korman told the Court he was the first and only Prime Minister to approve compensation – in 1992; a total of Vt 275 million. This was paid to Erakor and Ifira – Vt 110 million each; and Pango – Vt 55 million. The money was paid to chiefs for the custom owners. The money was "to compensate the public land in Port Vila town in 1992" – to rectify the failure of the former Government.

55. Mr Korman said what was paid was not full payment, but only a part of it. He said this as the previous Government had agreed to pay Vt 2 billion in 1981-2. He also told me that he had made it clear that the Government would revisit the valuation of the land and release funds once that was completed. He also made it clear that exact boundaries were required to be established before final compensation could be issued.

56. Mr Korman confirmed that no valuation of the land taken was prepared in 1992. He agreed that Ifira had declined the compensation offered – however Pango and Erakor accepted. The payments made were a "good will" payment from VULCAN – as the Government had no money



itself to make such payments. Mr Korman said the payments were not intended to be in full and final settlement.

57. Mr Korman was shown a document at Page 440 of the Agreed Bundle. It is a record of the Council of Minister's ("COM") Meeting No. 15/28/09/95 regarding decision No. 108. It records that the COM approved of Mr Telukluk's implementing the "policy of compensation of urban land" to Ifira, Erakor and Pango. I was invited to take from that that it indicated that in October 1995 the COM was still of the view that the issue of compensation remained unfinished.

58. Mr Korman agreed that the sum paid out was arrived at by negotiation with the various interested parties. He agreed also that section 11 of the Land Reform Act required the Government to reach an agreement with the custom owners. He accepted further that COM decision 108 came about after considering Mr Telukluk's paper at page 438-9 of the Agreed Bundle, which recorded that compensation of about Vt 300 million had already been paid and "the second phase of this policy is to give few lots of land in town back to the three villages".

59. It was put to Mr Korman that compensation had already been completed by 1995 and he responded: "In paper yes, but not in actuality. These chiefs are still waiting". He agreed that lands were returned, as suggested in Page 440.

60. Mr Korman had told me the Government had promised compensation when the land was declared public. When I challenged him as to that, he seemed to back-track. He finally accepted that there was no such promise; and the real position was that the Government owed compensation under the Land Reform Act.

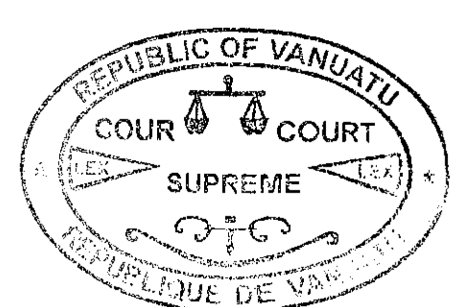
61. Mr S. Kalsakau told me that as no valuation was ever prepared, it is therefore not possible that compensation was paid to the custom owners. He produced a current valuation, and evidence of his custom ownership. He went on to say that he recalled "very well" that the 1994 payments were good will payments, not compensation payments. He said that message was conveyed by the Government to the people and that it was public knowledge the payments were good will payments. He maintained the payments were "nausautonga" – good will, for use of the land.

62. Mr Kalsakau acknowledged payments were made, but not to him. He was taken to various receipts in the Agreed Bundle. He agreed Page 393 was a receipt signed by a relative of his; and that nowhere in Page 394-6 or 400 was good will or nausautonga referred to.

63. Mr D. Kalmet produced a copy of the same current valuation and the same declaration of his customary ownership. He told me that he recalled "very well" that the 1994 payments were good will payments, not compensation. He confirmed that at page 207 of the Agreed Bundle a close relative had signed a receipt for compensation.

64. Mr L. Tarosa produced a current valuation of land he had prepared on the instructions of Mr Tangraro. He was unable to tell me the value of the land in 1981 – he estimated it has risen by some 30% in the interim since then.

65. Mr R. Dick produced a current valuation of land on the instructions of Mr Virelala. The valuation was reliant on the matters set out in sections 9A, 9B, C and 9D of the Land Reform Amendment Act of 2000. He agreed that the previous legislation, in particular section 11 of the Land Reform Act required the Government to negotiate compensation, which accords with the



COM agreeing in principal to "open negotiations... with a view to reaching agreement..." (see Page 205 of Agreed Bundle).

66. Mr K. Tangraro produced a Green Certificate demonstrating his interest in the land, and the Island Court declaration to the same effect. He said he had received no compensation payment; not even a valuation to get things started. His family was not part of the 1994 payments. He produced a current valuation (by Mr Dick) and told me the Government had to abide by its own legislation. He went on to say that no one at Eratap had received any compensation payments.

67. Mr R. Bakokoto produced evidence of his customary ownership and Mr Dick's current valuation. He too recalled "very well" that the 1994 payments were good will, not compensation. He said the entire Ifira community were made aware of that at the time. He told me his father was part to the 1992 Agreement, but it was not for compensation – it was a 'free will gift". He was unaware of any meetings or consultation at the time; and never at any time did he get any payment.

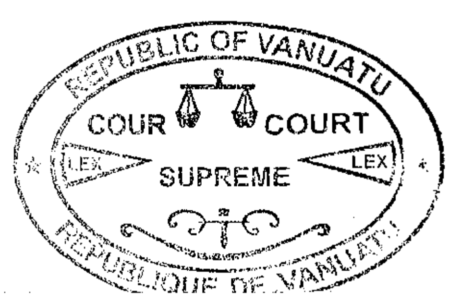
68. Mr Aron cross-examined Mr Bakokoto regarding whether Mr Korman described the payments in his sworn statement as good will – he accepted that Mr Korman had not said that in his sworn statement. Mr Bakokoto was taken to Page 433 of the agreed bundle – and he accepted his signature appeared on a receipt for Vt 100,000. He told me he'd accepted Vt 2 million on behalf of his father. He was shown further receipts, which he accepted as signed by a close relative, Douglas Bakokoto (Page 422); a close relative (Page 426); and his mother Rachel Bakokoto (Page 424). He was also taken to Page 222, which refers to 3 cheques being made to Ifira persons and accepted there was no mention of "good will"; similarly Page 223 and a cheque to Douglas Bakokoto and no reference to "good will". He agreed there was mention of compensation to Ifira.

69. It was put to Mr Bakokoto that he did receive compensation payments, but he denied that. He went on to say that those persons recorded at Page 222-3 of the Agreed Bundle are not custom owners, except for Pastor Douglas.

70. Mr E. Gorrytal set out the history of Port Vila land, pointing out that when compulsorily acquired by virtue of Order No. 26 of 29181 the custom owners were not identified and therefore could not be compensated. His evidence was that Mr Korman commenced the 1992 compensation discussions and that this is when numerous land cases were commenced to ascertain who the custom owners were, and to clarify/establish exact boundaries. The land case involving Mr Gorrytal's family only concluded in November 2014, when by consent, a number of families were declared to be custom owners, including the Gorrytal family.

71. Mr Gorrytal identified all his family land and produced a current valuation by Mr Tarosa. He told me that Government had paid a total of Vt 310 million as claimed compensation – Vt 110,160,000 each to Ifira and Erakor, and the balance to Pango. He said he was no longer able to locate documentation to that effect. He cited the two previous similar claims in the Supreme and Appeal Court as indicating the same amounts of payments.

72. Mr Gorrytal repeated his point that at the time of the payments there had been no proper determination of who the custom owners were, nor were any boundaries properly established. The "compensation" was not paid to custom owners, but to "associations, sports clubs, youth groups, other island communities, some businesses and business houses, and even certain



Chinese shops". Again, he was no longer able to locate documentation evidencing that in relation to Pango; but he produced a list of payments to Ifira which included payments to the groups and entities he earlier mentioned.

73. He considered therefore, that even if members of his family had received any money in 1992 out of the Pango funds, that amount pales into insignificance compared to the current value of the land at Vt 6 billion.

74. Therefore, Mr Gorrytal was of the view that Article 5(i)(j) of the Constitution had been breached – his family had been unjustly deprived of their property. He went onto allege that the 1992 Agreement had never been dismissed with the Ifira, Pango and Erakor communities. As the head of his family he had not discussed the 1992 Agreement, nor authorised anyone else to sign it.

75. Mr Gorrytal concluded his evidence in chief by endorsing what others had said – that the so – called compensation was in fact a good will payment.

76. In his second sworn statement Mr Gorrytal accepted Mr Dick's valuation of his family land to be actually Vt 3,274,938,721 – which is the amount he is actually claiming.

77. In cross-examination, Mr Gorrytal told me he had received Vt 59,000 in 1994, but did not sign any documentation. He eventually accepted this had been part payment of the Government "compensation", although he termed it a good will payment. He accepted that Mr Korman's sworn statement only referred to compensation for public land, and did not refer to good will.

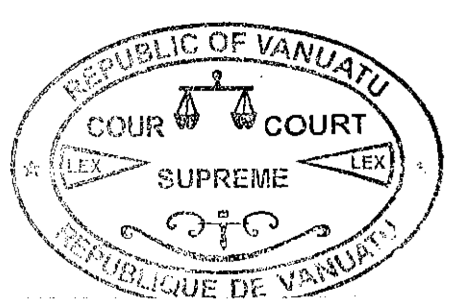
78. Mr K. Kaltabang also produced evidence of his custom ownership and Mr Tarosa's valuation. He too, apparently, could recall "very well" that the 1994 payments were good will and not compensation. He said that the Ifira community were made aware of that at the time.

79. Mr Kaltabang told me that even though he was a custom owner he received no compensation payment. He was shown receipts signed by his grandfather (Page 435), his brother (Page 436), and another brother (Page 437) for so-called compensation received. He said he was unaware as to where that money went.

80. Mr P. Telukluk did not provide a sworn statement, but gave oral evidence of his involvement with this whole matter in the early 1990's as Minister for Natural Resources and also as Minister of Lands in the Korman Government. He signed the 1992 Agreement – he stated there was only one agreement, which had been prepared by SLO.

81. The 1992 Agreement related not to final and complete payment by way of compensation, but was "to open up more developments". It was to use, not acquire land. He told me that after the 1992 Agreement, he "prepared for compensation under the Land Acquisition Act 1992". He told me that some land was given back to Ifira, Erakor and Pango, as approved by the COM. That was done because compensation had not yet been paid for all the land taken – compensation was made in 1994-5. This was evidenced at Page 440 of the Agreed Bundle.

82. He accepted in cross-examination that no custom owners had been declared at the time of the 1992 Agreement. He said discussions were with the chiefs of Ifira, Erakor and Pango, and with their land committees. He agreed the 1992 Agreement in evidence was signed by 4 persons from Erakor. He said there had been lots of talk about compensation with the Ifira and Pango



communities, but they did not want to sign as the amount was too small. As a result, he only signed with Erakor.

83. Mr Telukluk agreed Vt 110 million went to the people of Erakor. Two years later, the PM asked him to make a similar payment to Ifira as compensation to the customary owners.

84. In 1992 the Government had no money. It used money from VULCAN to make the compensation payments, as it was the only money available. That money was not the Government's – it belonged to the custom owners. There were no valuations in 1992 or earlier.

85. When it was put to him that the money paid was not good will money but compensation Mr Telukluk disagreed. He said it was a political decision at the time. He agreed that nowhere is there any record to demonstrate that what was paid was good will – all documentation refers to compensation. He was asked if by 1995 the compensation payments had been completed, he said it was just legal jargon – there had not been full settlement. He maintained that despite being shown his own COM's paper which referred to settlement – see Page 438 of Agreed Bundle.

86. Mr B. Kalopong simply attempted to substantiate that he had a viable interest in the land as a custom owner. He did not advance matters beyond that.

(ii) <u>By the Respondent</u>

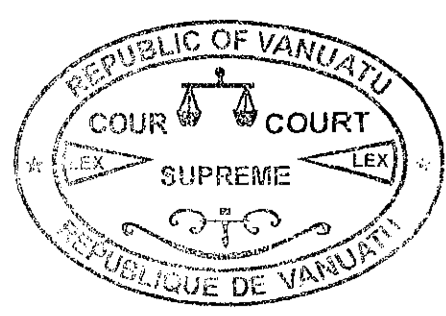
87. Mr R. Tari confirmed that Order No. 26 of 1981 was implemented in January 1981. He confirmed also that VULCAN was set up in 1981, and what's its functions were – he confirmed that a percentage of land rents was due to be paid to custom owners. He was unable to recall when VULCAN ceased to operate, but told me the Government closed it down due to complaints by custom owners and administrative issues. Its functions were taken over by the Department of Lands of which he was the Director between 1992-6.

88. Mr Tari advised that Mr Korman campaigned in 1991 on the issue of compensation. One of his election platforms was to compensate custom owners in respect of Order No. 26 of 1981 – he said there were media announcements to that effect, and many consultations with the chiefs of Ifira, Pango and Erakor. He told me that in 1991-2 Mr Korman and his officials consulted with the head chiefs and their people about compensation; and the chiefs and their people carried out several meetings among themselves to reach an agreement.

89. He told me there were three 1992 Agreements, one each for Pango, Erakor and Ifira. The contents of each were similar.

90. Mr Tari did not personally witness the payment ceremony with Ifira Chiefs but was at both the Pango and Erakor ceremonies. He recalls Mr Korman speaking at each ceremony in similar vein and referring to compensation in respect of Order No. 26 of 1981. Mr Korman signed both agreements at the time of handing over the compensation cheques.

91. Mr Tari is unaware of any challenge or complaint to those payments during his time as Director of the Department of Lands. He confirmed VULCAN funds were used to make the payments.



He also confirmed that by 1992, there had been no custom ownership declarations in relation to the land taken.

92. It was put to Mr Tari that the Pango Chief had not signed a version of the 1992 Agreement – he disagreed.

93. Mr Kalourai was Finance Manager for the Department of Lands from 1993-2017. He was aware of VULCAN and how it functioned. He recalled that in 1992 Mr Korman and his officials consulted with Chief Mantoi Kalsakau III of Ifira and representatives of the custom owners of Port Vila Town in relation to compensation – he was present at 2 or 3 such meetings. He recalled that the Chief and representatives accepted the compensation and an agreement was signed to that effect. The Government used VULCAN funds to make the compensation payments.

94. He reversed his position during examination – in – chief, and said that Chief Mantoi Kalsakau III had not in fact agreed to the compensation. I am unaware why this evidence changed. In cross-examination he denied Mr Korman speaking of good will payments, or *nausautonga*. He agreed the funds utilised to make the payments came from VULCAN. He told me the Chief expressed his view that the Vt 110 million was too low, but he didn't know why the Chief refused.

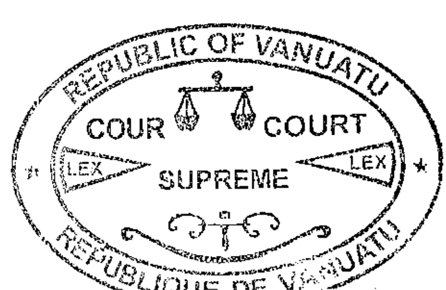
95. In re-examination, Mr Tari was asked the purpose of the 2 or 3 Ifira meetings he'd attended. He told the Court it was to establish what the Government should pay the customary owners; and whether the customary owners would agree to the compensation offered.

96. Mr R. Regenvanu was the Minister of Lands and Natural Resources from 2013-15 and 2016-17. He produced a Lands Policy Implementation document presented to Government by the then Minister of Lands which preceded the passing of the Land Reform Act. He confirmed that section 12 of the Act enabled compulsory acquisition of Land, as was done by Order No. 26 of 1981. He confirmed that VULCAN was then set up to administer the newly declared public land, and produced a copy of the COM paper.

97. Mr Regenvanu produced Mr Telukluk's COM's paper relating to compensation to the previous land owners at Port Vila and Luganville. He produced a copy of the 1992 Agreement relating to Erakor – and confirmed he could no longer locate similar agreements for Ifira and Pango. He confirmed those agreements were made in accordance with section 11 of the Land Reform Act. He produced receipts for the 1994-5 compensation payments made by the government in accordance with the Ifira agreement – he could not locate similar receipts for Erakor and Pango. He also produced the COM's letter by Mr Telukluk of 28 September 2005 confirming Vt 300 million had been paid to all 3 villages. The return of some of the land taken would complete the compensation, and he produced the COM's approval of that.

98. In cross-examination Mr Regenvanu was asked a number of questions relating to Green Certificates. I found this information to be of limited application to the issues I was considering. He confirmed that the Lands Policy Implementation document presented by Mr S Regenvanu established that consultation with customary owners had taken place.

99. He confirmed VULCAN funds were used to make the payments pursuant to the 1992 Agreements. He told me he knew all 3 villages received compensation payments as he had produced receipts signed by persons from Pango and Ifira; and he pointed to Mr Telukluk's



letter to the COM of 28 September 1995 confirming Vt 300 million had been paid to those villages in 1993-5.

G. Evaluation of Witnesses

100. I reminded myself to evaluate witnesses primarily on their consistency:- both within their accounts and when comparing their accounts with the evidence of others and the documentary exhibits. The manner in which each testified, or their "body language", is something which is unavoidable to take note of, but is only a small part of an overall assessment of either the veracity or reliability of that person.

101. I reminded myself also that each witness is a witness whose evidence should be taken into account, no matter who calls him/her to testify.

102. The two valuers Mr Tarosa and Mr Dick were sound witnesses whom I had no reason to doubt. They appeared to be independent. I accepted their evidence.

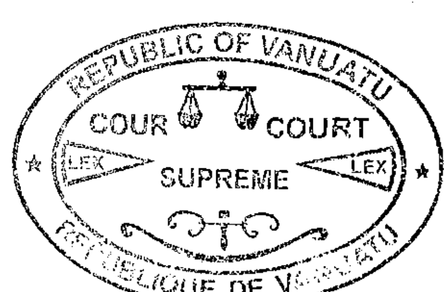
103. Mr Kalobong did not really advance matters for me. I accepted that he has a valid appeal under way and therefore he is an interested party; but his evidence did not address any of the issues I needed to determine. I had no difficulty accepting his evidence as far as it went.

104. I placed Mr Tangraro and Mr Gorrytal in the same category. Both were adamant that while money was paid by the Government in 1992-4, it was not paid to them or their village. Both also asserted, correctly, that there had been no proper declarations made as to who were the relevant custom owners, but less accurately that therefore the payments could not be categorised as compensation for land taken. I beg to differ with the latter sentiment:- it seems to me that if the chiefs and the representatives of the village land owners agreed a lump sum payment by way of compensation from the Government, then it was up to the chiefs and representatives as to who should share in such compensation. And the Government could rightly assume that they were in a sound position to make those assessments.

105. Both witnesses were adamant, but both were undermined in terms of their reliability by answers given in cross-examination. I was sure each believed fervently what he told the Court; but I was less sure of their reliability. I had doubts about material parts of their evidence.

106. I group Mr Kalsakau, Mr Kalmet, Mr Bakokoto and Mr Kaltabang together. In my view, they did not really advance the case. Each established that he was a custom owner of part of the land involved, and each produced a current valuation. Neither of those pieces of evidence was challenged:- but neither did they impact on the issues I was called upon to determine.

107. The real import of their evidence was that each could "very well" recall that the payments made were good will, not compensation. Such orchestration of the same phrase did not strike me as evidencing independent recollections. The fact of the exact words being used, without any supporting evidence, was suspicious to me. Given that all the communities were allegedly made well aware of the fact that the payments were good will payments, why was there so little and such unconvincing evidence of this? Given that Mr Korman had run his election campaign on this basis, where was the documentary evidence demonstrating this point? The answer is that any such documentary evidence was not produced by the claimants. The only evidence



tendered was these identical statements. I was not prepared to accept these bold statements from these witnesses.

108. Mr Korman, in my view, remains a polished politician. He answers questions by not answering them, but giving alternative statements. I did not think it safe to give weight to his evidence, on both the grounds of veracity and reliability. I felt he played to the crowd in Court and provided answers his supporters badly wanted to hear. A real disparity, between his sworn statement and his oral evidence.

109. Mr Telukluk was giving evidence relying on what he could recall from some 25 plus years ago without the aid of a sworn statement or documentary preps. That was one issue I had with his evidence. The other is that I did not find him a witness of the truth. He was evasive and inconsistent, at times with his answers. I determined it was not safe for the Court to rely on his evidence.

110. Mr Kalourai was a sound witness, who provided supporting documentation for what was stated. Mr Regenvanu was in the same category. I accepted both as witnesses of the truth, whose evidence I could rely on. Cross-examination did not undermine this assessment.

111. Mr Tari caused me concerns by immediately, and for reasons never explained, going back on his original statement in a very material way. I determined I could rely on his evidence only where there was independent support for what was said.

H. Discussion

(i) Are there breaches of the Constitution?

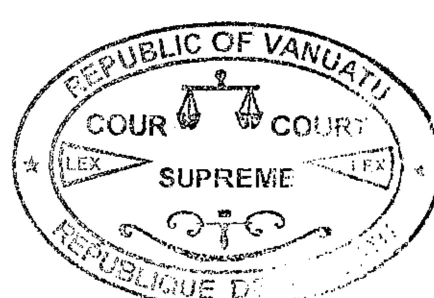
112. The applicants are in fact advancing the proposition that they have been unjustly deprived of property in that:-

- They have not been compensated; and/or that;

- Such payments that have been made are unholy inadequate as true compensation, have not been made to the correct persons as custom land owners, and were made out of funds accumulated in VULCAN for the custom owners - not Government funds.

113. In my view, the first of those issues is relatively straight forward. Article 80 of the Constitution provides for the Government to own land acquired in the public interest:- Order No. 26 of 1981 is therefore a valid compulsory acquisition of land, provided the necessary notice has been given and there is no challenge to that. Indeed the applicants acknowledge Government's right to acquire land, under section 12 of the Land Reform Act.

114. The next provision requiring consideration is Article 77 of the Constitution. It provides that Parliament "shall prescribe such criteria for the assessment of compensation and the manner of its payment as it deems appropriate..". The applicants submitted this provision required Parliament to pass legislation, which they further submitted was not done - the Government simply entered into the 1992 Agreements.



115. I do not accept that submission. I accept that Parliament was required to prescribe criteria for and manner for payments, but I do not accept that necessarily involves the passing of legislation.

116. What relevant legislation was in place at the time was the Land Reform Act, and in particular section 11 (2) which dealt with the issue of compensation for land taken under section 12 -

> "(2) The Government shall agree compensation with the custom owners for the use of land and loss of any improvements thereon"......

117. The subsection goes on to provide for the manner of any such payments. Subsection (4) deals with the situation where agreement cannot be reached.

118. No matter how one examines this, it is plain that the requirements set out in Article 77 of the Constitution are fully met by the provisions of section 12 of the Land Reform Act. That being so, what the Government was obligated to do was to "agree compensation" with the custom owners.

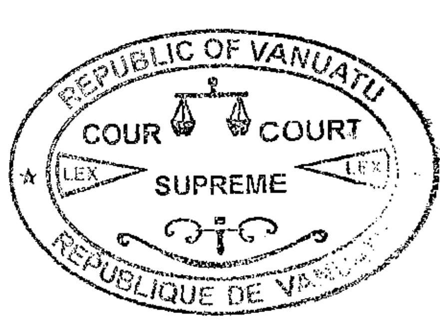
119. The Government submitted that the 1992 Agreements with each of the chiefs and representatives of the custom land owners of Ifira, Erakor and Pango was exactly that:- an agreement as to the compensation payable for the land acquired in 1981. It was late, and arguably settlement should have occurred much earlier. It was also a small settlement given the figure apparently bandied about in 1981-2 of some Vt 2 billion; and especially when compared to the current market valuations of Mr Tarosa and Mr Dick. However, the Government was not in a position where it could afford much by way of compensation; and that was made plain at the time by Mr Korman.

120. The clear evidence, which I accept, is that the chiefs and representatives of all 3 claimant villages signed the 1992 Agreements – they agreed on behalf of their communities to accept, some 11-12 years after the event, the comparatively small amount the Government could afford to pay by way of compensation. The sums involved were reached after negotiations, and by agreement.

121. Mr Kapapa submitted that the payments related to the loss of enjoyment of the land between 19811992, due to a strained interpretation of the words of the 1992 Agreement. I do not accept that interpretation. The wording of the Agreement mainly followed the wording of section 11. I am satisfied the payments were for loss of land:- compensation for the compulsory acquisition.

122. It follows that the constitutional application must fail. There is no breach by means of unjust deprivation of property, as compensation was required by law to be paid, and was actually paid.

123. I accept that there was no valuation done of the land in question:- but there did not need to be. And it must have been plain to all that the Government could not afford what might have been seen as a more realistic value, so why incur the additional cost of a valuation? I accept also that no declarations had been made in 1992 as to who the customary owners comprised. However, as stated earlier the chiefs and representatives of the custom owners were in a good position to distribute the compensation funds regardless of that fact.



124. It seems to me that dealing with the secondary issue set out in paragraph 112, as Mr Aron submitted, this case is another attempt to extract more compensation from the Government and it is not really a valid constitutional application. I say that as it is accepted that the Government could take the land from the custom owners. In return, by law, the Government was required to compensate the custom owners. It necessarily follows from those two facts that there cannot be an "unjust deprivation of property". The correct remedy, if the custom land owners were aggrieved at not being paid (or not being paid enough) would have been to sue the Government in contract law, for breach of its contractual/legal obligations to pay compensation or to pay sufficient compensation.

125. That correct remedy is no longer available to the claimants, due to the operation of the Limitation Act. Any such case is now time barred.

126. Further, if anyone is to be sued, pursuant to the receipts signed by those who accepted the Governments compensation payments, it ought to be those recipients - they have indemnified the Government in terms of both the amounts of compensation, the rightful custom owners and the correct boundaries.

127. For those reasons I find there has been no breach of constitutional rights. The first remedy sought, a declaration that the 1992 Agreement is invalid, void and of no effect is therefore declined.

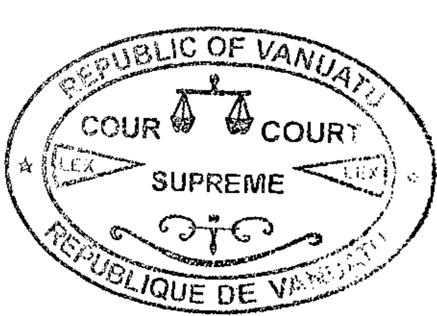
(ii) Other Issues

128. It follows from my earlier determination, that the claimed Vt 10 million for each claimant for the breach of their constitutional rights, must also fail.

129. It further follows that the declaration sought, that all compensation payments made pursuant to the 1992 Agreements are unlawful and do not relate to land acquisition, must also be declined.

130. Similarly, I decline to compel Parliament to pass certain legislation regarding this whole issue. What occurred is, in my view, lawful and valid, according to the laws then in existence.

131. There is a body of evidence suggesting that the payments were made from funds accumulated in and by VULCAN. Equally, there is evidence that VULCAN was shut down by the Government prior to compensation being paid out. Whether or not those funds were Government funds, as submitted by the applicants, is unclear to me on all the evidence presented. On one view, the former custom owners may have been entitled to that money under the regime under which VULCAN then operated. On another view, the funds belonged properly to the Government, to be used in any way the Government saw fit. However, this too is something that cannot now, in 2018, be resurrected – it is time barred, by the provisions of the Limitation Act.



I. Decision

132. The claims are all dismissed.

133. Costs ought to follow the event, as usual. However, given that this is in reality, the 3rd attempt to re-litigate the same issues, it seems appropriate to me that the usual means of determining the quantum of costs, namely by agreement or by taxation, is not appropriate.

134. It seems to me that a deterrent aspect needs to be considered so as to discourage future similar claims. I say this, well mindful of the late joining in of this action by the fourth applicant, and an even later attempt part-way through the trial to join this action by another applicant namely Kalrengo Kalmarie representing Family Pomal of Erakor village represented by Mr S. Stevens (whose application to join was declined) on the basis of being too late).

135. I invite counsel to make written submissions within 10 working days as to the quantum of costs that ought to be awarded in favour of the Respondent; and also the contribution of each applicant towards that amount.

Dated at Port Vila this 14th day of September 2018

BY THE COURT

....
Justice G.A. Andrée Wiltens

REPUBLIC OF VANUATU
COUR COURT
SUPREME
LEX
REPUBLIQUE DE VANUATU