

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

Civil
Case No. 16/3478 SC/CIVL

BETWEEN: GUAN KAI
Claimant

AND: MARY TOM & FAMILY
First Defendants

AND: FAINA PAKOA & FAMILY
Second Defendants

AND: ERIC SAILAS & FAMILY
Third Defendants

AND: RAMOU MISSAK & FAMILY
Fourth Defendants

AND: MARK SILAS & FAMILY
Fifth Defendants

AND: RAYMOND MISSAK & FAMILY
Sixth Defendants

AND: YAKAR & FAMILY
Seventh Defendants

AND: FATIMA FARATEA & FAMILY
Eight Defendants

AND: JOE NIKO & FAMILY
Ninth Defendants

AND: KAPEL PAKOA & FAMILY
Tenth Defendants

AND: DUK MISAK & FAMILY
Eleventh Defendants

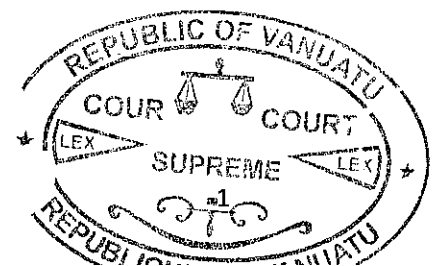
**AND: WAISINU BAKOKOTO, BAKAULU BAKOKOTO
& ANDAS BAKOKOTO**
Twelfth Defendants

Dates of Trial:

31 August-2 September 2020, and 1 and 2 October 2020

Before:

Justice V.M. Trief



In Attendance: Claimant – Mr R. Tevi
First Defendants – Mr L.J. Napuati, excused
Second-Eleventh Defendants – Mr M. Fleming
Twelfth Defendants – Mr S. Kalsakau

Date of Decision: 27 November 2020

JUDGMENT

A. Introduction

1. The Claimant Guan Kai seeks eviction orders against the Second-Eleventh Defendants who occupy his leasehold property title no. 12/0633/1387. This lease was transferred to him by Jacky Bakokoto (deceased); a lease granted by the Twelfth Defendants, Jacky's brothers Waisinu Bakokoto, Bakaulu Bakokoto and Andas Bakokoto ('Messrs Bakokoto'). Messrs Bakokoto support the grant of eviction orders.
2. The Second-Eleventh Defendants (the 'occupiers') claim that they have a right under s. 17(g) of the *Land Leases Act* (the 'Act') that Mr Kai's lease is subject to. They seek a declaration as to their asserted s. 17(g) right, registration of a sub-lease and payment of compensation.
3. This judgment determines the parties' claims.

B. The Law

4. "Lease" is defined in s. 1 of the Act as follows:

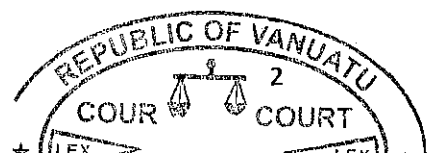
"lease" means the grant with or without consideration, by the owner of land of the right to the exclusive possession of his land, and includes the right so granted and the instrument granting it, and also includes a sublease but does not include an agreement for lease;

5. Sections 14 and 15 of the Act provide:

14. *Subject to the provisions of this Act, the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease together with all implied and expressed rights belonging thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.*

15. *The rights of a proprietor of a registered interest, whether acquired on first registration or subsequently for valuable consideration or by an order of the Court shall be rights not liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all rights, privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –*

(a) *to the encumbrances and to the conditions and restrictions shown in the register;*



- (b) *unless the contrary is expressed in the register, to such of the liabilities, rights and interests as are declared by this Act not to require registration and are subsisting:*

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as trustee.

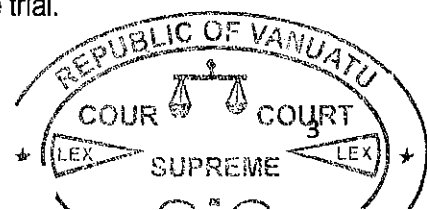
15. Section 17 of the Act provides:

17. *Unless the contrary is expressed in the register, the proprietor of a registered lease shall hold such lease subject to such of the following overriding liabilities, rights and interests as may, for the time being, subsist and affect the same, without their being noted on the register –*
- (a) *rights of way, rights of water, easements and profits subsisting at the time of first registration of that lease under this Act;*
 - (b) *natural rights of light, air, water and support;*
 - (c) *rights to sites of trigonometrical stations and navigational aids conferred by any law;*
 - (d) *rights of compulsory acquisition, resumption, entry, search and user conferred by any law;*
 - (e) *the interest of a tenant in possession under a sublease for a term of not more than 3 years or under a periodic tenancy;*
 - (f) *any charge for unpaid rates or other moneys, which, without the condition of registration under this Act, are expressly declared by any law to give rise to a charge on land;*
 - (g) *the rights of a person in actual occupation of land save where enquiry is made of such person and the rights are not disclosed; and*
 - (h) *rights and powers relating to electric supply lines, telegraph and telephone lines or poles, pipelines, aqueducts, canals, weirs, dams, roads and ancillary works conferred by any law.*

Provided that the Director may direct registration of any of the liabilities rights and interests herein before defined in such manner as he may think fit.

C. Statements of the Case

17. Mr Kai is the registered proprietor of leasehold title no. 12/0633/1387 (the 'lease'). By the Further Amended Claim filed on 29 May 2020, he seeks orders for the eviction of the occupiers and special damages arising from their alleged trespass. He alleges that he and Jacky Bakokoto agreed in their lease Sale and Purchase agreement to work together to relocate the occupiers. Their efforts included attempts to relocate the occupiers to land at Korman area and at Bladinieres Estate. Further, that he is a bona fide purchaser for value. Mr Kai alleges that despite several notices to quit, the occupiers continue to occupy the lease resulting in loss to him of enjoyment of the property.
18. The First Defendant Mary Tom is also an occupier of the subject land. Mr Kai discontinued the proceeding against her 3 days before the trial.



19. In their Defence, the occupiers Second-Eleventh Defendants admit that Mr Kai had wanted to relocate them. They allege that they have occupied the land with the express consent of the custom owners and lessors and have an overriding interest and right to occupy the land pursuant to s. 17(g) of the Act. They allege that any notices to quit purportedly given are of no effect due to their right to occupy the land.
20. In their Counter Claim, the Second-Eleventh Defendants allege that they lawfully occupied and resided on the subject land, having built houses and resided in them, built stores and kava bars, paid rental to the custom owners, and cultivated gardens all prior to Mr Kai owning the lease. They seek a declaration that their overriding interest is for the duration of the lease pursuant to s. 17(g) of the Act and that it be recorded on the Land Leases Register as a sub-lease for the duration of the lease. Alternatively, the occupiers seek an order that Mr Kai pays all costs arising from and incidental to them relocating to other lands on terms suitable or an order that Mr Kai pays them VT33,200,000 or such amount the court deems just to be divided on just terms.
21. In his Defence to the Counter Claim, Mr Kai alleges that the express consent of the custom owners to have the occupiers reside on their land was terminated in 2013. Further, that the occupiers must prove that since the termination of consent in 2013, that they have the custom owners' express consent to reside on the land. Mr Kai seeks dismissal of the Counter Claim and costs.
22. In their Reply to the Defence to the Counter Claim, the occupiers allege that Mr Kai obtained his lease by fraud pursuant to s. 100 of the Act and seek an order for the rectification of the Land Leases Register by cancelling the lease.
23. Also in the Reply to the Defence to the Counter Claim, the occupiers allege that their occupation of the land was at all times with the express and implied consent of all the custom owners and the custom owners are estopped from denying that consent was given.
24. The Twelfth Defendants in their Defence admit that Mr Kai is the registered proprietor of the lease and says that the occupiers are unlawfully occupying the subject land as they do not have an overriding interest to the land. They seek costs on an indemnity basis for the Claimant and Twelfth Defendants.
25. Finally, the Twelfth Defendants allege that the consideration for the lease is a higher amount than that stated on the lease and is part paid. Nothing turns on this. It is a matter for the Twelfth Defendants to pursue Mr Kai for breach of contract by separate action.
26. Mr Kalsakau formally withdrew the Twelfth Defendants' Counter Claim on 31 August 2020.
27. The issues arising are:
 - a) Is Mr Kai the registered proprietor of the lease? **[Issue 1]**
 - b) Are Jacky Bakokoto and Messrs Bakokoto the custom owners of the subject land? **[Issue 2]**



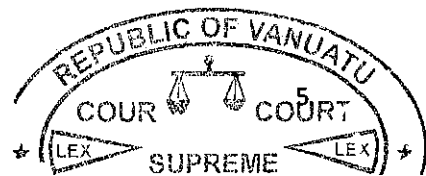
- c) Do the occupiers have a right under s. 17(g) of the *Land Leases Act*? **[Issue 3]**
- d) Do the occupiers have standing to bring a claim under s. 100 of the *Land Leases Act*? **[Issue 4]**
- e) Does Mr Kai have an obligation to relocate the occupiers? **[Issue 5]**
- f) Is Mr Kai entitled to the orders sought in the Claim? **[Issue 6]**
- g) Are Mr Kai and Messrs Bakokoto entitled to costs on an indemnity basis? **[Issue 7]**

D. Issue 1: Is Mr Kai the registered proprietor of the lease?

- 28. Mr Kai attached to his sworn statement [**Exhibit C1**] a copy of the Transfer of Lease for title no. 12/0633/1387 from Jacky Bakokoto (transferor) to him, Guan Kai (transferee), registered on 12 December 2013. There is no evidence to the contrary.
- 29. I find and accept that Mr Kai is the registered proprietor of the lease, in relation to land located at Tebakor area, Port Vila.
- 30. The market value of the lease in 2015 was VT63,000,000 [**Exhibit D2**], tendered by consent].
- 31. I find and accept from Raymond Missak's evidence [**Exhibit D3**] that the history of lease transactions for the subject land is:
 - On 26 March 2012, leasehold title no. 12/0633/112 between Waisinu, Bakaulu and Antas Bakokoto (lessors) and Jacky Bakokoto (lessee) was registered.
 - On 10 September 2013, the surrender of leasehold title no. 12/0633/112 was registered.
 - On 12 December 2013, leasehold title no. 12/0633/1387 between Waisinu, Bakaulu and Antas Bakokoto (lessors) and Jacky Bakokoto (lessee) was registered.
 - On 12 December 2013, the transfer of leasehold title no. 12/0633/1387 from Jacky Bakokoto (transferor) to Mr Kai (transferee) was registered.

E. Issue 2: Are Jacky Bakokoto and Messrs Bakokoto the custom owners of the subject land?

- 32. Messrs Bakokoto of Ifira Tenuku evidence that they and their late brother Jacky Bakokoto are the 4 sons of Edward Mara Bakokoto (deceased). Their father was the custom owner of the subject land. On his death, they became the joint owners of the land according to their custom. They evidence that according to their custom, one brother cannot deal with the land unless all brothers agree [**Exhibits D14, D15 and D16**].



33. In answer to Mr Tevi's cross-examination, Messrs Bakokoto confirmed that they did not have a custom ownership declaration in their favour in relation to the subject land. In Mr Kalsakau's submission, his clients openly conceded this.
34. In the circumstances, there is no evidence of a declaration of custom ownership in favour of Edward Bakokoto, Jacky Bakokoto or Messrs Bakokoto. However, they are the only persons in evidence who have asserted custom ownership of the land. The Director of Lands has accepted that the Messrs Bakokoto can deal with the land having registered 2 leases granted by them, the second of which was transferred to Mr Kai.
35. I accept and find that on 18 November 2014, Jacky Bakokoto passed away [Kereto Bakokoto's sworn statement, "**Exhibit D17**"].
36. I accept and find that Edward Bakokoto and Jacky Bakokoto did, and Messrs Bakokoto do, hold themselves out as the custom owners of the subject land however they do not have a declaration of custom ownership in their favour.

F. Issue 3: Do the occupiers have a right under s. 17(g) of the *Land Leases Act*?

37. The following introduction of s. 17 from *William v William* [2004] VUCA 16 at p. 8 is useful:

Section 17 is one of the provisions in Part IV of the Land Leases Act. That part contains the central provisions of the Act which establish and give effect to the notion of indefeasibility of registered titles.

Section 14 deals with the effect of registration. It provides that, "Subject to the provisions of this Act, the registration of a person as a proprietor of a lease shall vest in that person the leasehold interest..."

Section 15 provides that the rights of a proprietor of a registered interest shall be rights not liable to be defeated

"except as provided by this Act, and shall be held... subject... to such of the liabilities, rights and interests as are declared by this Act not to require registration and are subsisting..."

These sections lead into the provisions of s. 17 and give emphasis to the exceptions and limitations to indefeasibility that are provided for in the Act. Section 17 then provides for

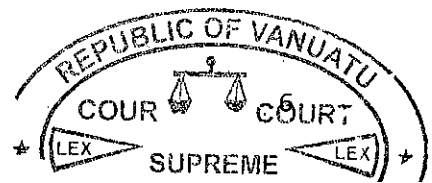
"overriding liabilities, rights and interests as may, for the time being, subsist and affect the same, without their being noted on the register..."

38. The s. 17(g) right is expressed as:

17. *Unless the contrary is expressed in the register, the proprietor of a registered lease shall hold such lease subject to such of the following overriding liabilities, rights and interests as may, for the time being, subsist and affect the same, without their being noted on the register –*

...

(g) *the rights of a person in actual occupation of land save where enquiry is made of such person and the rights are not disclosed;...*



39. The Court of Appeal stated in *William v William* at pp 8-9:

It is clear from the nature of the liabilities, rights and interests described in paragraphs (c), (d), (f) and (h) that they may subsist indefinitely into the future. Paragraph (e) has within its terms a limit on the duration for which liabilities, rights and interests subsist as overriding once in the absence of a notation on the register. As paragraph (e) is the only paragraph which expresses a limitation on duration, and as other paragraphs may extend indefinitely, we consider paragraph 17(g) should also be construed as being capable of operating indefinitely.

In a particular case, how the provision operates to give overriding effect as to the rights it protects will depend on the nature of the rights. For example, and pertinent to this case, if the person "in actual occupation of land" is there pursuant to an equitable proprietary interest, the protection will subsist as long as the equitable interest continues. In such a case, the nature and duration of the equity will have to be determined. Where the interest is one acquired through or under a previous proprietor of a registered lease, the interest may continue for as long as the term of the lease.

(my emphasis)

40. To determine the nature and extent of the right asserted requires an examination of the evidence and findings of facts; *William v William* at p. 10.
41. The Second-Eleventh Defendants' case was that their right to occupy the subject land derived from and through Jacky Bakokoto and in one instance, from Edward Bakokoto. They allege that their occupation of the land was at all times with the express and implied consent of all the custom owners and lessors. Further, that the custom owners are estopped from denying that consent was given.
42. Having found that Edward Bakokoto, Jacky Bakokoto and Messrs Bakokoto do not have a declaration of custom ownership in their favour, I find that the occupiers do not have the express consent of the custom owners as claimed. I accept Mr Tevi and Mr Kalsakau's submissions to that effect.
43. Edward Bakokoto, Jacky Bakokoto and Messrs Bakokoto not being declared custom owners, no s. 17(g) right could arise by way of consent from them as the alleged custom owners.
44. The lessors of the lease are Messrs Bakokoto. They evidenced that they have not given consent, express or implied, to the occupiers to reside on the subject land. They evidence that according to their custom, they are joint owners in custom and one brother alone could not deal with the land without all 4 brothers' agreement ["Exhibits D14, D15 and D16"]. Bakaulu Bakokoto evidenced that the occupiers reside on the land only because Jacky allowed them to. However, he and their other brothers never consented to their residing there ["Exhibit D16"].
45. Each of Messrs Bakokoto were unshaken in cross-examination that they did not consent to the occupiers residing on the land. They were also unshaken in confirming that Jacky Bakokoto acted on his own in his dealings with the occupiers. Mr Fleming submitted that Messrs Bakokoto were evasive in their answers to his cross-examination thus detracting from their credibility. I do not agree. They kept their answers to "Yes", "No" and "Mi no save" ("I don't know") which visibly frustrated Mr Fleming. However, the purpose of cross-examination was for Mr Fleming to put



his clients' case to them. Messrs Bakokoto were not successfully challenged as to their evidence. I accept they were witnesses of truth.

46. I find and accept that at all material times Messrs Bakokoto did not consent to the occupiers occupying the land.
47. I find and accept that Messrs Bakokoto did not authorize their brother Jacky Bakokoto to act for all 4 brothers in his dealings with the occupiers. I find and accept that according to their custom, Jacky's dealings with the occupiers could not bind his brothers as all 4 of them had to agree. The occupiers' claim that their occupation of the land was at all times with the implied consent of the custom owners and lessors is not made out.
48. The Second-Eleventh Defendants have therefore failed to prove on the balance of probabilities that their occupation of the land was at all times with the express and implied consent of all the custom owners and lessors.
49. In case I am wrong as to this and Edward Bakokoto, Jacky Bakokoto and Messrs Bakokoto are the custom owners of the subject land, I next consider the nature and extent of the right allegedly granted to the occupiers.
50. Faina Pakoa evidenced that she had an agreement with Edward and Jacky Bakokoto to live on the land ["**Exhibit D4**"]. Erick Silas ["**Exhibit D5**"], Ramou Missak ["**Exhibit D6**"], Priscilla Margaret Pakoa ["**Exhibit D7**"], Raymond Missak ["**Exhibit D3**"], Fatima Faratea ["**Exhibit D8**"], Joe Niko ["**Exhibit D9**"], Kapel Pakoa ["**Exhibit D10**"] and Leisale Maki Missak ["**Exhibit D11**"] evidenced that their agreement was with Jacky Bakokoto. Their evidence as to when they agreed, the date they began residing on the land, what they built, the amounts of their initial payment and for rent, when it would be paid and to who is as follows:

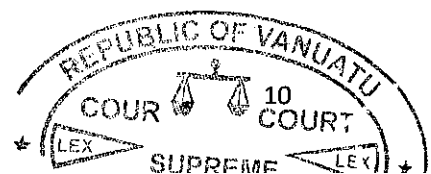
Name of witness (party)	Agreement with who & when	Date started residing	Dwellings built	Initial payment amount & to who	Rental amount, when and who paid to
Faina Pakoa (Second Defendant)	With Edward Bakokoto & Jacky Bakokoto in 1988	1988	1 house, kava bar and rent rooms	VT10,000 (kava bar) and VT15,000 (business) to Jacky Bakokoto	VT14,500 monthly to Jacky Bakokoto
Erick Silas (Third Defendant)	With Jacky Bakokoto in 2001	2001	1 house, 1 rent house and 1 toilet		VT2,000 monthly to Jacky Bakokoto
Ramou Missak (Fourth Defendant)	With Jacky Bakokoto in 2010	2002	1 house		VT2,000 to Jacky Bakokoto
Priscilla Margaret Pakoa (Fifth Defendant)	With Jacky Bakokoto in 1996	1996	1 house (4 rooms - 3 rooms for rent)		VT7,500 monthly to Jacky Bakokoto
Raymond Missak (Sixth)	With Jacky	1987	1 house		

Defendant)	Bakokoto in 2013				
Fatima Faratea (Eighth Defendant)	With Jacky Bakokoto in 2011	2011	1 house, store and 1 kava bar	VT15,000 (kava bar), VT10,000 (house) and VT5,000 (store) to Jacky Bakokoto	VT13,000 monthly to Jacky Bakokoto
Joe Niko (Ninth Defendant)	With Jacky Bakokoto in 2004	2003	1 house (4 rooms) and 1 toilet	VT15,000 and custom ceremony (head of kava, local chicken, yam and 2 bags of local food) to Jacky Bakokoto	VT2,000 monthly to Jacky Bakokoto
Kapel Pakoa (Tenth Defendant)	With Jacky Bakokoto in 2003	1988	1 house, 1 rent house, kava bar and car wash		VT2,500 monthly to Jacky Bakokoto
Leisale Maki Missak (Eleventh Defendant).	With Jacky Bakokoto in 2013	2008	1 house and 1 toilet	VT5,000 to Jacky Bakokoto	VT1,000 monthly to Jacky Bakokoto

51. In summary, the evidence for the occupiers is that they agreed with Jacky Bakokoto (and for the Second Defendant, with both Edward and Jacky Bakokoto) to build houses and other buildings on the land and reside there, paying rent monthly.
52. Mr Kalsakau challenged each of the occupiers in cross-examination as to whether or not they had enquired as to the truth of Jacky Bakokoto's assertion that he was the custom owner of the land. Their common refrain in answer to Mr Kalsakau was, "Mi save Jacky nomo" ("I only know Jacky."). It is undisputed therefore that the occupiers dealt only with Jacky Bakokoto, not Messrs Bakokoto.
53. The occupiers' evidence as to any agreement with Edward or Jacky Bakokoto was not objected to on the ground of hearsay. Nevertheless that evidence is hearsay as it was given in order to prove the truth of the existence of the alleged agreements. Edward and Jacky Bakokoto, both being deceased, cannot give evidence to confirm or disprove the occupiers' evidence. I rule that the Second-Twelfth Defendants' evidence as to their alleged agreements with Edward and Jacky Bakokoto is hearsay and inadmissible.
54. I do find and accept that the occupiers dealt with Jacky Bakokoto alone and in one instance, with Edward Bakokoto in relation to their occupation of the land. Given the hearsay evidence from the occupiers, I am unable to conclude what agreements, if any, were reached. Bakaulu Bakokoto evidenced that he had had a disagreement with Jacky in the past as to the unequal sharing of monies received from the occupiers. This is consistent with the occupiers' evidence that they paid rent to Jacky Bakokoto. I find and accept that the occupiers paid monies to Jacky Bakokoto.



55. I found earlier that Jacky Bakokoto's actions in relation to the land could not bind his brothers as all 4 of them had to agree. The 4 brothers did agree on one thing which was the issuance of a notice to quit to the occupiers dated 3 June 2013.
56. Mr Kai evidenced the notice to quit in attachment "GK1" of ["**Exhibit C3**"] and Kereto Bakokoto did in attachment "KB1" of ["**Exhibit D17**"]. In the notice, Jacky Bakokoto and Messrs Bakokoto gave the occupiers 3 months' notice to vacate the subject land. The reason expressed in the notice for terminating the occupiers' residence on the land was "in order for future commercial development". Bakaulu Bakokoto ["**Exhibit D16**"] and Andas Bakokoto ["**Exhibit D15**"] evidenced that in 2013, they and their brothers agreed to lease the subject land to Mr Kai following which they gave the occupiers the notice to quit.
57. Mr Kai also evidenced in ["**Exhibit C3**"] a notice to quit dated 20 January 2015 from Messrs Bakokoto, witnessed by Kereto Bakokoto. It is addressed to "Teiwai Mate Community". It stated that:
- This notice is to serve you that you are to vacate this land as soon as possible. Our investor wants to develop this land. Because of our kindness, we offered the community a piece of land at Bladinieres Estate. So the family Bakokoto issued this final notice for every person inside the community to MUST sign in order to VACATE this land.*
- Anyone refusing to sign will face the EVICTION ORDER.*
58. Kereto Bakokoto confirmed in his evidence ["**Exhibit D17**"] that he and Messrs Bakokoto issued the 20 January 2015 notice to quit. He also attached notices to quit from Loughman & Associates Lawyers dated 22 January 2015 and from Tevi Bulu Lawyers dated 29 August 2016.
59. In cross-examination:
- a) Raymond Missak stated that he does not remember seeing the 2013 notice to quit. He agreed that after that notice, there were other notices to them to quit. In answer to Mr Kalsakau, he confirmed that the notice was because Jacky had sold the land to a Chinese person;
 - b) Fatima Faratia said she stayed despite the 2013 notice because she had a claim for all the monies she had spent on her buildings on the land;
 - c) Eric Silas confirmed that in 2013, Jacky told them to leave the land. He confirmed in re-examination that in 2013 was the first time he received a notice to quit the land;
 - d) Ramou Missak agreed in cross-examination that by notice dated 3 June 2013, Jacky Bakokoto and Messrs Bakokoto gave them notice to quit the land;
 - e) Priscilla Margaret Pakoa accepted in cross-examination that in 2013, Jacky and his brothers told them that they had to move out of the land and that the letter "KB1" gave them 3 months' notice to do so;



- f) Fatima Faratea said that Jacky told her twice in 2013 that they had to move off the land. She did not remember if he told her that before or after the 3 June 2013 notice to quit;
- g) Joe Niko stated that it was his first time to see the letter, "KB1" as he was in New Zealand in 2013 however his family called him and told him that they were frightened because Jacky had said that they had to leave the land. He was also told that Jacky had said that an investor had already bought the land;
- h) Kapel Pakoa agreed that in 2013, Jacky said that he had found an investor for the land and that they had to move out. He did not remember if the letter "KB1" came before or after their community meeting with Jacky. He agreed that by the 2013 notice, Jacky and his brothers gave them notice to quit; and
- i) Leisale Maki Missak agreed that in 2013, one of the Bakakoto's told her that the land had been sold to a Chinese investor. She had not seen the letter "KB1" before but agreed it gave them 3 months' notice to move out.

60. I find that:

- a) Jacky Bakokoto and Messrs Bakokoto issued a notice to quit dated 3 June 2013 to the occupiers;
- b) By the notice, they gave the occupiers 3 months' notice to vacate the land;
- c) The occupiers received or knew of this notice;
- d) The notice brought to an end the occupiers' right to occupy the subject land; and
- e) Subsequently, there were other notices to quit.

61. It is trite law that a licence can be revoked and a tenancy may come to an end by the giving of notice. Whatever the agreements made with Edward and Jacky Bakokoto to reside on the land, these were brought to an end by the notice to quit from Jacky Bakokoto and his 3 brothers Messrs Bakokoto.

62. If the occupiers allege that they have an equitable interest arising from their agreement with Jacky Bakokoto and that it was not brought to an end with the 2013 notice, their remedy lies by separate action against Jacky Bakokoto's estate or Messrs Bakokoto. There is no cross-claim or third party notice against the Twelfth Defendants in this case. Mr Kai is the only person sued in the Counter Claim however he is not the proper party to defend a claim as to the occupiers' alleged equitable interest. The argument that Messrs Bakokoto are estopped from denying that consent was given is for that separate action; it is misconceived in this matter.

63. It is undisputed that the occupiers have not paid rent to Jacky Bakokoto or Messrs Bakokoto since the 2013 notice to quit. They have lived on the land rent-free since



June 2013. I accept Messrs Bakokoto's evidence that no rent has ever been paid to them. I infer that whatever the agreements with Jacky Bakokoto, the occupiers accepted from June 2013 the repudiation of contract by their ceasing to pay any further rent.

64. The occupiers have not proved that they had the express or implied consent of the custom owners and lessors. In the circumstances, they do not have a right under s. 17(g) of the Act to occupy the subject land.
65. The occupiers are persons in actual occupation who without the custom owners' or lessors' consent, and Mr Kai's consent, to occupy the subject land, are trespassers. A person in actual occupation who is a trespasser will have no "rights" which are protected by s. 17(g) of the Act; *William v William* at p. 9.
66. The occupiers had suggested that their right to occupy the land derived from Madame Houdie as a predecessor in title of the lease. However, Madame Houdie was never a custom owner of the subject land, nor was she a predecessor in title of *the lease*. I reject that submission.
67. The Second-Eleventh Defendants do not have a s. 17(g) right as claimed.
- G. Issue 4: Do the occupiers have standing to bring a claim under s. 100 of the *Land Leases Act*?
68. The Second-Eleventh Defendants pleaded in their Reply to the Defence to the Counter Claim that the lease registration was obtained by fraud pursuant to s. 100 of the Act. Mr Kai had no opportunity to file a Defence to it. In the circumstances, this pleading does not give rise to any issue for my determination as to fraud under s. 100 of the Act.
69. In case I am wrong on this, I will consider whether or not the occupiers have standing to bring a s. 100 claim.
70. The Court of Appeal stated in *Nafalak Teufi Ltd v Kalsakau* [2005] VUCA 15 that:

The particular aspect of section 100 that requires clarification in this appeal, is the question of who may make the application or who may invoke section 100 of the Land Leases Act?

...

We are satisfied on a consideration of the object and purpose of the section that, at the very least, a person seeking to invoke section 100 must include a person who has an interest in the register entry sought to be rectified and which it is claimed was registered through a mistake or fraud...

71. I have determined that the occupiers do not have an interest under s. 17(g) of the Act. Accordingly, they do not have an interest in the lease which is the register entry sought to be rectified and which it is claimed was registered through a fraud. The occupiers therefore do not have standing to bring a claim under s. 100 of the Act.
72. In the circumstances, there is no evidence or finding to displace Mr Kai's assertion that he is a bona fide purchaser for value. Accordingly, I accept his evidence as to this.



H. Issue 5: Does Mr Kai owe a duty to relocate the occupiers?

73. A copy of the Agreement for the sale and purchase of the lease, between Jacky Bakokoto and Mr Kai, dated 14 September 2013 was tendered by consent [**Exhibit D1**]. In clause 3(i) of the agreement, they agreed that Jacky Bakokoto would clear and relocate the people residing on the site with the assistance of Mr Kai. Mr Kai's evidence in his sworn statements [**Exhibit C2 and C3**] is that their efforts included attempts to relocate the occupiers to land at Korman area and at Bladinieres Estate.
74. Kereto Bakokoto evidenced that prior to the issuance of the 3 June 2013 notice to quit, he met with the occupiers. It was from this meeting that they requested that the Bakokoto's arrange for them to move to another property. He stated that in good faith, they then took out VT2 million from their own pocket to invest in land at Korman area [**Exhibit D17**].
75. The evidence of Kapel Pakoa [**Exhibit D10**], Mary Tom [**Exhibit C4**] and Kereto Bakokoto [**Exhibit D17**] was that Mr Kai and the Bakokoto brothers had tried to relocate the occupiers to Korman area. Mr Pakoa and Ms Tom evidenced that they began work to clear the land at Korman area but were chased off by Annie Tangraro, the sister of the person they had signed an agreement with.
76. Mr Pakoa and Ms Tom also evidenced that Mr Kai tried to move the occupiers to Bladinieres Estate. However, Mr Kai never transferred title for land there to them so they remained at Tebakor. Raymond Missak evidenced that for the land at Bladinieres Estate, they (I assume the occupiers) had to pay the stamp duty and registration fees of VT775,000 [**Exhibit D3**].
77. I accept the evidence of Leisale Maki Missak in cross-examination who stated that Kereto Bakokoto told them that they wanted to give them a lease title but needed to know the name that would go on the lease title. Kereto Bakokoto evidenced in cross-examination that Mr Kai paid for a Bladinieres Estate lease but the occupiers never agreed what lessee's name to put on the lease. I accept his evidence as to that.
78. [**Exhibit D12**] tendered by consent shows 2 receipts for Mr Kai's payment to Bladinieres s Estate (Urban Ltd) of VT1,890,000 and VT210,000 for a plot at the Estate.
79. I find therefore that there was an agreement between Mr Kai and Jacky Bakokoto dated 14 September 2013 in which they agreed to work together to relocate the occupiers. Mr Kai was entitled to clear title from Jacky Bakokoto. It made sense that they agreed to work together to achieve this as part of Mr Kai's purchase of the lease. The later actions to move the occupiers to Korman area and then Bladinieres Estate are consistent with such contract. I also find that Mr Kai and Jacky Bakokoto's efforts to relocate the occupiers included attempts to relocate them to land at Korman area and to Bladinieres Estate.
80. The contract of course was between Mr Kai and Jacky Bakokoto. They can sue the other for breach of contract. However, third parties to the contract such as the occupiers cannot sue for breach including any alleged failure to relocate them. I find

that the contract does not impose a duty on Mr Kai that is owed to the Second-Eleventh Defendants to relocate them.

81. The occupiers pleaded their alleged s. 17(g) right as the basis for orders that Mr Kai pay all costs arising from and incidental to their relocation to other land or alternatively, the sum of VT33,200,000 (or other sum the court deemed just) to be divided on just terms. Given my determination that the occupiers do not have a right under s. 17(g) of the Act, I decline to make the orders sought and dismiss the occupiers' Counter Claim.

I. Issue 6: Is Mr Kai entitled to the orders sought in the Claim?

82. There is clear evidence of Mr Kai's legal entitlement to the land. He is the registered proprietor of the lease.

83. Mr Kai has also proved that the Second-Eleventh Defendants occupy the land, and are unwilling to vacate the property despite notices to quit to them.

84. The Second-Eleventh Defendants do not have a right that justifies their actual occupation of the land.

85. Mr Kai has proved his Claim. He is entitled to recover possession through the eviction orders sought.

86. I accept that Mr Kai has suffered the loss of enjoyment of his property from the occupiers' occupation of the property. He sought VT1,000,000 special damages. However, no receipts were produced to prove Mr Kai's claim for special damages. I decline to award special damages.

87. Mr Kai also sought in the Claim any other order the Court deems fit. Considering that Mr Kai has been prevented from enjoying his lease and being able to develop the land as a result of the occupiers residing on the land, I award general damages of VT500,000 to be paid by the occupiers.

J. Issue 7: Are Mr Kai and Messrs Bakokoto entitled to costs on an indemnity basis?

88. A high threshold must be passed for costs to be awarded on an indemnity basis. The Court of Appeal stated in *Air Vanuatu (Operations) Ltd v Molloy* [2004] VUCA 17 that the awarding of indemnity costs arises only in "very extreme" cases.

89. Rule 15.5(5) of the *Civil Procedure Rules* provides:

15.5 *The court may also order a party's costs be paid on an indemnity basis if:*

- (a) *the other party deliberately or without good cause prolonged the proceeding; or*
- (b) *the other party brought the proceeding in circumstances or at a time that amounted to a misuse of the litigation process; or*
- (c) *the other party otherwise deliberately or without good cause engaged in conduct that resulted in increased costs; or*
- (d) *in other circumstances (including an offer to settle made and rejected) if the court thinks it appropriate.*

90. I do not consider that the circumstances of this case fall within rule 15.5 or otherwise merit an indemnity costs order in favour of Mr Kai and Messrs Bakokoto.

K. Result and Decision

91. The Claimant is the registered proprietor of leasehold title no. 12/0633/1387 **[Issue 1]**.

92. The late Jacky Bakokoto and the Twelfth Defendants do not have a declaration of custom ownership in their favour in relation to the land subject to leasehold title no. 12/0633/1387 **[Issue 2]**.

93. The Second-Eleventh Defendants do not have a right under s. 17(g), *Land Leases Act* as claimed **[Issue 3]**. Further, the Second-Eleventh Defendants do not have standing to bring a claim under s. 100 of the *Land Leases Act* **[Issue 4]**.

94. The Second-Eleventh Defendants' Counter Claim is declined and dismissed.

95. Mr Kai does not have an obligation to relocate the Second-Eleventh Defendants **[Issue 5]**.

96. The Claimant has proved his Claim. He is entitled to the orders sought **[Issue 6]**.

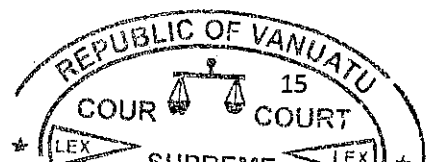
97. Judgment is entered for the Claimant. He is granted the eviction orders sought.

98. The Second-Eleventh Defendants are to vacate lease title no. 12/0633/1387 within 28 days from the date of service of this decision, namely:

- Faina Pakoa and Family, Second Defendants
- Eric Sailas and Family, Third Defendants
- Ramou Missak and Family, Fourth Defendants
- Mark Silas and Family, Fifth Defendants
- Raymond Missak and Family, Sixth Defendants
- Yakar and Family, Seventh Defendants
- Fatima Faratea & Family, Eight Defendants
- Joe Niko and Family, Ninth Defendants
- Kapel Pakoa and Family, Tenth Defendants
- Duk Misak and Family, Eleventh Defendants

99. The Second-Eleventh Defendants are to pay the Claimant VT500,000 general damages.

100. Interest on the judgment sum in the preceding paragraph is to run at 5% per annum from the date of judgment until payment in full has been completed.



101. Costs should follow the event. The Second-Eleventh Defendants are to pay the Claimant's costs as agreed or taxed by the Master including filing and service fee of VT30,000. Costs are ordered on the standard basis **[Issue 7]**. Once settled, these are to be paid within 21 days.
102. There is no order as to costs of the Twelfth Defendants.
- L. Enforcement
103. Pursuant to Rule 14.3(1), I now schedule a Conference **at 8am on 8 December 2020** to ensure the judgment has been executed or for the judgment debtors to explain how it is intended to pay the judgment debt.
104. For that purpose, this judgment must be served on the Second-Eleventh Defendants.

**DATED at Port Vila this 27th day of November 2020
BY THE COURT**

UM Trief
.....
Viran Molisa Trief
Judge

