

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

Civil
Case No. 20/1049 SC/CIVL

**BETWEEN: Samson Mahe administrator of the estate
of late Emile Mahe**
First Claimant

AND: Mele Trustees Limited
Second Claimant

**AND: Roro Poilapa, Lorry Kaltabanga Bangalulu
& Tilu Bema Charley representing Family
Songoriki**
First Defendants

AND: Vakutono Ione Committee (Inc.) (500560)
Second Defendant

**AND: Bluespring Evergreen Farm and Plantation
Limited**
Third Defendant

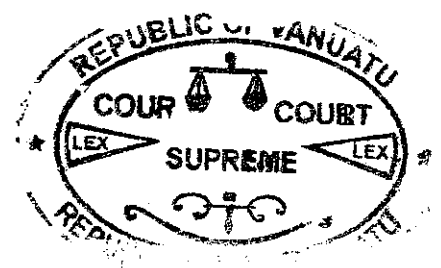
AND: Republic of Vanuatu
Fourth Defendant

Date of Hearing: 22 April 2024
Before: Justice V.M. Trief
In Attendance: Claimant – Ms L. Raikatalau & Ms V. Muluane
First and Second Defendants – Mr E. Nalyal
Third Defendant – no appearance (in person)
Fourth Defendant – Mr L. Huri
Date of Decision: 29 April 2024

DECISION AS TO FIRST AND SECOND DEFENDANT'S STRIKE-OUT APPLICATION

A. Introduction

1. This was a contested application to strike out the Further Amended Claim of the First Claimant Samson Mahe, administrator of the estate of the late Emile Mahe and the



Second Claimant Mele Trustees Limited ('MTL'). This iteration of the claim was filed on 21 November 2022.

2. The Third Defendant Bluespring Evergreen Farm and Plantation Limited ('Bluespring') filed Defence on 7 June 2023.
3. The Fourth Defendant the State filed its Defence on 8 June 2023.
4. The First Defendants Roro Poilapa, Lorry Kaltabanaga Bangalulu and Tilu Bema Charley representing Family Songoriki and the Second Defendant Vakutono lone Committee (Inc.) (500560) ('Vakutono') have not filed a defence but on 23 November 2023, filed the Application seeking orders striking out the entire proceeding or alternatively, removing them as parties to the proceeding (the 'Application'). The sworn statement of Roro Poilapa was filed in support.
5. Prior to the hearing, the parties filed:
 - a. Fourth Defendant's Submissions in support of the First and Second Defendants' Application to Strike out the Claim, on 7 February 2024; and
 - b. Claimants' Response Submissions to the First and Second Defendants' Strike-out Application on 13 February 2024.

6. This is the decision.

B. The Law

7. The words, "instrument", "interest" and "registrable" are defined in s. 1 of the *Land Leases Act* [CAP. 163] (the 'Act') as follows:

1. *In this Act unless the context otherwise requires –*

....

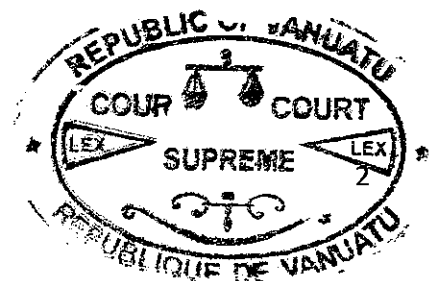
"instrument" includes any deed, judgment, decree, order or other document requiring or capable of registration under this Act;

"interest" in relation to land includes a recorded interest in land, lease, sublease, mortgage, easement, restrictive agreement and profit; and "person interested" has a corresponding meaning and includes custom owners;

...

"registrable", in relation to an instrument, means required to be registered or capable of registration under this Act;

...



8. Section 9 of the Act provides as follows:

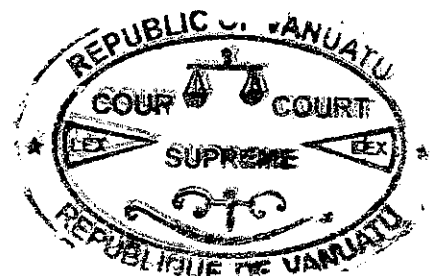
9. (1) *The Director or any other staff of the Department of Land are not liable for anything done or omitted to be done in good faith in exercising his or her functions or powers under this Act.*
- (2) *Subsection (1) does not apply, if it is proven that the Director or any of his officers acted in bad faith or in dereliction of their duties or exercise of their powers under this Act.*

9. Section 100 of the Act provides as follows:

100. (1) *Subject to subsection (2) the Court may order rectification of the register by directing that any registration be cancelled or amended where it is so empowered by this Act or where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.*
- (2) *The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the interest for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.*

10. Sections 101-103 of the Act provide as follows:

101. (1) *Subject to the provisions of this Act and of any law relating to the limitation of actions any person suffering damage by reasons of –*
 - (a) *any rectification of the register under this Act;*
 - (b) *any mistake or omission in the register which cannot be rectified under this Act; or*
 - (c) *any error in a copy of or extract from the register or any copy of or extract from any document or plan in each case certified under this Act;**shall be entitled to be indemnified by the Government.*
- (2) *No indemnity shall be payable under this section –*
 - (a) *to any person who has himself caused or substantially contributed to the damage by his fraud or negligence or who derives title, otherwise than under a registered disposition made bona fide for valuable consideration, from a person who so caused or substantially contributed to the damage;*
 - (b) *in respect of any loss or damage occasioned by the breach of any trust; and*
 - (c) *in respect of any damage arising out of any matter into which the Director is exonerated from enquiry under section 24.*
102. (1) *Where an indemnity is awarded in respect of the loss of any registered interest it shall not exceed –*
 - (a) *where the register is not rectified, the value of the interest at the time when the mistake or omission which caused the damage was made; or*



(b) where the register is rectified, the value of the interest immediately before the time of rectification.

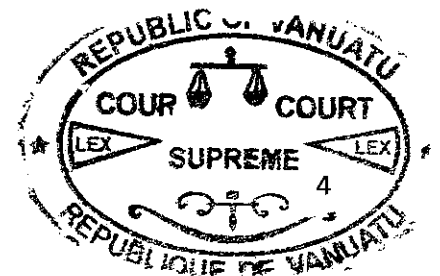
(2) Every award of indemnity shall include interest thereon at 5 per centum per annum from the date of the award up to the date of payment.

103. Any person who considers that he has a right to indemnity under the provisions of section 101 may apply to the Court which shall hear and determine the matter and subject to the provisions of section 102 shall make such award, if any, including costs and expenses as it thinks fit.

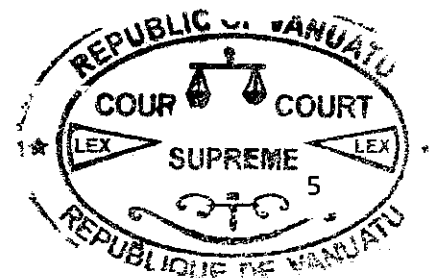
C. The Further Amended Claim

11. The following is alleged in the Further Amended Claim (the 'Claim'):

- a. That the late Mr Mahe's family, including the First Claimant, occupy land within the lease that Bluespring is the registered proprietor of;
- b. In 2019, Bluespring gave them notice to vacate the land following which they commenced the present proceedings;
- c. The late Mr Mahe was the registered proprietor of leasehold title no. 12/0544/002; MTL was the lessor and the lease term was 30 years commencing from 30 July 1980 (the '002 lease');
- d. That the 002 lease expired on 30 July 2011;
- e. That on 3 August 2009, the lessor of the 002 lease was rectified from MTL to the First Defendants Family Songoriki by fraud and/or mistake as the Director of Lands exceeded his powers to do so based on illegitimate reasons including that the change was made contrary to restraining orders by Lunabek CJ and Fatiaki J in the Ponatoka land case;
- f. That the Minister of Lands acted in bad faith and breached his duty to the disputing custom owners of Ponatoka land and therefore by fraud and/or mistake in allowing the change of lessor because the custom ownership of Ponatoka land was still disputed;
- g. That the Director of Lands and the Minister of Lands changed the lessor name by fraud and/or mistake because they did so without the Claimants' knowledge and without giving them prior notice;
- h. That on 27 October 2010, the First Claimant and MTL executed a variation of condition of the 002 lease (extension of 50 years), signed consent and paid premium for the lease extension;
- i. That on 4 November 2010, MTL paid VT2,500 registration fee and VT3,000 stamp duty for the lease extension;



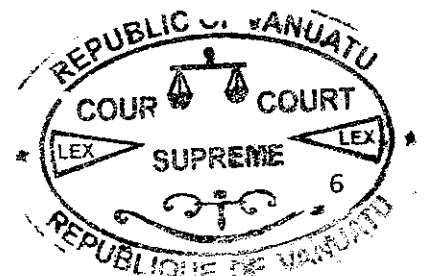
- j. That the lease extension was not registered and was returned at an unknown time by mistake and without the Claimants' knowledge;
- k. That on 22 August 2011, the Director of Lands acted in bad faith in cancelling the 002 lease at the illegitimate request of Family Songoriki and exceeded his powers as the land was disputed, MTL was the lessor, and MTL had agreed to an extension of the lease for 50 additional years;
- l. That at all material times, the land subject to the 002 and 060 leases was within Ponatoka land, the custom ownership of which is disputed;
- m. On 2 October 2019, a new lease title no. 12/0544/060 between Family Songoriki (lessor) and Vakutono (lessee) was registered over the land previously subject to the 002 lease, albeit a smaller area (the '060 lease'). This was by mistake and/or fraud as Family Songoriki are the declared custom owners of Lakenpagatau land (33 hectares) but misrepresented that they are the custom owners of Ponatoka land (500 hectares), MTL continued to be the lessor, the Minister of Lands mistakenly consented to the new lease, and the Director of Lands mistakenly registered it, all of which Family Songoriki, Vakutono and the State did in bad faith;
- n. On the same date, the transfer of the 060 lease from the Second Defendant to Bluespring was registered in bad faith and by fraud and/or mistake on the deliberate misrepresentation that the 060 lease was valid as Family Songoriki were not lessors and at an undervalue of VT2,000,000 when the value of the land is much higher;
- o. That Bluespring is not a *bona fide* purchaser for value as it substantially contributed to the mistake by paying the registration fee, and the lease was not acquired for valuable consideration as its value was considerably more than VT2,000,000, and it had knowledge that the custom ownership of the land is disputed;
- p. That on 29 April 2022, the Director of Lands registered a Third-Party Mortgage with BRED (Vanuatu) Limited in respect of its loan to Hans Hq Hen in bad faith and by mistake as the Director did know that Family Songoriki were not the custom owners of the leased land and should have but failed to exercise his power under para. 8(c)(iii) of the Act to refuse registration of the mortgage;
- q. That the State's actions in bad faith and in breach of duty are not protected by s. 9 of the Act hence the State is liable to indemnify the Claimants for damage suffered as a result of its actions;
- r. That the First Claimant is occupying the leased land therefore has an equitable right under para. 17(g) of the Act; and



- s. That between October-December 2019, Bluespring's agents and workers damaged and destroyed properties belonging to the First Claimant's family including trees and vegetables, which damage has been assessed at over VT19,000,000.

12. The relief sought includes the following remedies, orders and declarations:

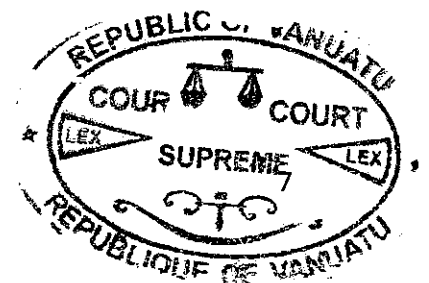
- a. That the registration of the 060 lease and its transfer were obtained by fraud and/or mistake, and that both dealings be cancelled;
- b. That the change in lessor in August 2009 was by fraud and/or mistake and the lessor was still MTL;
- c. That the 002 lease was cancelled by fraud and/or mistake and requires the Director to reinstate that lease;
- d. That as far as the 002 lease was cancelled in bad faith, renders the State liable to indemnify the Claimants;
- e. That the 002 lease extension was valid and that it be registered;
- f. That Family Songoriki and Vakutono caused and contributed to the fraud and/or mistakes as they knew they were the custom owners only of 33 hectares which did not include leases 002 and 060;
- g. That Bluespring at all times caused or contributed to the fraud and/or mistakes as they knew or ought to have known that the land was disputed and Family Songoriki could not have been its custom owners;
- h. That the First Claimant has an equitable right under para. 17(g) of the Act;
- i. That the registration of the Third-Party Mortgage was by fraud and/or mistake;
- j. That the registration of the mortgage is ineffectual against the Claimants and that they are entitled to be indemnified against any damages arising out of it including in particular but not limited to, at the minimum, equivalent to the value of mortgage of VT12,000,000 and interest and costs of the mortgage;
- k. That the State acted in bad faith and is not protected by s. 9 of the Act;
- l. That all the Defendants be jointly and severally liable for damages caused to the Claimant;
- m. An order restraining the Defendants from trespassing onto the land of the 002 lease;
- n. Costs; and



- o. Any other order deemed fit.
13. The Claim is disputed by Bluespring and the State.

D. The Application and Submissions

14. The grounds of the Application included that the Claimants do not have *locus standi* or standing to bring the Claim as they do not have an interest as defined in the Act because the late Mr Mahe's lease had expired, and no renewal of that lease had been made, as required by the Act. The First and Second Defendants' counsel Mr Nalyal submitted that the claim should only be against Vakutono and/or the State for failing to extend the term of the lease or to register an extension of the lease. That is why the alternative order sought is for the First and Second Defendants to be removed as parties to the proceedings. He also submitted that his clients applied for their lease at a time no lease at all was registered. He adopted the State's submissions and sought costs on an indemnity basis.
15. The State supported the Application. State counsel Mr Huri relied on the written submissions and submitted that the Claimants did not have standing or an interest as the 002 lease had already expired therefore they no longer had a lease capable of registration and thus no registrable interest. He submitted that there was no failure by the Director of Lands to register an extension of the 002 lease because it was lodged for registration *after* the expiry of the lease. Further, that MTL is a purported lessor who is not a custom owner and therefore does not have a registerable interest, and that it has been superseded as lessor by declared custom owners.
16. The Application was opposed. Claimants' counsel Ms Raikatalau relied on the written submissions and submitted that the definition of "interest" in the Act must be read with that of "registrable", and therefore the Claimants have standing as they executed a variation extending the 002 lease, signed consent, paid premium and paid registration fee and stamp duty *before* the expiry of the lease (on 30 July 2011) therefore it was a registrable interest, as defined in the Act, which the Director of Lands failed to register. Further, that until the cancellation of the 002 lease on 22 August 2011, the First Claimant had a registrable interest. The Claimants have pleaded a whole series of mistakes from the change of name of registered lessor on 3 August 2009 to the registration of the registration of the third-party mortgage on 29 April 2022.
17. Ms Raikatalau cited the judgments in *Presbyterian Church Trust Association v Moore* [2013] VUCA 2 and in *Simbolo v Government of the Republic of Vanuatu* [2018] VUSC 49 and submitted that unlike in *Moore*, the Claimants' case is that at all material times Family Songoriki and Vakutono were not custom owners, and that this was within the knowledge of Bluespring. She submitted that like in *Moore*, the Claimants' cause of action accrued when the 060 lease was registered which prevented the registration of the extension of the 002 lease.



18. She also submitted that Mr Huri could not make the submission that Family Songoriki was declared custom owners because the State's admissions in paras 4(d), 7(b), 7(f) and 17(c) of its Defence are that at the time of registration of the 060 lease, it was unclear if the 060 lease was within Ponatoka land (which is disputed) or within Lakenpagatau land which Family Songoriki are the declared custom owners of. She submitted that this affects Family Songoriki and Vakutono's issuance of the 060 lease.
19. In reply, Mr Nalyal submitted that in order for an instrument to be capable of registration, it has to be registered before the expiry of the term of the subject lease. He also submitted that there are many Court of Appeal decisions that the Register is everything (the Land Leases Register) therefore in 2009, Family Songoriki were the registered lessors so the Claimants must show that they have an interest in order to have standing. He sought the same amount of costs as Ms Raikatalau.

E. Consideration

20. Many of the State's submissions and as a result, the Claimants' submissions, related to the issues in dispute between the parties, which are triable issues. I reminded counsel that the Application is an interlocutory application therefore I could not make findings of fact in deciding it. Findings of fact must be made after trial hence I will consider whether or not the Claimants have standing by reference to the pleadings.
21. In *Naflak Teufi v Kalsakau* [2004] VUCA 15 at pp 5-6, the Court of Appeal considered the question of who may bring a claim under s. 100 of the Act and held as follows:

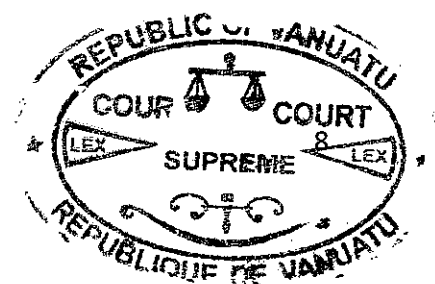
The particular aspect of section 100 that requires clarification in this appeal, is the question of who may make the application or who may invoke section 100 of the Land Leases Act?

The answer to the question is not immediately apparent as the section itself does not speak about Applicants or Claimants; it is purely an empowering section for the Supreme Court. That is not to say that no one may apply to invoke section 100 outside the Court itself.

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. ... We use the word "interest" in the widest possible sense although accepting it may have in appropriate circumstances be distinguished from a mere busy body.

(my emphasis)

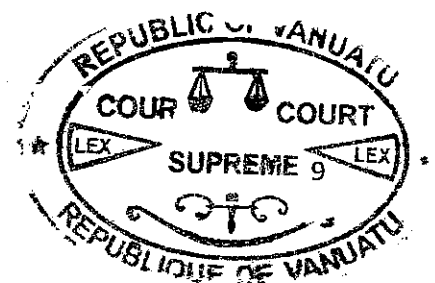
22. The Court of Appeal observed in *Ashem v Malingy* [2022] VUCA 11 at [46]-[47] as follows:
46. *As is apparent, the Court in Naflak Teufi v Kalsakau was not purporting to state exhaustively, the nature of the interest which would be required for a claimant to have standing. It took a broad view of the nature of the interest which may be sufficient.*



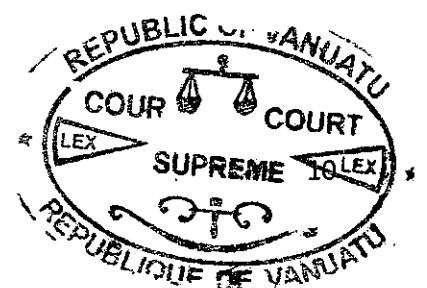
47. We also observe that the appeal in *Nafalak Teufi v Kalsakau* succeeded even though the appellants in that case had not established that they had a right to be registered on the lease.

(my emphasis)

23. Mr Nalyal submitted that the Claimants do not have standing to bring the Claim as their 002 lease had expired and no renewal of that lease had been made, as required by the Act.
24. However, this overlooks that part of the Claimants' case alleging that they executed a variation extending the 002 lease, signed consent, paid premium and paid the required registration fee and stamp duty *before* the expiry of the 002 lease but that the Director of Lands failed to register the lease extension. Further, alleging that the Director of Lands cancelled the 002 lease in bad faith and mistakenly at the illegitimate request of Family Songoriki as the land was disputed, MTL was the lessor, and MTL had agreed to an extension of the lease for 50 additional years.
25. Prior to these events, the Director of Lands had changed the name of the lessor of the 002 lease from MTL to Family Songoriki. That is also challenged in the present proceedings. Assuming that that the Claimants succeed in establishing that MTL was removed as registered lessor by fraud and/or mistake, the next aspect of their challenge concerns the alleged failure by mistake and/or fraud to register the lease extension and to cancel the 002 lease.
26. Given those pleadings, in the specific circumstances of the present case, I agree with Ms Raikatalau's submission that the definition of "interest" in the Act must be read with that of "registrable" in relation to the alleged 002 lease extension which was allegedly lodged for registration *before* the expiry of the lease but which, it is said, the Director failed to register. The alleged extension of the lease was a registrable instrument required to be registered or capable of registration to extend the term of the lease therefore it was an "interest", as defined in the Act, belonging to the lessee, the First Claimant.
27. In addition, up until its cancellation on 22 August 2011, the 002 lease was a registered interest. The registered 002 lease was an "interest" as defined in the Act, belonging to the lessee, the First Claimant.
28. For the reasons given, I consider that the First Claimant has standing to bring the Claim.
29. The balance of the Claimants' case consists of a series of mistakes and/or fraud pleaded in relation to the registration of the 060 lease, its transfer and of the third-party mortgage, a damages claim against Bluespring for damage caused to the First Claimant's properties, and an indemnity claim against the State.



30. As I understand the pleadings, it is contested whether the 002 lease expired on 30 July 2011 (the Claimants' case) or on 30 July 2010 (the State's case). That is a triable issue. It is also contested whether MTL lodged the 002 lease extension before or after the expiry of the lease. That too is a triable issue. If the documents were lodged prior to the expiry of the lease, there could be any number of reasons why the Director of Lands did not register the extension of lease. That also is a matter for determination after trial.
31. Mr Huri submitted that MTL is a purported lessor who is not a custom owner and therefore does not have a registrable interest, and that it has been superseded as lessor by declared custom owners. I agree that a custom owner may have an interest as defined in the Act and that in many cases, this arises from a recorded interest in land or declaration otherwise of custom ownership of land. MTL, however, is a limited liability company who by the Claim, was appointed by the Minister of Lands to act on his behalf for and on behalf of the disputing custom owners. It is not pleaded that it has a recorded interest in land or any declaration of custom ownership.
32. However, as to Mr Huri's submission that MTL has been superseded as lessor by declared custom owners Family Songoriki, that is a conclusion for the Court to draw, if at all, after trial.
33. By its Defence, the State alleges that it is unclear if the leased land is within Ponatoka land which is still disputed (500 hectares) or within Lakenpagatau land which Family Songoriki are the declared custom owners of (33 hectares). The Claimants' case is that it is within Ponatoka land. That is a triable issue. It will be a matter for determination after trial what information the Director had in his possession and/or knowledge at the time he changed the registered lessor of the 002 lease from MTL to Family Songoriki, and whether he did so in bad faith. It must also be determined after trial the knowledge of the Director of Lands, and when, as to the location of the 060 lease and whether or not it fell within Family Songoriki's custom land. Findings of fact as to these matters will be relevant to determining what, if any, of the Director's alleged acts or omissions constituted fraud and/or mistake.
34. It was singularly unhelpful of counsel to make submissions about the triable issues when all that was required was to focus on whether or not the Claimants have standing to bring a claim under s. 100 of the Act.
35. I turn now to whether or not MTL has standing to bring a claim under s. 100 of the Act.
36. MTL was the registered lessor of the 002 lease and it is challenging, *inter alia*, the change in name of lessor from it to Family Songoriki, the alleged failure to register the lease extension that it had agreed with the First Claimant, and the cancellation of the 002 lease.



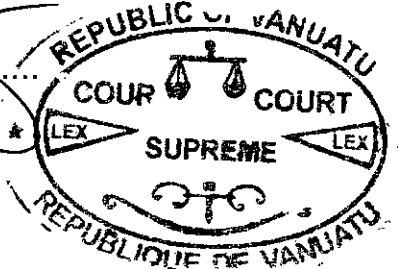
37. I consider that in the specific circumstances of the present case, in which MTL was a registered lessor and is now challenging its removal as registered lessor, the alleged failure to register the 002 lease extension and the cancellation of the 002 lease (which removed any possibility of registration of the 002 lease extension) and having already held that the lease extension was a registrable instrument, I consider that MTL had an "interest" as defined in the Act. Accordingly, MTL also has standing to bring the Claim under s. 100 of the Act.
38. If I am wrong and MTL does not have standing to bring a claim under s. 100 of the Act, given the Claimants' case that they suffered damage by reason of the change in the name of the lessor of the 002 lease and the other mistakes or omissions pleaded hence their claim to be indemnified by the Government, I consider that MTL does have standing for its indemnity claim as those actions caused it to lose its benefits as a registered lessor. Accordingly, in the specific circumstances of the present case, I consider that MTL has standing to bring its claim for indemnity under s. 103 of the Act.
39. For the reasons given, the Application will be declined and dismissed.

F. Result and Decision

40. The First and Second Defendants' Application filed on 23 November 2023 seeking orders striking out the entire proceeding or alternatively, removing them as parties to the proceeding Application, is **declined and dismissed**.
41. Costs must follow the event. The First and Second Defendants are to pay the Claimants' costs of the Application fixed at VT100,000.
42. There is no order as to the Fourth Defendant's costs of the Application.

**DATED at Port Vila this 29th day of April 2024
BY THE COURT**

VM Trief
Justice Viran Molisa Trief



The seal of the Supreme Court of Vanuatu is circular. It features a central scale of justice. The words "REPUBLIC OF VANUATU" are written along the top inner edge, and "REPUBLIQUE DE VANUATU" along the bottom inner edge. The words "COUR" and "COURT" are on either side of the scale, and "SUPREME" is written below it. Two small triangles containing the word "LEX" are positioned on the left and right sides of the seal.