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

Judicial Review
Case No. 13/8 SC/JUDR

BETWEEN: **RACHEL AND MATHIAS MOLSAKEL**

Claimants

AND: **TIMOTHY MOLBARAV, AMAL SOLOMON, PETER NATU, JAMES TAMATA AND SINGO MOLVATOL**

First Defendants

ZEBEDEE MOLVATOL

Second Defendant

BOETARA FAMILY

Third Defendant

THE REPUBLIC OF VANUATU

Fourth Defendant

Date of Hearing: ***December 8th and 9th 2016 and August 8th, 9th, 10th and 11th 2017***

Date of Judgment: ***December 19th, 2017***

Before: ***JP Geoghegan***

Appearances: ***Garry Blake and Evelyn Blake for the Claimants***

Felix Laumae for the First and Third Defendants

Wilson Iauma for the Second Defendant

Sakiusa Kalsakau (SLO) for the Fourth Defendant

JUDGMENT

REPUBLIC OF VANUATU COUR COURT LEX SUPREME LEX

1. In these proceedings the claimants have sought orders by way of judicial review quashing the decision of the Veriondali Customary Land Tribunal made on May 30th 2005 together with an Order directing that the Island Court is to hear and determine the customary ownership of land which is known as Belbarav Land.

2. In 1992 the claimants filed a claim over Belbarav land in Santo in the Santo/Malo Island Court. The case is referred to as Case No. 5 of 1992 (*"Island Court Case"*).

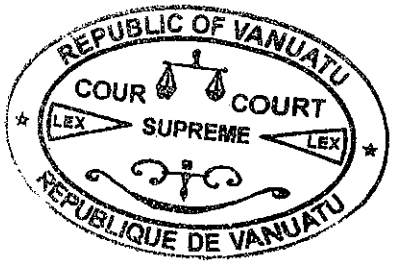
3. It is alleged that in 2004 a Magistrate in the Island Court ordered that all cases pending before the Island Court would now be dealt with by the Customary Land Tribunal. Accordingly the claimant's case was transferred to the Veriondali Customary Land Tribunal for decision. It is the claimant's case that this occurred despite the claimants express wish that the claim remain in the Island Court and be dealt with by the Island Court.

4. On May 30th 2005 the Veriondali Customary Land Tribunal (*"VCLT"*) made a ruling in respect of the land naming the second and third defendants in these proceedings as the customary owners of the land.

5. That decision was appealed and the Court of Appeal[1] determined that the matter should be returned to the VCLT with a direction that it was required to clarify exactly who the custom owners were.

6. It is contended by the claimants that rather than acting on the Court of Appeals specific directions the VCLT then replaced its earlier decision with another decision which named the first defendants in these proceeding as the custom owners of the land.

[1] Court of Appeal Case 42/2007



7. To add to the rather complex background of this matter the claimants also claim that they appealed the decision of the VCLT made on May 30th 2005 but that that appeal was never dealt with. That is an assertion which is not accepted by the first and third defendants.

8. There are two distinct parts to the claimants claim in these proceedings. Firstly, it is argued by the claimants that the Veriondali Land Tribunal had no jurisdiction to deal with the claimants claim as that claim had been unlawfully transferred to the Land Tribunal from the Island Court in breach of the provisions of the Customary Land Tribunal Act. Accordingly the decision of the Tribunal in 2005 should be quashed and the matter determined by the Island Court as it should have been years ago.

9. Secondly, it is argued that if the claim was correctly transferred or otherwise lawfully dealt with by the Land Tribunal then it is argued that there has been an alleged failure of the Area Land Tribunal to hear an appeal to it from the Village Tribunal.

10. By express agreement between the parties it is only the first issue which is for determination in this judgment.

11. The essential issue for determination by the Court in this case is whether or not the Island Court had jurisdiction to transfer the proceedings to the VCLT in the first instance and if not, what is the effect of that.

12. That determination turns on section 5 of the Customary Land Tribunal Act [Cap. 271] which provides for the manner in which disputes may be transferred to be dealt with by a Customary Land Tribunal.

13. In this regard the claimant says:-

    a) There was never an application to the Island Court to have the proceedings withdrawn from the Island Court and dealt with under the Customary Land Tribunal Act; and

b) There was no consent of all parties to the withdrawal of the proceedings from the Island Court and to the dispute being dealt with under the Customary Land Tribunal Act.

14. Accordingly, the claimant claims the Island Court did not have the power to transfer the proceedings to the Veriondali Land Tribunal therefore the Veriondali Land Tribunal could never have had jurisdiction to determine the issue.

15. This trial originally commenced in December 2016 however it became plainly apparent that the time estimated by counsel for disposal of the matter had been underestimated. Regrettably the trial could then not recommence until August 2017. The Court heard oral evidence from 13 witnesses in total, nine of those witnesses giving evidence on behalf of the claimant and four giving evidence on behalf of the defendants.

Background and evidence

16. The background to the claim was set out in the evidence of the claimant Mathias Molsakel. The evidence of Mr Molsakel was that in 1992, he and his late mother Rachel Molsakel filed a claim for what is described as *"the land of High Chief Molsakel"* with the Tanafo Village Court[2].

17. The case was heard by the Chiefs in the Tanafo Village Court on May 8th 1992 and the Village Court declared Rachel Molsakel as the custom owner of the following areas of land, namely Sarapu to Saravi, Sarata to Palikulo, Beltarav, Pelsi, Sarakata through to Sevirar, Monicsall and Wasep, Muru, Tanafo and Nassei[3].

18. Mr Molsakel deposed that following the decision of the Village Court he and his mother submitted the case to the Area Court *"to consider and give a decision about*

[2] See sworn statement Mathias Molsakel 11/09/2015 paragraph 2

[3] See annexure MM1 sworn statement Mathias Molsakel 11/09/2015

it". Mr Molsakel deposed that the claim by him and his mother was dealt with by the Tanafo Area Court on May 12th 1992.

19. The decision of the Tanafo Area Court was produced by Mr Molsakel[4]. The decision appears to refer to a dispute relating to the use of land belonging to Chief Molsakel. The decision refers to two individuals, Chief Tari Buluk and Thomas Tosirikit apparently receiving rent for the land. The decision refers to the two individuals *"running away"* because they were not custom owners of the land that they were receiving rent for and the decision records the Court's decision that the land owned by Chief Molsakel belonged to Rachel Bolratang (Rachel Molsakel). The Court determined that Chief Buluk and Mr Tosirikit should stop receiving rent to the lands belonging to both Rachel Boltarang and recorded that the parties had 30 days to appeal to the Santo/Malo Island Court.

20. At the bottom of the decision is a description of the land referred to as starting at *"Tanaeo"* to Solway Sarakata. *"Beltarav"*. The decision is signed by Chief Mark Alick and Chief Sitangtang.

21. In his evidence Mr Molsakel conceded that he had written his name into the decision so that the decision read that the land belonged to *"Rachel Boltarang and Mathias Molsakel"*. His explanation for that was that when she saw the decision his mother had told him to write his name next to hers because they had claimed it jointly.

22. It is not clear if the decision was actually a decision declaring custom ownership or was rather a decision determining a dispute as to the rights to claim rent from the land. What appears clear though is that the decision acknowledged and recognized that the land was owned by Rachel Molsakel through her late father.

23. Mr Molsakel deposed that upon receipt of that decision he and his mother submitted their claim in respect of the land to the Santo/Malo Island Court. Mr Molsakel produced a copy of an undated letter purportedly signed by his mother Mrs

[4] See annexure MM2 sworn statement Mathias Molsakel 11/09/2015

Vogratang, *"Molsakel"* which refers to Mrs Molsakel being the last wife of Chief Molsakel and that she and Mathias Molsakel were claiming back the lands belonging to Chief Molsakel. Those lands are described in the letter as:-

> *"Sarapu to Saravi and Sarautu and Saranta and onto Teproma, Palikolo and Banban, Beltarav to Sarakata river and onto Belci and Monixhill, Sevirar, Wasepmuru, Tanafo and onto Nasei waterfall".*

24. The claim refers to the fact that the lands described are the lands owned by her late husband Chief Molsakel. The claim makes a complaint that Chief Molsakel's first wife, Francois Kaba has sold some of the land without letting Mrs Molsakel know and the final paragraph of the claim requests the Court to remove Taribuluk, Thomas Tasitite and Ben Tamala from the land as they did not own it. The claim also refers to the Court requiring people from Mavea and Tutuba to also move from the land.

25. Mr Molsakel also produced a letter from the Santo/Malo Island Court dated January 17th 1977[5]. That letter stated:-

> *"TO WHOM IT MAY CONCERN*
>
> *This is to confirm that the land "TANAFO" including the eastern part of Luganville Town also known as Molsakel's land, is officially disputed in the Santo/Malo Island Court by MRS RACHEL VOKRATANG. Such claim has been lodged and filed on 3rd November 1992, filed No. 5/92."*

26. Mr Molsakel stated that that letter was handed to him by the Island Court Clerk at the time, Mrs Helen Aru.

27. Mr Molsakel said that he waited from 1992 until 2001 without receiving any advice from the Island Court as to the progress of the matter. Accordingly in 2001 he went to the Santo/Malo Island Court to check the file. When he did so, a new Island Court Clerk, Mr Kollan Nicholas gave him a letter dated February 14th 2001 which stated as follows:-

[5] Annexure MM4 sworn statement Mathias Molsakel 11/09/2015

"TO WHOM IT MAY CONCERN

SUBJECT: TANAFO AND EASTERN PART OF LUGANVILLE – MOLSAKEL'S LAND

Please be informed that the above subject land has been registered in the Sanma Island Court as a disputed land.

The parties disputing whole or part of the subject land are Rachel Vokratang, Rukone Berei, Emil Sar, Thomas Toa Serikite and Chief Franky Stephens."

The letter bears the seal of the Santo/Malo Island Court.

28. With reference to this letter Mr Nicholas gave evidence that he was the Island Court Clerk from 1999 to 2013. He confirmed that he wrote the letter that Mr Molsakel produced and that he remembered the Molsakel's claim and that it had been registered by the Island Court Clerk who was employed prior to him.

29. Mr Nicholas also deposed that he recalled that about the time the Customary Land Tribunal Act came into force Magistrate Jimmy Garae had determined that all cases that were in the Sanma Island Court (also known as the Santo/Malo Island Court) that had not yet been dealt with would be transferred to the Customary Land Tribunal and that one of those claims transferred was the Molsakel claim.

30. Regrettably in 2011, the Sanma Island Court building was burned and all of the files were damaged. One of those files, according to Mr Nicholas was the Molsakel file.

31. In his oral evidence before the Court Mr Nicholas stated that he knew that the previous Clerk had registered the claim as there was a registry for land purposes and that the Clerk at that time who he identified as *"Helen"* had recorded the Molsakel's claim and that he had seen that record.

32. Under cross examination Mr Nicholas stated that when he was approached by Mr Molsakel to write the letter which he had signed, he had gone through the Land Register and found that the Molsakel claim had been registered. He stated that

there was a file in respect of the matter and that he had seen it. He stated that there was a statement of claim and a sketch map. There was no receipt but the claim was recorded in the register book with a receipt number. When asked by Mr Laumae whether or not he had seen a public notice regarding the claim, Mr Nicholas said that he did not recall having seen such a notice. Mr Nicholas was also questioned about the other individuals mentioned in the second paragraph of the letter. He stated that some of those persons were registered in the Land's Registry and in the case of Mr Franky Stephen, Mr Stephen had come to file a claim and Mr Nicholas had registered it.

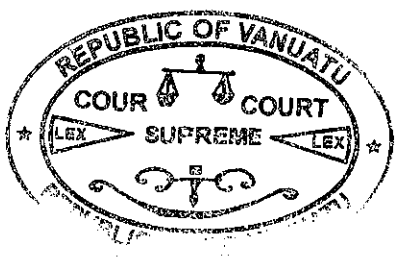
33. Mr Nicholas was asked by Mr Laumae whether he recalled a hearing in 2004 before Magistrate Garae which involved the Molsakel case. He confirmed that he was aware of the case and that he had summoned all of the parties to attend the Court hearing. He was unable to identify all of those involved in the Molsakel claim but stated that he had sent a summons and issued notices to attend in that case and other cases. Mr Nicholas said that as far as he could recall notices were sent to Rachel Voltarang, Rukon Perei, Emil Sar, Franky Stephen, and the Boetara Family all of those names having been put to him by Mr Laumae. Mr Nicholas stated that as far as he could recall he served the summonses however when further questioned about the Boetara Family he stated that he could not remember whether he served them or not. Sometime summonses were served by the Court Clerk and sometimes by the Sheriff. Although it was put to Mr Nicholas by Mr Laumae that he was lying to the Court he struck me as an honest and genuine witness.

34. Mr Nicholas was asked to describe what happened at the time of the hearing before Magistrate Garae. He advised that Senior Magistrate Garae asked the parties in which Court they wanted their case to be heard, the Island Court or the Land Tribunal. Mr Nicholas stated that the majority of parties were in Court at that time although he could not recall their names. He stated that the majority of people present wanted their claim to go the Land Tribunal although he could not recall how many parties constituted the majority. He could also not recall whether or not a member of the Boetara Family was present. He stated that the Molsakel claim was the only one which was dealt with by Magistrate Garae on that day.

35. Mr Nicholas stated that while the case had been transferred to the Land Tribunal the file had remained in the Santo Court hence it being damaged during the course of the fire in 2011. It was put to Mr Nicholas by Mr Laumae that the current Island Clerk Mr Anthony Lessy had made a sworn statement stating that he had comprised a list of all land cases registered in the Santo/Malo Island Court from 1987 to 2000 and that the Molsakel case was not on that list. When asked to comment on that Mr Nicholas simply stated that he did not consider that Mr Lessy's list was complete.

36. Mr Nicholas' evidence regarding the service of a notice of the 2004 hearing on Mathias Molsakel did not match the evidence of Mr Molsakel himself who deposed that he had not received any notice of the 2004 hearing but became aware of it after receiving a telephone call from a Mr Joseph Rack who advised him that the Santo/Malo Island Court was in the process of holding a meeting with all of the people who had lodged a claim with the Court. He immediately went off to the Court and saw that there were a lot of people present, some of whom were claimants and some of whom were simply there to hear what the Court had to say. He deposed that Senior Magistrate Garae was the one who talked at the meeting and that Magistrate Garae stated that the Lands Tribunal had been established to deal with all cases relating to land and accordingly Santo/Malo Island Court would no longer be dealing with the land cases and that those cases would be dealt with by the Land Tribunal. He deposed that Magistrate Garae then said that in respect of those who had submitted claims to be dealt with by Santo/Malo Court, he asked for a show of hands from those who wanted their cases to remain in the Island Court. Mr Molsakel stated that there were four who raised their hands to register their wish for the case to stay before the Island Court, those four being Rukon Perie, Franky Stephen, Ben Tunali and Mr Molsakel. The Magistrate then transferred cases to the Land Tribunal on the basis of a majority vote

37. A pivotal witness in the proceedings was Mr Jimmy Garae who, before his retirement, was a Senior Magistrate in Luganville. It was Mr Garae who made the order transferring the proceedings to VCLT in 2004. In a sworn statement dated February 17th 2015 he stated:-



"3) *In 2004, after the new legislation, the Customary Lands Tribunal Act, came into force, at a hearing, I transferred the case to be dealt with under that Act and the Island Court file was sent to Port Vila.*

4) *I remember well that majority of the parties to land case no. 5 of 1992 consented to the transfer."*

38. In his oral evidence, Mr Garae referred to the case as the Tanofo case. At the close of cross examination I asked Mr Garae how it was that he could remember the case after such a long period of time. He stated that he remembered the name Tanafo and recalled that the land covered by the claim was a huge area of land which covered some Palekula land and also included land that had already been before the Island Court and the Supreme Court. He stated that he was aware that Mathias Molsakel was wanting to keep the claim before the Island Court while others were wishing to transfer it to the VCLT. He referred to remembering the claim *"quite well"*. He was familiar with most if not all of the persons who were connected with the claim and reiterated that he could remember the hearing regarding a transfer as he could recall questioning the parties and could also recall the fact that most of the parties agreed to that transfer. He stated that in Santo most cases were retained in the Island Court because the legislation was new but that his understanding of the criteria for transfer at that time was that if the majority of the parties agreed to a transfer then such a transfer could occur. He stated that it was subsequent to the decision to transfer that he received training in respect of the new Act.

39. Despite the lengthy period of time which has lapsed since the hearing in question I considered Mr Garae to be a reliable witness who had a clear recollection of events. I was impressed by his evidence.

40. Mr Molsakel deposed that he heard nothing further from the Island Court in respect of the matter but that sometime in 2005, he saw a notice issued by the Veriondali Land Tribunal calling on people to submit their claims in relation to Belbarav Land. He accordingly submitted his claim and went to the show grounds for that case. He did so because he was at that time unaware of the legal requirements around

transfer of cases to the Land Tribunal and Magistrate Garae had already transferred the case in any event.

41. As to the decision of the Area Court dated May 12th 1992, the Court heard evidence from Mr Kalmasei Warsal who, at that time was the Secretary of the South East Area Council of Chiefs and who deposed that he went to Tanafo for the Area Court to consider the Molsakel case. He confirmed that the Area Court decided that all of the land belonging to Chief Molsakel was in the hands of Rachel Molsakel. Mr Warsal was the person who wrote the decision, a copy of which was annexed to Mr Molsakel's sworn statement.

42. Under cross examination, Mr Warsal stated that Santo is divided into custom areas known as East, South East, South and West and that South Santo was divided into two areas – Area 1 and Area 2. Mr Warsal was able to give this evidence as he was the Chairman of the Santo Council of Chiefs. Mr Warsal stated that he did not issue a notice to the public at large in respect of the claim to be dealt with by the Tanafo Area Court but that he had written a letter to Chief Buluk and Mr Tosirikit but that they did not attend the hearing.

43. Mr Laumae questioned Mr Warsal closely on the contents of the Area Court decision in particularly the land that had been referred to. Mr Warsal stated that, with reference to the description of the land at the end of the judgment he had written the words *"graon ia stat long Tanafo I kam kasem Solway Sarakata"*. He stated the word *"Beltarav"* was not written by him. Mr Warsal was asked whether or not at the commencement of the hearing Mrs Molsakel produced a map. Mr Warsal advised that she did not but that she had indicated verbally where the land involved in the claim was. In re-examination a map was put to Mr Warsal that map being annexure MM6, to the statement of Mathias Molsakel dated September 11th 2015. That map was the map which Mr Molsakel says depicts the land which he and his mother had been claiming through the Area Court and the Island Court. It is a very large area of land which includes areas referred to as Tanafo, Beltek, Banban and Palekula. Mr Warsal confirmed that that map corresponded with the area which Mrs Molsakel was describing to the Area Court in 1992.

44. Present at both the Tanafo Village Court hearing and the Island Court hearing was Mr Mele Tau. Mr Tau had accompanied his father to the hearing in 1992 and confirmed that he was present when the Court made the decision that the land belonging to High Chief Molsakel belonged to Rachel Molsakel. He deposed also that he was present at the meeting of the Santo/Malo Island Court when Magistrate Garae transferred all cases from the Island Court to the Land Tribunal

45. He confirmed that he attended the Island Court as a result of receiving a phone call from Mr Molsakel who asked Mr Tau to accompany him to the Island Court because he (Mr Molsakel) had just heard that the Island Court was going to transfer cases to the Land Tribunal. Mr Tau deposed that he attended the Island Court with Mr Molsakel and that he saw a lot of other people present there as well. He confirmed that Magistrate Garae asked for a show of hands from people who wished their cases to stay in the Island Court and that four persons raised their hands accordingly. He stated that Magistrate Garae then asked who wanted their cases to go to the Land Tribunal and, after a hand count was taken, stated that if the majority wished their cases to go to the Land Tribunal, all cases would be transferred there.

46. Mr Tau also deposed that he knew that the Area Court had transferred the Molsakel case to the Santo/Malo Island Court. When asked how he knew that he stated that he sat in the Area Court when it was transferred. On reflection, when considering his evidence it may well be that Mr Tau has confused the transfer from the Area Court to the Island Court with the transfer from the Island Court to the Land Tribunal. I say this because Mr Molsakel did not give evidence that the Area Court transferred the proceedings to the Island Court.

47. Under cross examination by Mr Laumae Mr Tau was asked to identify the parties concerned in the Village Court claim. Mr Tau stated that the chiefs in Santo sat to consider issues of land and that he was at a Chief's meeting in Tanafo and that there was then an appeal to the Area Court also in Fanafo. He referred to the claimants as being the Molsakels but there were also *"a lot of claimants"* claiming *"under"* Molsakel. Some lost their cases and appealed to the Area Village Court where Rachel Molsakel was confirmed as the custom owner. When Mr Tau was asked when this

took place he stated 1981 or 1982. When Mr Laumae put it to Mr Tau that he was giving evidence that the village courts and area courts were held in 1981 or 1982 Mr Tau replied that that's *"when it started"* because that was when *"lots of people started laying claims to land"*. Mr Tau was also cross examined by Mr Iauma on the issue of the transfer of the proceedings from the Area Court to the Island Court. Mr Iauma put it to Mr Tau that he was not there when the case was transferred to the Island Court to which Mr Tau replied that he was there and that he could say *"it was a man Malekula before the Court and he had to go back"*.

48. Mr Nakatu Satangtang also gave evidence that he was present in the 1992 Area Court when the Area Court declared the land of High Chief Molsakel belonged to Rachel Molsakel. His father was Chief Satangtang who was sitting on that case and whose signature appears on the judgment. Under cross examination by Mr Laumae, Mr Satangtang confirmed that he lived in Fanafo and that the descriptions Tanafo and Fanafo were interchangeable words describing the same custom area of land. When Mr Laumae put to Mr Satangtang that the Area Court hearing had been regarding a dispute about the land Mr Satangtang replied that the Court decided both the issue of the rental dispute and the ownership of land.

49. Mr Franky Stephen gave evidence that at the beginning of 2001 he filed a claim in the Sanma Island Court over land which he called *"Etoro"*. He deposed that Etoro was the name of the Molsakel tribe. The land claimed by Mr Stephens would appear to cover most but not all of the area which Mr Molsakel claims in his case.

50. Mr Stephen deposed that he lodged his claim on 23 January 2001 and paid a filing fee of Vt 30,000. Mr Stephens produced a copy of the receipt issued upon payment of that fee. He deposed that when he took the receipt to the Clerk of the Sanma Island Court to file his claim he was told by that person that the land he was claiming was also being claimed by Mr Molsakel. He deposed that the Clerk then took his claim and gave him a letter confirming that he was also claiming land which was in the Molsakel claim. The letter is dated February 14th 2001 and is the same letter as the letter referred to in the evidence of Mr Molsakel.

51. Mr Stephen deposed that after the filing of his claim the Customary Lands Tribunal Act was passed in Parliament and he heard on the radio that all land cases before the Island Court would remain there but that all new land cases would be dealt with by the Customary Land Tribunal. Sometime in 2004 he received a notice from the Sanma Island Court to attend a conference at the Court. When he went to that conference there were a number of tribal representatives and he stated that *"all the tribes present at the Sanma Island Court at that time within the area council of Fanafo Canal"*. Mr Stephens confirmed the evidence of the other witnesses that Magistrate Garae after taking a show of hands as to who wished their cases to be dealt with by the Customary Land Tribunal and who wished their cases to remain in the Island Court, determined that as the majority of persons present had said that the Customary Land Tribunal should deal with their cases, those cases would then be transferred to the Customary Land Tribunal. Mr Stephen confirmed that he was one of the persons who did not want his claim to go to the Customary Land Tribunal. He gave evidence that the persons opposing the transfer were the claimant, Rukone Perei, Thomas Tosirikit and Mr Stephen himself. He stated that it was sometime in September 2004 that the Veriondali Customary Land Tribunal issued a notice stating that any claimants in the Belbarav land should come and file their claims with the Tribunal. A further notice was issued at the beginning of 2005.

52. In cross examination by Mr Laumae, Mr Stephen was asked whether or not at the Island Court hearing in 2004 Mr Stephens' case was called individually. Mr Stephen stated that there were numerous cases in the Island Court but that the cases were not called on an individual basis. Mr Stephens' evidence was that the Magistrate dealt with all cases in a collective manner rather than on an individual basis and that since a majority of persons indicated a wish to have their cases dealt with by the Custom Land Tribunal the Magistrate advised that that was what would occur.

53. Mr Stephen stated that after the Magistrate had made a decision to transfer the case there was subsequently a public notice issued by the Land Tribunal and that that notice was published in the Etoro area. The public notice referred to a hearing to be held by the Land Tribunal in respect of land known as *"Belbarav"* and that the hearing would be held on September 13th 2004. Mr Stephen stated that he took

steps to file a claim in the Tribunal because Belbarav land came within the boundary of the Etoro land being claimed by Mr Stephen. A comparison of the maps provided in respect of the Molsakel claim would establish that the Belbarav land referred to is also within the area of land claimed by Mr Molsakel.

54. Mr Stephen gave evidence that he advised the Chairman of the Land Tribunal that he had a case before the Island Court and that he also objected to Chiefs from other islands acting as Chairman of the Land Tribunal. The Land Tribunal went ahead and heard the case nonetheless.

55. The second defendant Mr Zebedee Molvatol provided two sworn statements dated February 5th and 25th 2016. Mr Molvatol's statement of February 25th contains a number of assertions in relation to Mr Mathias Molsakel's right to their claim to be a customary owner of land through High Chief Molsakel and also records some alleged history of the respective families and their connection to the land. Much of what was contained in the statement is therefore irrelevant to the issue which the Court has to determine. What is significant however about his evidence is that he annexed to his statement a copy of the Village Land Tribunal judgment of May 23rd 2005 which declared the custom owners of claimed Belbarav land to be Zebedee Iarvui and the Boetara family. The judgment annexes a sketch map of the claimed area. It is clear from that sketch map that the area claimed, while not identical to that claimed by the Molsakels, covers very significant areas of land in common with the Molsakel claim. Mr Molvatol accepted under cross examination that the map supplied by Mr Molsakel which set out the claim filed with the Island Court was similar to Belbarav land.

56. While Mr Molvatol asserted that there was not a hearing before Magistrate Garae in 2004 where it was decided to send cases from the Island Court to the Land Tribunal he conceded under cross examination that he did not attend such a meeting and had never attended any hearing before Magistrate Garae or any other hearing where it was decided to transfer cases from the Island Court to the Land Tribunal.

57. Mr Lawrence Solomon gave evidence on behalf of the defendant as the duly authorised representative of the Boetara family, the third defendant. Mr Solomon was referred to the map setting out the Molsakel claim[6] and acknowledged that the area depicted by black dots within the *"Molsakel claim"* was an area claimed as Belbarav land.

58. Mr Solomon had filed a sworn statement which referred to issues arising from endeavours to subdivide the Belbarav land in what is referred to as the "Zone Zero" subdivision. That subdivision commenced sometime in 1999 or 2000. At that time the Boetara family clearly regarded themselves as having the right as custom owners to subdivide the land. Litigation was issued however to stop that subdivision which resulted in a consent order being made in the Supreme Court[7] on June 26th , 2002 the first paragraph of which stated:-

> *"There is a serious question to be tried in the Sanma Island Court for the determination of the custom land owners of the land Belbarav on South East Santo in the Republic of Vanuatu."*

59. The consent orders made, while acknowledging the dispute also made arrangements for the sub division to continue with the proceeds of sale or income arising from the sub division being carefully monitored.

60. Mr Solomon deposed that it was only through the proceedings currently being determined that the Boetara family had become aware of the claim by the Molsakels, something which came as a surprise to the Boetara family. Mr Solomon deposed that upon becoming aware of the claim *"we consulted the Santo/Malo Island Court to find out whether there is indeed such a land case and if it concerns Belbarav land".* Mr Solomon annexed a letter from the Clerk of the Santo/Malo Island Court Mr Lessy Anthony dated October 21st 2014 stating:-

> *"To whom it may concern*
>
> *Re: Tanafo Customary Land Santo Area, Sanma Province*

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[6] Annexure MM2 to sworn statement of Mathias Molsakel dated May 16th 2016

[7] Civil Case 51 of 2001

I have search the Santo/Malo Island Court Registry for any registered dispute against the above customary land.

I confirm that there is no registered land and case under Case No. 05 of 1992.

Thank you for your attention".

61. I will come to the evidence of Mr Anthony shortly.

62. Mr Solomon deposed that in late 2004 the Veriondali Village Land Tribunal was to set up *"to hear our claim over Belbarav land"*. That was the notice previously referred to, which notified a hearing on September 13th 2004. Mr Solomon depose that Mr Molsakel lodged his counter claim in respect of the notification of that hearing and was a party to the dispute. There is no dispute that that was what occurred. It was the evidence of Mr Solomon that despite the fact that the parties were given an opportunity to raise an objection to the Land Tribunal hearing the claim, Mr Molsakel did not do so and neither did he inform the Tribunal that a land case had been registered in the Santo/Malo Island Court. In all of the circumstances, that may not have been unusual bearing in mind the transfer of the case to the Land Tribunal and bearing in mind that Mr Molsakel felt that he had no alternative.

63. Mr Solomon's sworn statement contained interesting evidence regarding the history of the Boetara Family and its relevant claimed custom ownership of Belbarav land. That evidence however is not relevant to the issue which I have to determine in this judgment.

64. The Court heard evidence from the current Clerk of the Santo/Malo Island Court, Mr Anthony Lessy. In a sworn statement dated March 7th 2016, he deposed that in mid-October 2014 he was approached by both the claimants and the defendants in this case requesting that he confirm to them whether or not there was an Island Court Case lodged by the claimants in the Santo/Malo Island Court over Belbarav land or land covering part of Belbarav land registered as Land Case No. 5 of 1994. He provided a letter dated October 21st advising that there was no registered land case

under case No. 05 of 1992. Following an enquiry by the Supreme Court he wrote a further letter dated January 28th 2016 confirming *"that there is no registered dispute against Tanafo and Eastern part of Luganville land recorded in the Santo/Malo Island Court Registry"*. He deposed that the only land case lodged and registered with the Santo/Malo Island Court concerned customary land commonly known as Palekula in the Eastern part of Luganville and that two families, Family Vatarivimol and Family Voram had lodged claims in respect of that matter.

65. Mr Anthony annexed to his sworn statement what he referred to as *"a true copy of the official list of all land cases lodged in and registered with Santo/Malo Island Court since 1987 up until 2000 some the land case completed and some pending hearing (sic)"*. He stated that in the event of the claimants lodging a claim with the Island Court they would have to have paid a Vt 30,000 Court fee and been issued receipt of payment and that accordingly they should have the original receipt, statement of their claim and map of their claim with the Island Court stamp on it. He confirmed also that some files were burned when part of the Court house was burned in 2011 and had been reconstructed.

66. Not surprisingly, Mr Anthony was subjected to extensive cross examination by Mr Blake. Under that cross examination he confirmed that he commenced working as the Island Court Clerk in 2013 and that before that he had not worked in a Land Tribunal or Island Court previously. He identified the persons as having come to see him as being Mathias Molsakel and Laurent Solomon. Mr Anthony acknowledged that his reference in his sworn statement to Land Case No. 5 of 1994 was incorrect and it should have read 1992.

67. Mr Anthony stated that the list that he compiled and which is annexed to his sworn statement was compiled after he had checked every file in the Island Court. He stated that the primary source of the information gathered by him had been the Island Court Register and that that Register had been maintained prior to his arrival by the previous Clerk. Mr Anthony acknowledged, when shown the 2001 letter signed by Mr Nicholas that the signature looked like Mr Nicholas' signature and that the letter also referred to the existence of an Island Court file. Mr Anthony also

acknowledged that at the time he wrote his letter to the parties on October 31st 2014 he was aware of the existence of the previous letter written by Mr Nicholas but that he did not contact Mr Nicholas regarding the matter.

68. Mr Anthony was then asked about the claim in respect of Palekula land. He was asked to identify where on his own computer generated list, that case appeared. Mr Anthony acknowledged that that case did not appear on the list. It was put to Mr Anthony that it was possible that some of the files that existed prior to the 2011 fire had not been reconstructed. Mr Anthony denied that that was the case and stated that *"files were reconstructed by the former Clerk and I would ask people for receipt and they would show it to me."*

69. Mr Anthony gave his evidence openly and honestly. However, having heard it I am not satisfied that the list of land cases compiled by him is necessarily a comprehensive list. It is clear from Mr Anthony's evidence that he was relying on the accuracy of the Register and the files which were currently located at the Island Court. The reality of the position is that files could only be reconstructed if the documents were there to enable that reconstruction to occur. If parties did not have those documents, and it appears Mr Molsakel did not, then the files could not be reconstructed. In addition, by Mr Anthony's own admission his list did not contain all of the files held by the Island Court. Mr Anthony could also not say that the Registry book that he was relying on was the one that existed prior to the fire. He conceded that it was possible that the Registry book itself was compiled after 2011. Mr Anthony gave evidence that when a claim is filed the Clerk signs the Register book. However photocopies of the book, which he had brought with him but which were not admitted in evidence did not contain the signature of a Clerk.

70. The clear impression which I gained with reference to the registration of claims and location of documents particularly after the unfortunate events of the 2011 fire is that there would be considerable doubt as to whether or not current Registry records accurately recorded the claims filed.

71. The Court also heard evidence from Mr Joseph Riri who was the Chairman of the Veriondali Village Land Tribunal that heard and determined custom ownership of Belbarav Land of May 30th 2005.

72. Mr Riri has stated that the Tribunal had been set up to hear a custom land dispute between Family Paul Livo and the Boetara Family pursuant to the order referred to in paragraph 48 herein.

73. In fact, the Chief Justice's order does not refer to anything other than a serious question to be tried *"in the Sanma Island Court"*. There is no reference at all to the Veriondali land Tribunal, a matter which was referred to in cross examination. Under cross examination Mr Riri acknowledged that the order of the Chief Justice referred to the Island Court only and conceded that the dispute did not go to the Island Court. He stated that one of the parties to the dispute, Mr Paul Livo had requested that Mr Riri deal with the matter, that request coming sometime in 2003, as a result of which Mr Riri went to the Island Court and spoke with Mr Nicholas who said that the Land Tribunal must deal with the matter.

74. The notice of hearing issued by the Veriondali Land Tribunal was issued on September 13th 2004 and it would appear extremely likely therefore that the Island Court had made the same fundamental error in considering that matters could simply be transferred to the Land Tribunal. It was clear from the evidence of Mr Riri that the consent of the other parties to any transfer had not been given and indeed it would appear from the evidence that the land case dispute between Family Livo and Family Boetara was referred to the Land Tribunal in breach of the provisions of the Customary Land Tribunal Act.

75. Mr Riri confirmed that the claimants in the Land Tribunal included Mathias Molsakel and Franky Stephen. He deposed that Mr Molsakel did not raise any objection against the Land Tribunal hearing the dispute or nor did he inform the Tribunal that he had registered a land case in the Santo/Malo Island Court. He

added that Mr Molsakel did not object by the presence of any members of the Tribunal either.

76. Mr Riri stated that the hearing took three weeks and Mr Molsakel presented his case and made submissions about his claim. On May 30th 2005, the Land Tribunal delivered its decision declaring the Boetara Family and Zebedee Molvatol to be the customary owner of Belbarav land. He stated that no party lodged an appeal to the south East Santo Area Land Tribunal after that decision was issued but he was aware of subsequent Court proceedings.

77. Under further cross examination from Mr Iauma, Mr Riri confirmed that he had been advised by Mr Nicholas that the Livo Belbarav case had to be transferred.

78. The irresistible inference from Mr Riri's evidence is that the only reason the Land Tribunal ended up dealing with the matter was because of a fundamental error on the part of the Island Court as to the issue of jurisdiction. It appears that the Island Court simply took the view that if any party to a dispute wished to have the matter transferred to the Land Tribunal then that could occur. Unfortunately, that is not in accordance with the provisions of the Act.

Discussion

79. When the subject of these proceedings came before the Court of Appeal[8], the Court referred to a list of issues which might be considered in this case in the determination of the matter. I respectfully adopt those issues which are as follows:-

a) Whether there an Island Court Land Case No. 5 of 1992;

b) If so, whether the area of land it related to is the same as, or the extent to which it overlaps, the Belbarav land dealt with by the Veriondale land Tribunal Decision of 23 May 2005;

c) If so, whether that claim was *"transferred"* to the Veriondali Land Tribunal in 2004, or whether the Veriondali Land Tribunal simply

[8] Molvatol v. Molsakel [2015] VUCA 22

received and decided a separate claim over Belbarav land independently;

d) If so, and the Island Claim was *"withdrawn"* to the Veriondali Land Tribunal –

   a) How that happened and was it accordance with section 5 of the Customary Land Tribunal Act;

   b) Whether the Molsakels are estopped from saying that the withdrawal was not in accordance with section 5 of the Customary Land Tribunal Act.

e) The significance and effect of prior Supreme Court and Court of Appeal proceedings including those referred to in the defence.

80. I consider that those issues very helpfully summarise the issues which need to be considered in the determination of this matter.

Was there an Island Court Land Case No. 5 of 1992

81. In coming to a determination of this issue two significant matters which have a bearing on the outcome are firstly, that this said case involved events which occurred some 25 years ago and secondly, the fire which occurred at the Island Court premises in 2011. Both of these factors have, in my assessment, had a significant effect on the evidence which has been presented.

82. I am drawn to the conclusion however that it is more likely than not that Island Court Land Case No. 5 of 1992 was registered by the late Rachel Molsakel and that that claim involved not only an issue as to rights to enjoy the benefit of income from the land but more fundamentally who was the custom owner of the land. The reasons for coming to these conclusions are as follows:-

a) There is clear evidence that prior to the filing of a claim in the Island Court there had been a village Court hearing regarding *"Molsakel land"*. The determination of the Area Village Court is not as clear as it

could or should be but I do not consider that the issue before the Court could be said to have been only an issue regarding the right to possession or use of the income from the land. Fundamentally, there was also the issue of custom ownership of the land and more importantly who had the right to be regarded as the custom owner.

b) There is some evidence that it is likely that the statement and map together with details of a family tree were lodged when the claim was lodged with the Island Court.

c) The evidence of Mr Nicholas is clear that as the Island Court Clerk at that time that the claim was filed a land case was filed by Mrs Molsakel and her son. Mr Nicholas' evidence was that he searched the land case register, found that the case had been registered and issued a letter accordingly. He also confirmed that while there was no receipt on the file it was recorded in the Register book or the receipt number.

d) The evidence of Mr Franky Stephen establishes that he filed a claim in respect of Etoro land which involved an area which is substantially the same as those claimed by the Molsakels. Those claims were filed in January 2001 and was acknowledged and recognised by the subsequent letter written by Mr Nicholas. While it is a separate claim I accept the submissions of Mr Blake that it appears that in all likelihood the claim was regarded as the same claim that was filed by the Molsakels.

e) Apart from the Island Court Clerk who dealt with the filing of the claim there was the evidence of Magistrate Garae. Mr Garae gave very clear evidence about the existence of a land case, the holding of a hearing to deal with the transfer of cases from the Island Court to the Land Tribunal which included the claimant's case and the fact that he acknowledged that he had ordered the transfer of the case in the absence of unanimous consent. Mr Garae also gave evidence that he received training in the new law only after the decision to transfer had been made.

f) While the evidence of Mr Anthony was given in a genuine and honest manner the reality of the position is that he was working from

reconstructed material. Quite obviously he had no personal knowledge of the filing of claims which had occurred prior to the commencement of his employment. None of the matters raised by Mr Anthony were put to Mr Nicholas in cross examination and for these reasons Mr Anthony's evidence needs to be treated with considerable caution.

g) The confirmation of the filing of a land claim had also been confirmed by another Island Court, Mrs Aru in 1997.

83. For these reasons I am satisfied that a land claim was lodged by the claimant in 1992, that that land claim was in respect of a significant area of land as depicted in annexure MM2 to the sworn statement of Mr Molsakel dated May 16th 2016 and that the claim was assigned the reference land case 05 of 1992.

Is the area of land the subject of land claim 05 of 1992 the same as, or to the extent that it overlaps, the Belbarav land dealt with by the Veriondali Land Tribunal decision of 23 May, 2005?

84. The answer to this question is in the affirmative. It is clear that even the witnesses for the defendant accepted that the map produced by Mr Molsakel and which I have already accepted to be reflective of the land claim filed covered the Belbarav land dealt with by the Land Tribunal.

Was the land claim *"transferred"* to the Veriondali Land Tribunal in 2004 or did the Land Tribunal simply receive and decide a separate claim over Belbarav land independently?

85. The evidence presented on behalf of the claimants and in particular the evidence of Mr Garae clearly establishes that the land claim filed by the Molsakels was transferred out of the Island Court in 2004. What happened to the claim from there is a matter of conjecture, however I consider the evidence to have clearly

established both that the transfer of the claim occurred and that the transfer occurred because the Magistrate acted on a majority vote rather than by agreement as clearly contemplated by the legislation.

86. On this point there can be no doubt that the Magistrate was not entitled to do what he did. Section 5 of the Custom Land Tribunal Act provides that:-

> *"**5.** (1) If:*
>
> *(a) a person is a party to a proceeding before the Supreme Court or an Island Court relating to a dispute about customary land; and*
>
> *(b) the person applies to that Court to have the proceeding withdrawn and the dispute dealt with under this Act; and*
>
> *(c) the other party or parties to the proceeding consent to the withdrawal and to the dispute being dealt with under this Act; and*
>
> *(d) that Court consents to the withdrawal and to the dispute being dealt with under this Act;*
>
> *the dispute must be dealt with under this Act and one of the parties must give notice under section 7.*
>
> *(2). The Supreme Court or an Island Court may:*
>
> *(a) order that any fees paid to that Court in respect of such proceedings be refunded in full or in part to the applicant or any of the other parties; and*
>
> *(b) make such other orders as it thinks necessary.*
>
> *(3). To avoid doubt, if proceedings before the Supreme Court or an Island Court relating to a dispute about customary land are pending, the dispute cannot be dealt with under this Act."*

87. Firstly, there is no evidence that any application had been made by any person to withdraw the dispute from the Island Court and have it dealt with under the Customary Land Tribunal Act. Secondly, it is absolutely clear that there was no consent on the part of the Molsakels to the withdrawal of the dispute from the Island Court and to it being dealt with under the provisions of the Customary Land

Tribunal Act. Quite simply, the Magistrate had no power to adopt the course which he did and an analysis of the evidence would indicate that he had taken the mistaken view that the effect of the Customary Land Tribunal Act was to require all existing cases before the Island Court to be transferred to the Custom Land Tribunal if the majority of parties were happy for that to occur. There was no legislative provision which could justify that course. Accordingly I accept the submission of Mr Blake that the Island Court was the only proper forum in which the claim could be determined.

88. As to the issue of whether or not the Veriondali Land Tribunal simply received and decided a separate claim over Belbarav land that is not entirely clear from the evidence. What is clear however is that prior to the determination of the matter by the Land Tribunal there was a consent order in respect of the Zone Zero subdivision which acknowledged, in respect of Belbarav land that there was a serious question to be tried in the Sanma Island Court. The evidence of Mr Riri, the Chairman of the Land Tribunal was that after the claim was referred to the Tribunal he saw Mr Nicholas who advised him that the claim had been referred to the Land Tribunal from the Island Court. Given that evidence I consider it more likely than not that the claim was not a separate and independent claim in respect of the Belbarav land but a claim which had been transferred, unlawfully, from the Island Court.

Are the Molsakel's estopped from saying that the withdrawal was not in accordance with Section 5 of the Customary Land Tribunal Act?

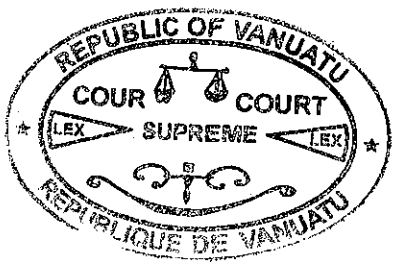
89. For the second defendants Mr Laumae submitted that the decision of the Veriondale Lands Tribunal must remain standing as the decision is now *"statue barred and cannot be challenged under the judicial proceedings".*

90. Mr Iauma submitted that Belbarav land *"had brought its dispute as a result of Zero zone subdivision which then let (sic) to the making of the orders of the Chief Justice on*

26th June 2002 in CC No. 51 of 2001. The continuity of that issue finally end in the Lands Tribunal".

91. While there is no question that matters finally ended in the Land Tribunal the issue of how the matters got to be before the Land Tribunal is one where, as I have already stated, the evidence is somewhat unclear. That is particularly so given the reference in the consent order signed by the Chief Justice that there was a serious issue to be tried in the Sanma/Malo Island Court. It was accordingly anticipated that the Island Court would deal with the matter and the evidence of Mr Riri as to checking with the Island Court before dealing with the matter in the Land Tribunal establishes, in my assessment, that matters were wrongly transferred to the Land Tribunal and that the Land Tribunal could never have had jurisdiction to deal with them. It is not sufficient simply to say that that is the end of the matter particularly in circumstances where the Land Tribunal had not jurisdiction to deal with the issue in the first place.

92. Mr Iauma also submitted that the claimants had accepted the issue of Belbarav when participating in the proceedings of the Land Tribunal and were accordingly estopped from reliance on purported Land Case No. 5 of 1992 as a basis for the claim for judicial review. I do not accept these submissions. The clear evidence of Mr Molsakel was that given that the Land Tribunal had appeared to be seized of jurisdiction in the matter (albeit wrongly) he felt that he had no choice but to argue his case before that Tribunal. I accept that Mr Molsakel would have been unaware of the requirements of the Customary Land Tribunal Act in relation to transfer of the proceedings from the Island Court to the Land Tribunal. A party cannot and should not be forced to accept the jurisdiction of the Court simply because there appears to be no other option available. In all of the circumstances I accept Mr Molsakel's evidence that he felt that he had no alternative but to participate in the Land Tribunal hearing. That does not however provide a proper basis to apply the principal of estoppel thereby conferring a jurisdiction on the Land Tribunal where no jurisdiction exists.



93. As to the defendant's assertion that the issues in this case are res judicata I reject such submissions. The Court of Appeal dealt with a previous argument of res judicata in Zebedee Molvatol v. Molsakel and Others[9] where at paragraph 19 it stated:-

> *"19.During the hearing of the appeal Mr. Laumae asserted that the present claim in Judicial Review 08 of 2013 is exactly the same as in the discontinued claim in Civil Case No. 08 of 2010 and was therefore "res judicata" in terms of Rule 9.9 of the CPR. To the suggestion that the parties were different, Mr. Laumae explained that the two additional names in the First Defendants in the present review namely 'Timothy Molbarav' and 'Singo Molvatol' are brothers of the already named First Defendants in the Civil Case and therefore added nothing. Likewise the absence of any mention of the "Boetara Family" as the third Defendant in the review case was immaterial or added nothing as the First named Defendant's bothers are representatives of the Boetara Family as noted in the intituling of the earlier Civil Claim. After considering the papers and counsels' submissions, we are satisfied that for present purposes the parties in Civil Case No.08 of 2010 are the same as in Judicial Review Case No.08 of 2013.*
>
> *20.We turn to consider next whether the grounds of challenge are also the same and we find that the dual basis asserted in Civil Case No.8 of 2010 for challenging the Tribunal decision of 30 May 2005 are: "bias and/or conflict of interest" (see: paragraph 12 of the claim).*
>
> *21.The original claim in Judicial Review No.08 of 2013 does not expressly mention bias or conflict of interest on the part of the Tribunal members as a ground for challenging its decision, instead, the grounds refer to an aborted hearing of the Molsakels' appeal before the South East Santo Area Land Tribunal and to a subsequent purported clarification of the Verondali Land Tribunals decision which went beyond clarification by adding the names of new custom owners other than "Zebedee Molvatol" and "Boetara Family". Plainly these grounds are not the same as those raised in the earlier Civil Case No. 08 of 2010.*
>
> *22.Furthermore when reference is made to the amended judicial review grounds dated 02 September 2014 one finds the following additional information:*
>
> *"In 2004 the Santo/ Malo Island Court made a decision which brought an end to proceedings in Land Case No.05 of 1992 and the same land became the subject of the dispute before the Verondali Customary Land Tribunal. Through no fault of the Claimant they only recently became aware that their wish expressed to the Island Court, that Land Case No.05 of 1992 continued in the Island Court meant that the Island Court decision that day to transfer the*

[9] Civil Appeal Case 12 of 2015

proceedings to a Customary Land Tribunal and the subsequent Customary Land Tribunal preceded were seriously flawed".

23.This additional ground which found favour with Harrop J. further distinguishes and differentiates Judicial Review No.08 of 2013 from Civil Case No.08 of 2010, such that, any possible plea of "res judicata" cannot be entertained or succeed against the Judicial Review No. 08 of 2013."

94. Mr Iauma referred as well to the case of Molbarav v. Wells[10] where Saksak J determined, inter alia, an application for a stay of proceedings in proceedings between some of the parties in this matter. One of the grounds for the application for stay was counsel for Mr Molsakel's assertion that the disputes over ownership of Belbarav land were still alive in view of the appeal by the Molsakels on the grounds that the Veriondali Lands Tribunal was not legally constituted thus making its decision irregular. In dismissing the application for a stay Saksak J stated as follows:-

"9. The Court takes judicial notice of that case [Civil Case No. 48 of 2009] and in order to maintain a consistent approach, this Court must maintain that there is no appeal pending before the Lands Tribunal and as such, this Court must also maintain that the ownership of Belbarav land is res judicata.

10. The documents sought to be relied on by Mr Molsakel could have been before the Court in Civil Case No. 48 of 2009 some three years ago but were not. The Court must ask why have they surfaced only this late....."

95. The comments of Saksak J could not possibly found a successful plea of res judicata in this case. The parties in civil case 25 of 2012 were different to the parties in this case and it would appear that the issues were also different. Saksak J was not required to determine the issues which the Court has been asked to determine in this case and res judicata simply does not apply.

96. Mr Iauma also submitted that the laws of Vanuatu do not permit the Supreme Court to exercise its review powers over Land Tribunal decisions as those powers have

[10] [2012] VUSC 201

not been vested in the Island Courts. Mr Iauma submitted that while the Supreme Court had supervisory powers to review the decisions of any Land Tribunal under the provisions of section 39 of the Customary Land Tribunal Act No. 7 of 2001, the power to review was effectively revoked when that Act was repealed by the Customary Land Tribunal (Repeal) Act No. 34 of 2013 and that the powers of review have been vested in the Island Courts pursuant to section 58 of the Customary Land Management Act No. 33 of 2013.

97. Mr Iauma referred to the Supreme Court decisions of Manasakau v. Forari Village Land Tribunal[11] and Family Kalmet v. Family Kalmermer[12].

98. As to the decision of the Court of appeal in Kalmet v. Kalmermer, I do not consider that that case involves the same issues as are presented in this case. The case involved competing decisions made in respect of custom ownership by the Island Court and by a Land Tribunal. The Court found that there had been no transfer of a common dispute pursuant to section 5 of the Customary Land Tribunal Act as the various cases under consideration dealt with different pieces of land. It determined that the Island Court made a declaration as to custom ownership of land when it had no jurisdiction to do so as final orders as to customary ownership had already been made by the Land Tribunal at an earlier point. That is not the case here. I accordingly reject the submissions of Mr Iauma in respect of that matter.

The significance and effect of prior Supreme Court and Court of Appeal proceedings including those referred to in the defence.

99. Given that this is a judicial review proceeding, there is a residual discretion held by the Court as to whether or not the orders sought by the claimant should be granted even in the event of the claimant establishing his case. These proceedings have now

[11] [2014] VUSC 175

[12] [2014] VUSA 11

dragged on for over a decade with a significant amount of litigation involving numerous decisions in the Supreme Court and Court of Appeal.

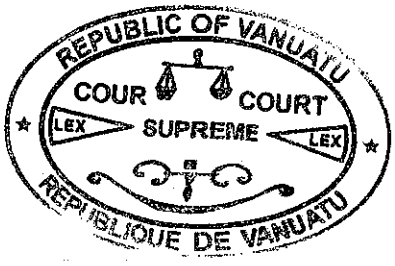
100. The outcome has been most unfortunate as it has not enabled the matter to be resolved and the parties to achieve finality.

101. There is force in the argument that however the matter came before the Veriondali Land Tribunal in 2005, Mr Molsakel and other parties had a full opportunity to engage in the proceedings and indeed did so. On that basis therefore, the argument runs that they should not be entitled to have a second bite of the cherry.

102. As against that however, the issue of customary land ownership is one which involves issues of huge importance to Ni-Vanuatu. The importance of the issue is recognized by the Constitution and by the very legislation which provides the means by which disputes such as this should be dealt with. In this case I am satisfied that there is clear evidence that the Veriondali Land Tribunal should not have been dealing with the matter at all and that at all times the proceedings should have been dealt with in the Island Court. I consider that notwithstanding the significant passage of time it is crucial that the Courts recognise the fundamental importance of the issue of customary land ownership in Vanuatu and that it is not appropriate that parties be given little or no choice as to how a dispute is resolved because of a fundamental lack of understanding of the manner in which a dispute is to be resolved, on the part of the very institution which is there to resolve it.

103. While it is correct that there have been many decisions regarding this particular piece of land many of the decisions have involved what are essentially interlocutory matters rather than substantive issues.

104. Accordingly, notwithstanding the history of this matter I consider that it is appropriate that the matter be dealt with as it should have been dealt with from the start and in accordance with the relevant legislation.



105. Accordingly I make the following orders:-

1) An order quashing the order of the Santo/Malo Island Court made in 2004 which transferred land case No. 5 of 1992 to the Veriondali Land Tribijnal.

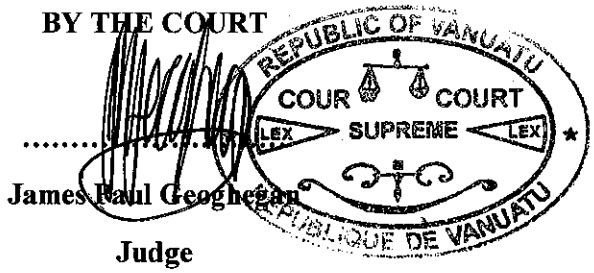
2) An order quashing the decision of the Veriondali Land Tribunal dated May 30th, 2005.

3) I direct that the Island Court is to hear Land Case No. 5 of 1992, if possible, as a matter of urgency. Given the passage of time and lack of documentation which is apparent in this case there will have to be some assistance provided to the Island Court in clarifying the claim, however this is a matter that can be left for counsel.

4) Given the success of the claimant's claim the claimant is entitled to costs on a standard basis to be agreed within 28 days failing which costs are to be taxed.

DATED at Port Vila this 19th day of December, 2017

BY THE COURT



.....

James Paul Geoghegan

Judge