

SUPREME COURT
OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil
Case No. 16/3478 SC/CIVL

BETWEEN: GUAN KAI
Claimant

AND: MARY TOM & FAMILY
First Defendants

AND: FAINA PAKOA & FAMILY
Second Defendants

AND: ERIC SAILAS & FAMILY
Third Defendants

AND: RAMOU MISSAK & FAMILY
Fourth Defendants

AND: MARK SILAS & FAMILY
Fifth Defendants

AND: RAYMOND MISSAK & FAMILY
Sixth Defendants

AND: YAKAR & FAMILY
Seventh Defendants

AND: FATIMA FARATEA & FAMILY
Eight Defendants

AND: JOE NIKO & FAMILY
Ninth Defendants

AND: KAPEL PAKOA & FAMILY
Tenth Defendants

AND: DUK MISAK & FAMILY
Eleventh Defendants

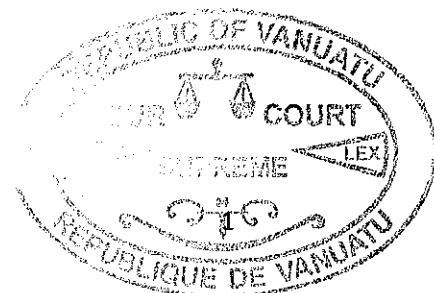
**AND: WAISINU BAKOKOTO, BAKAULU BAKOKOTO
& ANDAS BAKOKOTO**
Twelfth Defendants

Date of Hearing:

13 July 2021

Before:

Justice V.M. Trief



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

Date of Decision: 11 March 2022

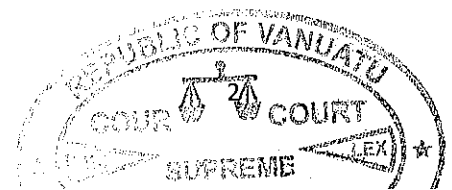
JUDGMENT

A. Introduction

1. This is a claim in trespass by the Claimant Guan Kai ('Mr Kai'), the registered proprietor of leasehold title no. 12/0633/1387 (the 'lease').
2. The lease was granted by the Twelfth Defendants who are brothers, Waisinu Bakokoto, Bakaulu Bakokoto and Andas Bakokoto ('Messrs Bakokoto') to their brother Jacky Bakokoto, since deceased. The brothers are the sons of Edward Bakokoto, also deceased. Messrs Bakokoto support the grant of eviction orders.
3. The Second-Eleventh Defendants occupy the lease (the 'occupiers'). They claim a right under s. 17(g) of the *Land Leases Act* (the 'Act') which Mr Kai's lease is said to be subject to. They seek a declaration as to such right, registration of a sub-lease and payment of compensation.
4. The proceeding was discontinued against the First Defendants.
5. On 27 November 2020, I delivered Judgment in *Kai v Tom* [2020] VUSC 279. It was appealed.
6. The Court of Appeal in *Pakoa v Kai* [2021] VUCA 24 allowed the appeal and remitted issues for re-hearing.
7. This judgment is made having heard counsel as to the remitted issues and on the basis of the evidence already received.

B. Pleadings

8. By the Further Amended Claim filed on 29 May 2020, Mr Kai sought orders for the eviction of the occupiers and special damages arising from their alleged trespass. He alleged that he and Jacky Bakokoto agreed in their lease Sale and Purchase agreement to work together to relocate the occupiers. Their efforts included attempts to relocate the occupiers to land at Korman area and at Bladiniere Estate. Further, that he is a bona fide purchaser for value. Mr Kai alleged that despite several notices to quit, the occupiers continue to occupy the lease resulting in him losing quiet enjoyment of the property.



9. In their Defence, the occupiers admitted that Mr Kai wanted to relocate them. They alleged that they have occupied the land with the custom owners' and lessors' express consent and have an overriding interest and right to occupy the land pursuant to s. 17(g) of the Act. They alleged that any notices to quit purportedly given are of no effect due to their right to occupy the land.
10. The occupiers alleged in their Counter Claim that they lawfully occupied and resided on the subject land, having built houses and resided in them, built stores and kava bars, paid rental to the custom owners, and cultivated gardens all prior to Mr Kai owning the lease.
11. They seek a declaration that their overriding interest is for the duration of the lease pursuant to s. 17(g) of the Act and that it be recorded on the Land Leases Register as a sub-lease for the duration of the lease. Alternatively, the occupiers seek an order that Mr Kai pays all costs arising from and incidental to them relocating to other lands on terms suitable or an order that Mr Kai pays them VT33,200,000 or such amount the court deems just to be divided on just terms.
12. In his Defence to the Counter Claim, Mr Kai alleged that the express consent of the custom owners to have the occupiers reside on their land was terminated in 2013. Further, that the occupiers must prove that since the termination of consent in 2013, that they have the custom owners' express consent to reside on the land. Mr Kai seeks dismissal of the Counter Claim and costs.
13. In their Reply to the Defence to the Counter Claim, the occupiers alleged that Mr Kai obtained his lease by fraud pursuant to s. 100 of the Act and seek an order cancelling the lease.
14. Also in the Reply to the Defence to the Counter Claim, the occupiers alleged that their occupation of the land was at all times with the express and implied consent of all the custom owners and the custom owners are estopped from denying that consent was given.
15. Messrs Bakokoto admitted in their Defence that Mr Kai is the registered proprietor of the lease and alleged that the occupiers are unlawfully occupying the subject land as they do not have an overriding interest to the land. They seek costs on an indemnity basis for the Claimant and Twelfth Defendants.
16. Finally, Messrs Bakokoto alleged that the consideration for the lease is a higher amount than that stated on the lease and is part paid. Nothing turns on this. It is a matter for the Twelfth Defendants to pursue Mr Kai for breach of contract by separate action.
17. Messrs Bakokoto withdrew their Counter Claim.

C. Burden of proof

18. I remind myself that Mr Kai bears the onus of proving the Amended Claim and that the occupiers bear the onus of proving their Counter Claim. The standard of proof is on the balance of probabilities.

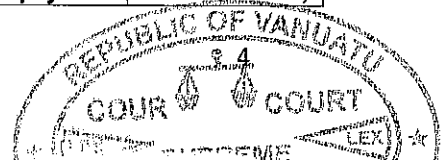


D. Background circumstances

19. The Court of Appeal summarized the background circumstances as follows in *Pakoa v Kai* [2021] VUCA 24 at [7]-[18]:

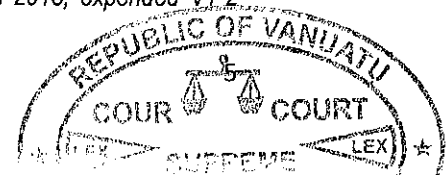
7. *The lessors of the Lease are three brothers: Waisunu, Bakaulu and Andas Bakokoto. The primary Judge referred to them as "Messrs Bakokoto" and we will do likewise. Messrs Bakokoto were collectively the 12th defendant at trial and are the second respondent on the appeal.*
8. *There was a fourth Bakokoto brother, Jacky. Before Jacky's death on 18 November 2014, the four Bakokoto brothers had been the custom owners of the Land. They had become the custom owners in 1992 on the death of their father, Edward Bakokoto. Since Jacky's death, Messrs Bakokoto have been the custom owners. The Judge accepted the evidence of Messrs Bakokoto that both before and after the death of Jacky, it was (and is) the custom of the brothers to make decisions in concert, with the effect that one brother could not deal with the Land without the agreement of all the others.*
9. *The history of lease transactions concerning the Land is as follows:*
 - *on 26 March 2012, Leasehold Title No. 12/0633/112 between Messrs Bakokoto as lessors and Jacky Bakokoto as lessee was registered;*
 - *on 10 September 2013, the surrender of Leasehold Title No. 12/0633/112 was registered;*
 - *on 12 December 2013, Leasehold Title No. 12/0633/1387 between Messrs Bakokoto as lessors and Jacky Bakokoto as lessee was registered; and*
 - *on 12 December 2013, the transfer of Leasehold Title No. 12/0633/1387 from Jacky Bakokoto, as transferor, to Mr Kai, as transferee, was registered.*
10. *The Court was told that the surrender of Leasehold Title No. 12/0633/112 on 10 September 2013 occurred so that a misdescription in the Lease, in particular a misdescription of its boundaries, could be corrected. That may well have been prompted by Jacky Bakokoto's entry into a contract bearing the date 4 September 2013 to sell the Lease to Mr Kai.*
11. *The appellants occupy houses on the Land and in some instances, have done so, for many years. They asserted that they have built and operated stores and bars and have planted trees, gardens and crops. In all but one case, they asserted that their occupation was pursuant to oral agreements made with Jacky Bakokoto. The exception is Faina Pakoa who said that she had made an agreement with Edward and Jacky Bakokoto.*
12. *The appellants' case at trial, and on appeal, was that they had contractual licences to occupy and use a portion of the Land and that those licences, together with their carrying out of improvements in the expectation of being able to occupy the Land indefinitely, had given rise to an equitable interest.*
13. *The primary Judge summarised the evidence of the appellants as to their agreements in a Table (taken from the appellants' Schedule of Particulars of their claim):*

Name	of	Agreement	Date	Dwelling	Initial payment	Rental amount,
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witness (party)	with who & when	started residing	s built	amount & to who	when and who paid to
Faina Pakoa (Second Defendant)	With Edward Bakokoto & Jacky Bakokoto in 1988	1988	1 house, kava bar and rent rooms	VT10,000 (kava bar) and VT15,000 (business) to Jacky Bakokoto	VT14,500 monthly to Jacky Bakokoto
Erick Silas (Third Defendant)	With Jacky Bakokoto in 2001	2001	1 house, 1 rent house and 1 toilet		VT2,000 monthly to Jacky Bakokoto
Ramou Missak (Fourth Defendant)	With Jacky Bakokoto in 2010	2002	1 house		VT2,000 to Jacky Bakokoto
Priscilla Margaret Pakoa (Fifth Defendant)	With Jacky Bakokoto in 1996	1996	1 house (4 rooms – 3 rooms for rent)		VT7,500 monthly to Jacky Bakokoto
Raymond Missak (Sixth Defendant)	With Jacky Bakokoto in 2013	1987	1 house		
Fatima Faratea (Eighth Defendant)	With Jacky Bakokoto in 2011	2011	1 house, store and 1 kava bar	VT15,000 (kava bar), VT10,000 (house) and VT5,000 (store) to Jacky Bakokoto	VT13,000 monthly to Jacky Bakokoto
Joe Niko (Ninth Defendant)	With Jacky Bakokoto in 2004	2003	1 house (4 rooms) and 1 toilet	VT15,000 and custom ceremony (head of kava, local chicken, yam and 2 bags of local food) to Jacky Bakokoto	VT2,000 monthly to Jacky Bakokoto
Kapel Pakoa (Tenth Defendant)	With Jacky Bakokoto in 2003	1988	1 house, 1 rent house, kava bar and car wash		VT2,500 monthly to Jacky Bakokoto
Leisale Maki Missak (Eleventh Defendant).	With Jacky Bakokoto in 2013	2008	1 house and 1 toilet	VT5,000 to Jacky Bakokoto	VT1,000 monthly to Jacky Bakokoto

14. The Judge accepted that the appellants had dealt with Jacky Bakokoto alone (and in Faina Pakoa's case, also with Edward Bakokoto) and accepted that the appellants had paid monies to Jacky Bakokoto (we infer the amounts stated in the Table). However, the Judge regarded as hearsay the evidence which the appellants had given about their agreements with Jacky Bakokoto, and said that she could not make findings as to the agreements, if any, which they had reached with him.
15. In his submissions on the appeal, counsel for the appellants said that Raymond Missak had, following the agreement with Jacky Bakokoto in 2013, expended VT 2



million on a house on the Land. That is not consistent with the Schedule of Particulars on which the Judge relied. Nor is there any apparent reference to it in the Judge's notes of evidence. In these circumstances, we consider it appropriate to proceed on the basis that the Table in the Judge's reasons, based as it is on the appellants' own Schedule of Particulars, is correct.

16. *On 3 June 2013, Jacky Bakokoto and Messrs Bakokoto served notices on the appellants requiring them to vacate the Land by 15 September 2013. The notice said that they were required to vacate "in order for future commercial development".*
17. *Although it seems that some occupiers may have vacated the Land in response to that notice, the appellants did not. On 20 January 2015, Messrs Bakokoto served a further notice to vacate on the appellants, telling them that their "investor wants to develop this land". They served another notice to vacate two days later (22 January 2015) and their solicitor served notices to vacate on the appellants on 29 August 2016.*
18. *It is apparent that there have been some attempts made by Mr Kai to assist in the relocation of the appellants but arrangements which they consider satisfactory have not yet been reached.*

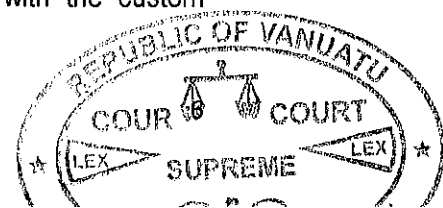
E. The Issues

20. The remitted issues are:

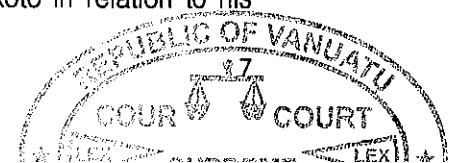
- a) Whether or not Jacky Bakokoto had the ostensible authority of his father in relation to his dealings with the Second Defendant Faina Pakoa and of Messrs Bakokoto in relation to his dealings with the other occupiers and, if so, whether Jacky's dealings with the occupiers were authorized by the custom owners? **[Issue 1]**
- b) What were the terms and conditions agreed upon between Jacky Bakokoto and the Second-Eleventh Defendants with respect to occupation of the land and whether those terms and conditions, together with the subsequent conduct of the Second-Eleventh Defendants in relation to the land, gave rise to an equity existing at the commencement of the lease which is protected by s. 17(g) of the Act and, if so, the duration of that equity? **[Issue 2]**
- c) Whether or not the Notices to Vacate served on 3 June 2013 or any of the later Notices to Vacate, were effective to terminate any rights of occupation held by the Second-Eleventh Defendants? **[Issue 3]**
- d) Whether or not the Second-Eleventh Defendants have standing pursuant to s. 100 of the Act to seek rectification of the Land Leases Register? **[Issue 4]**

F. Issue 1: Whether or not Jacky Bakokoto had the ostensible authority of his father in relation to his dealings with the Second Defendant Faina Pakoa and of Messrs Bakokoto in relation to his dealings with the other occupiers and, if so, whether Jacky's dealings with the occupiers were authorized by the custom owners?

21. The occupiers' pleaded case was that they occupied the land with the custom owners' express and implied consent.



22. The occupiers also led evidence and Mr Fleming submitted that the occupiers' forbears originally entered into occupation of the land pre-Independence with the approval of a pre-Independence freehold owner of the land, Madame Lucien Houdie, and that after Independence, their agreement with Madame Houdie then transferred to the custom owners, Family Bakokoto. Those submissions are rejected.
23. I accept Mr Blake's submissions that as at Independence, ownership of all land, including land previously held as freehold, reverted to custom owners and any freehold interests held pre-Independence were lost. Accordingly, any fresh rights for the occupiers needed to be negotiated with and obtained post-Independence from the custom owners of the land.
24. It is undisputed that in the present case, there has been no dispute as to custom ownership and, accordingly, it was possible for Edward Bakokoto (who died in 1992) and later his sons to consent to the occupiers' occupation of the land: *Pakoa v Kai* [2021] VUCA 24 at [30].
25. As the custom owners are brothers, the occupiers may prove their consent by evidence of the consent given by one custom owner coupled with proof that that custom owner had the authority of the others, whether express, implied or ostensible, to give that consent: *Pakoa v Kai* [2021] VUCA 24 at [39].
26. The occupiers' Schedule of Particulars attached to their Defence and Counter Claim set out that the Second Defendant Faina Pakoa ('Mrs Pakoa') had an agreement with Edward and Jacky Bakokoto in 1988.
27. However, Mrs Pakoa's evidence in "**Exhibit D4**" (via adoption of Raymond Missak's evidence in "**Exhibit D3**") is that she obtained permission from Jacky Bakokoto to occupy the land.
28. In cross-examination, she was asked if she agreed with Edward in 1988? She replied that no, she did not make an agreement with Edward, "*with Jacky nomo*". It was put to her that the document (the Schedule of Particulars) set out that she agreed with Edward in 1988 – was that true or not? She replied, "*I no tru*" ("It's not true").
29. Accordingly, Mrs Pakoa's evidence was clearly that she only ever dealt with Jacky. I so find.
30. It is undisputed that the other occupiers only ever had dealings with Jacky Bakokoto.
31. I proceed therefore on the basis that all of the occupiers only ever had dealings with Jacky Bakokoto.
32. I previously held that Messrs Bakokoto were witnesses of truth and found that they had not consented to the occupiers occupying the land nor authorized their brother Jacky to act for all four brothers in his dealings with the occupiers. These findings were not challenged on appeal insofar as these were findings about *express consent* or *express authority*: *Pakoa v Kai* [2021] VUCA 24 at [33]-[34].
33. However, I need to consider whether or not Jacky Bakokoto had the *ostensible authority* of his father Edward Bakokoto and of Messrs Bakokoto in relation to his



dealings with the occupiers and if so, whether Jacky's dealings with the occupiers were authorized by the custom owners.

34. The Court of Appeal explained the doctrine of ostensible authority as follows in *Pakoa v Kai* [2021] VUCA 24 at [35]:

35. *The doctrine of ostensible authority is the means by which a principal who has, by words or actions, conferred 'apparent' or 'ostensible' authority on a person may be bound by contracts entered into by that person on its behalf even though the person lacked actual authority to do so: Dal Pont, Law of Agency, Pont, 4th Edition, LexisNexis 2020 at [20.1].*

35. The basic requirements for apparent authority are set out as follows in *Principles of the Law of Agency*, Bennett, Hart Publishing, 2013 at [4.6]-[4.8]:

4.6 *According to English law's estoppel analysis, apparent authority has two requirements: first, a representation by the principal to the third party that the agent is clothed with certain authority, and, secondly, reliance on the representation by the third party...*

4.7 *Consistent with the general approach to contract formation, whether the principal has made to the third party a representation of authority in respect of a certain person and, if so, the extent of the authority represented, is determined objectively in the light of all relevant circumstances by reference to a reasonable person in the position of the third party, tempered by any contrary knowledge the actual third party possesses.*

4.8 *A principal may state expressly, in terms, and directly to the third party that the agent enjoys authority that in truth the agent does not. Generally, however, the representation arises impliedly by conduct...*

36. Generally speaking, to establish apparent authority, there must be first, a representation by the principal by words or conduct, and secondly, reliance on the representation by the third party.

37. The representation, if any, is to be determined objectively in the light of all relevant circumstances by reference to a reasonable person in the position of the occupiers, tempered by any contrary knowledge the occupiers possess: *Principles of the Law of Agency*, Bennett, Hart Publishing, 2013 at [4.7].

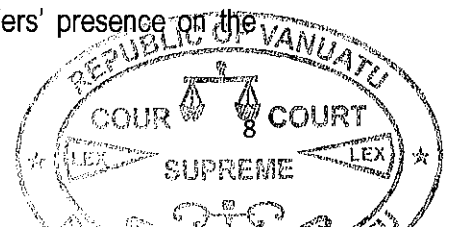
38. First, as to the representation relied on.

39. Clearly there were no words by either Edward Bakokoto or Messrs Bakokoto to the occupiers as to authority conferred on Jacky.

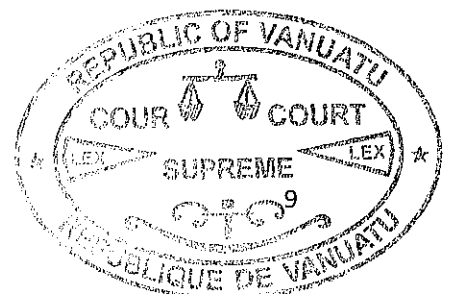
40. However, was there a representation impliedly by conduct?

41. The following conduct favours a finding that from the occupiers' perspective, Jacky Bakokoto had the apparent authority of his father and brothers in relation to his dealings with them:

- a. The occupiers' occupation of the land seems to have been obvious, as was the fact that they had erected houses and other improvements on it;
- b. Messrs Bakokoto must have known of the occupiers' presence on the land and of their activities on it;



- c. Bakaulu Bakokoto evidenced that he had known that Jacky had been collecting money from the occupiers and had had a disagreement with Jacky as to the sharing of those monies;
 - d. Waisinu Bakokoto acknowledged that the occupiers had had Jacky's consent to occupy the land; and
 - e. Despite knowing these matters and knowing that Jacky was having dealings with the occupiers in relation to the land, Messrs Bakokoto did not take any action until the notices to vacate given in 2013, 2015 and 2016 to object to the arrangements which Jacky had made with the occupiers or to inform them that Jacky was doing so without their authority. Instead, they seem to have allowed Jacky to engage in all the dealings as though he had their authority to do so.
42. On the other hand, the following factors are against finding that Jacky had the apparent authority of his father and brothers in his dealings with the occupiers:
- a. Most of the occupiers knew that Jacky had several brothers but none of the occupiers ever had any dealings with or spoke to or inquired of Messrs Bakokoto about a right to occupy their land. Their dealings were with Jacky only; and
 - b. There is no direct evidence of Jacky ever suggesting that he had the approval of the other custom owners to bind them or that they were even aware of the terms he was allegedly agreeing with the occupiers.
43. On balance, by reference to a reasonable person in the position of the occupiers, I find that there was a representation impliedly by the conduct of Edward Bakokoto and Messrs Bakokoto that Jacky Bakokoto had their authority in relation to his dealings with the occupiers.
44. Secondly, I find that the occupiers relied on such representation to take up occupation of the land.
45. In the circumstances, it is proved that Jacky Bakokoto had the ostensible authority of his father and of his brothers Messrs Bakokoto in relation to his dealings with the occupiers. It follows therefore that Jacky's dealings with the occupiers were authorized by the custom owners.
46. Mr Blake submitted that the Act requires the consent of all custom owners for the registration of a lease over customary land therefore to find that the actions of one custom owner would bind the other custom owners would be contrary to public policy. That is a compelling argument however I am not concerned here with applying a legislative standard. Rather, I am applying principles from contract law and estoppel which are concerned with avoiding unfairness to third parties who relied on a representation made, albeit impliedly by conduct.
47. The answer to Issue 1 is, "Yes".



G. Issue 2: What were the terms and conditions agreed upon between Jacky Bakokoto and the Second-Eleventh Defendants with respect to occupation of the land and whether those terms and conditions, together with the subsequent conduct of the Second-Eleventh Defendants in relation to the land, gave rise to an equity existing at the commencement of the lease which is protected by s. 17(g) of the Act and, if so, the duration of that equity?

48. The occupiers' case is that they have an equitable interest in the land arising from contractual licences together with their subsequent conduct in entering the land and making significant improvements to it. It is alleged that this interest still subsisted at the time of the first registration of a lease on 26 March 2012 and could not be terminated by the issuing of a notice to vacate. Further, that Messrs Bakokoto are estopped from denying the existence of that equitable interest. Thus they seek orders pursuant to s. 17(g) of the Act.

49. Section 17(g) of the Act provides:

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

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

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

50. The rights of an occupier pursuant to s 17(g) which subsist “for the time being” without being noted on the register are an exception to the indefeasibility of registered titles: *William v William* [2004] VUCA 16.

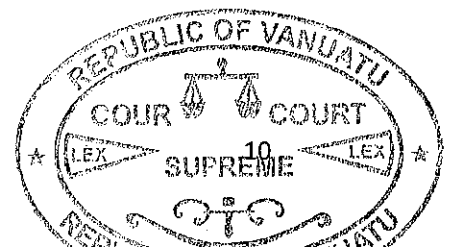
51. The Court in *William v William* continued by saying:

[I]f the person “in actual occupation of land” is there pursuant to an equitable proprietary interest, the protection will subsist as long as the equitable interest continues. In such a case, the nature and duration of the equity will have to be determined. Where the interest is one acquired through or under a previous proprietor of a registered lease, the interest may continue for as long as the term of the lease.

...
[Section] 17(g) operates in respect of “rights”, that is rights recognized by the law of Vanuatu. A person in actual occupation who is a trespasser will have no “rights” which are protected by the provision. A right may arise under custom law, or it might be a right that derives from and through the proprietor of a registered lease or the predecessor in title of that lease.

52. To determine the nature and extent of the right asserted requires an examination of the evidence and findings of facts: *William v William* at p. 10.

53. Chief Justice Lunabek held as follows in *Bakokoto v Obed* [1999] VUSC 44 at pp. 17-18:

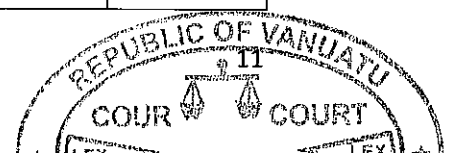


The court's approach in cases of this kind is first to inquire what is the equity due to the licensees and then to consider how best to satisfy it.

... if the Plaintiff allows the Defendants to build houses and live on his land, it amounts to expending money on the land under expectation created or encouraged by the Plaintiff that the Defendants will be able to remain there. That raises an equity in the licensees (Defendants) which entitles the Defendants to stay on the Plaintiff's land. The Court will not allow an expectation to be defeated where it would be inequitable to do so. The present Plaintiff is bound by this equity which is recognized by law to arise from the expenditure of money by the Defendants in actual occupation of the land when they are led to believe by the Plaintiff/custom landowner that, as a result of that expenditure they will be allowed to live on the land.

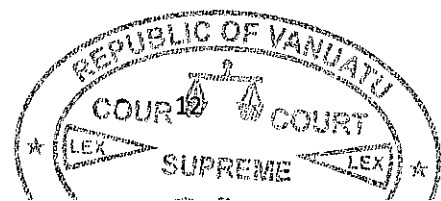
54. The rights and obligations of the parties have to be determined by reference to their agreement: *Bakokoto v Obed* [1999] VUSC 44; *Pakoa v Kai* [2021] VUCA 24 at [51].
55. For the reasons given under Issue 1, I need not consider what were the terms and conditions agreed upon between Jacky and Edward Bakokoto and Faina Pakoa.
56. I will now consider what were the terms and conditions agreed upon between Jacky Bakokoto and the occupiers with respect to occupation of the land.
57. There were no written agreements between Jacky Bakokoto and the occupiers.
58. As the Court of Appeal stated in [44] of *Pakoa v Kai* [2021] VUCA 24, in the case of agreements which are wholly oral, the only way by which the agreements can be proven is by parties leading evidence of their discussions in order to prove the truth of the matters spoken by each. The words actually spoken must be proved so that the Court can determine, on the basis of the words spoken, whether there had been agreements, and if so, the terms of the agreements.
59. Raymond Missak ["**Exhibit D3**"], Faina Pakoa ["**Exhibit D4**"], Erick Silas ["**Exhibit D5**"], Ramou Missak ["**Exhibit D6**"], Priscilla Margaret Pakoa ["**Exhibit D7**"], Fatima Faratea ["**Exhibit D8**"], Joe Niko ["**Exhibit D9**"], Kapel Pakoa ["**Exhibit D10**"] and Leisale Maki Missak ["**Exhibit D11**"] evidenced that Jacky Bakokoto gave them permission to occupy the land.
60. Their evidence from their sworn statements and before me at trial as to when they agreed with Jacky, the date they began residing on the land, what they built, the amounts of their initial payment and for rent, when it would be paid and to whom as well as amount paid for power or water connection is summarized in the following table:

Name of witness (party)	When agreement made with Jacky	Date started residing	Dwellings built	Initial payment amount & to who	Rental amount, when and who paid to	Amount paid for power or water connection and who paid to
Faina Pakoa (Second Defendant)	With Jacky Bakokoto in 1988	1988	1 house, kava bar and rent rooms	VT10,000 (kava bar) and VT15,000 (business) to	VT14,500 monthly to Jacky Bakokoto	

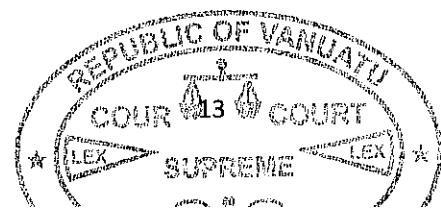


				Jacky Bakokoto		
Erick Silas (Third Defendant)	With Jacky Bakokoto in 2001	2001	1 house, 1 rent house and 1 toilet		VT2,000 monthly to Jacky Bakokoto	
Ramou Missak (Fourth Defendant)	With Jacky Bakokoto in 2010	2002	1 house		VT2,000 to Jacky Bakokoto	
Priscilla Margaret Pakoa (Fifth Defendant)	With Jacky Bakokoto in 1996	1996	1 house (4 rooms – 3 rooms for rent)		VT7,500 monthly to Jacky Bakokoto	
Raymond Missak (Sixth Defendant)	With Jacky Bakokoto in 2013	1987	1 house			
Fatima Faratea (Eighth Defendant)	With Jacky Bakokoto in 2011	2011	1 house, store and 1 kava bar	VT15,000 (kava bar), VT10,000 (house) and VT5,000 (store) to Jacky Bakokoto	VT13,000 monthly to Jacky Bakokoto	
Joe Niko (Ninth Defendant)	With Jacky Bakokoto in 2004	2003	1 house (4 rooms) and 1 toilet	VT15,000 and custom ceremony (head of kava, local chicken, yam and 2 bags of local food) to Jacky Bakokoto	VT2,000 monthly to Jacky Bakokoto	
Kapel Pakoa (Tenth Defendant)	With Jacky Bakokoto in 2003	1988	1 house, 1 rent house, kava bar and car wash		VT2,500 monthly to Jacky Bakokoto	
Leisale Maki Missak (Eleventh Defendant).	With Jacky Bakokoto in 2013	2008	1 house and 1 toilet	VT5,000 to Jacky Bakokoto	VT1,000 monthly to Jacky Bakokoto	

61. The rent amounts agreed are fairly nominal given that the land in question is land very close to the town of Port Vila, in a busy commercial area making it potentially valuable land for the purpose of future development.
62. There being no evidence to the contrary as to the discussions had or the words actually spoken regarding the matters set out in the table above, I accept these as part of the terms and conditions of the contractual licences agreed between Jacky and the occupiers.



63. The most contentious matter in dispute as to the terms and conditions of the contractual licences, however, was what, if anything, had been agreed as to the duration of the occupiers' contractual licences to occupy the land.
64. The occupiers contended that when negotiating rights of occupancy with Jacky, they negotiated the right to remain on the land for as long as they pleased.
65. However, in cross-examination, the following witnesses acknowledged that their right to occupy the land ran up until they received notice to leave:
- a. Raymond Missak;
 - b. Erick Silas;
 - c. Priscilla Pakoa;
 - d. Joe Niko; and
 - e. Leisale Maki Missak.
66. That evidence is consistent with the evidence of Messrs Bakokoto who understood that once they found a buyer the occupiers would leave.
67. It is also consistent with Mr Kai's evidence that it was represented to him when he purchased the lease that the occupiers could be removed.
68. On the evidence, I find on the balance of probabilities (that it is more likely than not) that the occupiers and Jacky agreed that the occupiers could build houses and occupy the land on payment of nominal monthly rent and that their occupation was terminable by notice, presumably reasonable notice.
69. Raymond Missak and Leisale Maki Missak's agreements with Jacky were made in 2013, after registration of the lease. I accept Mr Blake's submissions that given that Jacky and Messrs Bakokoto had gone to the trouble and cost to register a lease, their only intention must have been to sell the lease. It makes absolutely no sense for Jacky to purport to grant perpetual rights over the land after going to all the trouble of arranging a registered lease. There was simply no point of registering a lease if Jacky had granted indefinite or perpetual rights over the land that could not be terminated by the custom owners. The custom owners clearly intended that the lease would be sold and it must be inferred that Jacky and the occupiers all expected that come the day, they would need and would be expected to move out.
70. The subsequent conduct of the occupiers was that they built houses and lived on the land, and paid rent monies to Jacky Bakokoto: *Kai v Tom* [2020] VUSC 279 at [54]. That said, the occupiers ceased to pay rent after the first notice to vacate was given in 2013 and have not paid rent since.
71. I consider therefore that the terms and conditions agreed between Jacky and the occupiers, together with the subsequent conduct of the occupiers in relation to the land, gave rise to an equity which existed at the commencement of the lease which is



protected by s. 17(g) of the Act. The duration of that equity was that it was terminable by reasonable notice.

72. My answer to Issue 2 is that the terms and conditions agreed are as set out above, and "Yes", there was an equity existing at the commencement of the lease which is protected by s. 17(g) of the Act and which was terminable by reasonable notice.
- H. Issue 3: Whether or not the Notices to Vacate served on 3 June 2013 or any of the later Notices to Vacate, were effective to terminate any rights of occupation held by the Second-Eleventh Defendants?
73. Jacky Bakokoto and his brothers Messrs Bakokoto together issued a notice to vacate to the occupiers dated 3 June 2013.
74. Mr Kai evidenced the notice to vacate in attachment "GK1" of ["**Exhibit C3**"] and Kereto Bakokoto did in attachment "KB1" of ["**Exhibit D17**"]. In the notice, Jacky Bakokoto and Messrs Bakokoto gave the occupiers 3 months' notice to vacate the subject land. The reason expressed in the notice for terminating the occupiers' residence on the land was "in order for future commercial development". Bakaulu Bakokoto ["**Exhibit D16**"] and Andas Bakokoto ["**Exhibit D15**"] evidenced that in 2013, they and their brothers agreed to lease the subject land to Mr Kai following which they gave the occupiers the notice to vacate.
75. Mr Kai also evidenced in ["**Exhibit C3**"] a notice to vacate dated 20 January 2015 from Messrs Bakokoto, witnessed by Kereto Bakokoto. It is addressed to "Teiwai Mate Community". It stated that:

This notice is to serve you that you are to vacate this land as soon as possible. Our investor wants to develop this land. Because of our kindness, we offered the community a piece of land at Bladinieres Estate. So the family Bakokoto issued this final notice for every person inside the community to MUST sign in order to VACATE this land.

Anyone refusing to sign will face the EVICTION ORDER.

76. Kereto Bakokoto confirmed in his evidence ["**Exhibit D17**"] that he and Messrs Bakokoto issued the 20 January 2015 notice to vacate. He also attached notices to vacate from Loughman & Associates Lawyers dated 22 January 2015 and from Tevi Bulu Lawyers dated 29 August 2016.
77. In cross-examination:
- a. Raymond Missak stated that he does not remember seeing the 2013 notice. He agreed that after that notice, there were other notices to vacate to them. In answer to Mr Kalsakau, he confirmed that the notice was because Jacky had sold the land to a Chinese person;
 - b. Fatima Faratia said she stayed despite the 2013 notice because she had a claim for all the monies she had spent on her buildings on the land;
 - c. Eric Silas confirmed that in 2013, Jacky told them to leave the land. He confirmed in re-examination that in 2013 was the first time he received a notice to vacate the land;

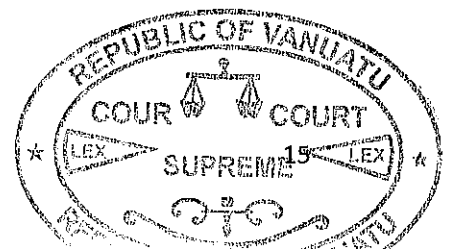


- d. Ramou Missak agreed in cross-examination that by notice dated 3 June 2013, Jacky Bakokoto and Messrs Bakokoto gave them notice to vacate the land;
- e. Priscilla Margaret Pakoa accepted in cross-examination that in 2013, Jacky and his brothers told them that they had to move out of the land and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

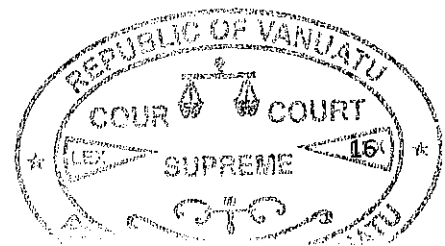
78. I find that:

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

79. Even if I am wrong on that, it is undisputed that after receiving the 2013 notice to vacate, the occupiers ceased to pay rent to Jacky Bakokoto. I accept Messrs Bakokoto's evidence that no rent has ever been paid to them. Accordingly, the occupiers have lived on the land rent-free since June 2013. I infer therefore that by ceasing to pay any further rent from June 2013, the occupiers accepted the termination of their rights of occupation.

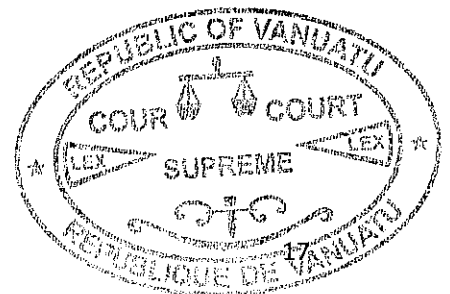


80. I also consider that the failure to pay rent since June 2013 was in breach of a fundamental condition attaching to the occupiers' occupation of the land, giving the custom owners grounds to terminate the licences. The notice to vacate dated 20 January 2015 put beyond doubt that the occupiers' licence rights were terminated by that notice and they were given reasonable time to vacate by use of the expression, "as soon as possible".
81. Accordingly, my answer to Issue 3 is that "**Yes**", the notice to vacate served on 3 June 2013 was effective to terminate the occupiers' rights of occupation but even if it were not, the ensuing failure to pay rent since June 2013 led to the notice to vacate dated 20 January 2015 which put beyond doubt that the occupiers' licence rights were terminated by that notice and they were given reasonable time to vacate by use of the expression, "as soon as possible".
- I. Issue 4: Whether or not the Second-Eleventh Defendants have standing pursuant to s. 100 of the Act to seek rectification of the Land Leases Register?
82. For the reasons given under Issue 3 above, the occupiers no longer have a right protected under s. 17(g) of the Act. Therefore they do not have standing pursuant to s. 100 of the Act to seek rectification of the Land Leases Register.
83. My answer to Issue 4 is that "**No.**"
- J. Costs of the trial and of the further hearing as to the remitted issues
84. A high threshold must be passed for costs to be awarded on an indemnity basis. The Court of Appeal stated in *Air Vanuatu (Operations) Ltd v Molloy* [2004] VUCA 17 that the awarding of indemnity costs arises only in "very extreme" cases.
85. Rule 15.5(5) of the *Civil Procedure Rules* provides:
- 15.5 *The court may also order a party's costs be paid on an indemnity basis if:*
- (a) *the other party deliberately or without good cause prolonged the proceeding; or*
 - (b) *the other party brought the proceeding in circumstances or at a time that amounted to a misuse of the litigation process; or*
 - (c) *the other party otherwise deliberately or without good cause engaged in conduct that resulted in increased costs; or*
 - (d) *in other circumstances (including an offer to settle made and rejected) if the court thinks it appropriate.*
86. I do not consider that the circumstances of this case fall within rule 15.5 or otherwise merit an indemnity costs order hence costs are ordered on the standard basis.
87. Costs should follow the event. The Second-Eleventh Defendants are to pay the Claimant's and Twelfth Defendants' costs as agreed or taxed by the Master. Once settled, these are to be paid within 28 days.



K. Result and Decision

88. Jacky Bakokoto had the ostensible authority of his brothers the Twelfth Defendants in relation to his dealings with the Second-Eleventh Defendants and therefore Jacky's dealings with the occupiers were authorized by the custom owners **[Issue 1]**.
89. The terms and conditions agreed upon between Jacky Bakokoto and the Second-Eleventh Defendants with respect to occupation of the land were that the latter could build houses and occupy the land on payment of nominal monthly rent and that their occupation was terminable by reasonable notice. Those terms and conditions, together with the subsequent conduct of the Second-Eleventh Defendants in relation to the land, gave rise to an equity existing at the commencement of the lease which is protected by s. 17(g) of the Act. The duration of that equity was that it was terminable by reasonable notice **[Issue 2]**.
90. The notice to vacate served on 3 June 2013 was effective to terminate the occupiers' rights of occupation but even if it were not, the ensuing failure to pay rent since June 2013 led to the notice to vacate dated 20 January 2015 which put beyond doubt that the occupiers' licence rights were terminated by that notice and they were given reasonable time to vacate by use of the expression, "as soon as possible" **[Issue 3]**.
91. The Second-Eleventh Defendants do not have standing to bring a claim under s. 100 of the Act **[Issue 4]**.
92. The Second-Eleventh Defendants pleaded their alleged s. 17(g) right as the basis for orders that Mr Kai pay all costs arising from and incidental to their relocation to other land or alternatively, the sum of VT33,200,000 (or other sum the court deemed just) to be divided on just terms. Given my determination that the occupiers no longer have a right under s. 17(g) of the Act, the Second-Eleventh Defendants' Counter Claim is declined and dismissed.
93. The Claimant has proved his Claim. He is granted the eviction orders sought.
94. The Second-Eleventh Defendants are to vacate lease title no. 12/0633/1387 within 3 months from the date of service of this decision, namely:
- Faina Pakoa and Family, Second Defendants
 - Eric Sailas and Family, Third Defendants
 - Ramou Missak and Family, Fourth Defendants
 - Mark Silas and Family, Fifth Defendants
 - Raymond Missak and Family, Sixth Defendants
 - Yakar and Family, Seventh Defendants
 - Fatima Faratea & Family, Eight Defendants
 - Joe Niko and Family, Ninth Defendants
 - Kapel Pakoa and Family, Tenth Defendants



- Duk Misak and Family, Eleventh Defendants

L. Enforcement

95. Pursuant to Rule 14.37(1), I now schedule a Conference **at 8am on 14 June 2022** to ensure the judgment has been complied with or for the Second-Eleventh Defendants to explain how it is intended to comply with this judgment. For that purpose, this judgment must be personally served on those Defendants.

**DATED at Port Vila this 11th day of March 2022
BY THE COURT**


Justice Viran Molisa Trief

