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

Civil
Case No. 23/816 SC/CIVL

BETWEEN: JULIAN WELLS representing Family Moltarusa Wells
Claimant

AND: THE REPUBLIC OF VANUATU
First Defendant

AND: LAURENT SOLOMON
Second Defendant

Date: ***8th day of March, 2024***
Before: ***Justice W. K. Hastings***
Distribution: ***Mr. D. Yawha for the Claimant***
Mr. JT. Wells for the First Defendant
Mr. J. Tari for the Second Defendant

RULING ON APPLICATION TO AMEND THE CLAIM

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1. On 19 February 2024, the claimants applied for leave under Rule 4.11 of the Civil Procedure Rules 2002 (CPR) to amend their claim which was filed on 28 September 2023. The application is supported by the sworn statement dated 19 February 2024 of Mr Wells as representative of Family Moltarusa Wells.

2. The second defendant opposes the application.

3. The first defendant said it will abide the ruling.

Background

4. The claim briefly stated is that the Claimants say they are the custom owners of Biria land by virtue of a declaration of the Supenatavuitano Island Land Tribunal dated 13 August 2004 concerning Belbarav land which includes Biria land (annexed as JW1 to the sworn statement of Julian Wells dated 1 June 2023). On 30 May 2005, a different tribunal, the Veriondali Area Land Tribunal, in Land Case No 5 of 1992, declared the Second Defendant's family to be the custom owners of Belbarav land which includes Biria land. Then, on 28 October 2015, a Biria Nakamal also decided the Second Defendant's family were the custom owners of Biria land.

5. The Biria Nakamal decision that the Second Defendant's family were the custom owners of Biria land was quashed by Island Court (Land) on 13 October 2017 (Case No. 17/2864). The Veriondali Area Land Tribunal's decision that the Second Defendant's family were the custom owners of Belbarav land was quashed by the Supreme Court on 19 December 2017, which also directed the Island Court to hear Land Case No 5 of 1992 (*Molsakel v Molbarev* [2017] VUSC 212). An appeal against the Supreme Court decision was dismissed by the Court of Appeal on 20 July 2018 in *Family Boetara v Molsakel* [2018] VUCA 28. The Court of Appeal said at para 2:

> *The effect of these 2017 orders was that the customary ownership of Belbarav land in East Santo was directed to be the subject of a determinative hearing in the Island Court involving all those who may have a claim to that particular piece of land – including the Boetara, Molvatol and Molsakel families. All previous so-called determinations of customary ownership, dating back to 1982, were no longer of any legal effect. The Island Court was to now finally determine exactly, and definitively, who the custom owners of the Belbarav land are.*

6. There is no reference in the Supreme Court or Court of Appeal judgments to the 2004 declaration of the Supenatavuitano Island Land Tribunal. That makes the finding that "*all previous so-called determinations of customary ownership, dating abck to 1982, were no longer of any legal effect*" perhaps somewhat less definitive but nonetheless binding on the Supreme Court. I also do not know if the Island Court has heard Land Case No 5 of 1992 yet.

7. Biria land was compulsorily acquired by the Republic under the Land Acquisition Act (LA Act) on 7 November 2017 for the Santo airport expansion. The Claimants object to the decision to pay VT 100,000,000 to the Second Respondent who, for just over two years, was also declared to be the custom owner of Biria land by the Biria Nakamal until that decision was quashed by the Island Court (Land) in 2017.

8. Before 2017, the Second Defendant had commenced development and subdivision of the land. The payment was based on a valuation which initially set the compensation payable at VT 44,129,000. This was appealed by the Second Respondent to the Valuer General, who increased the valuation to VT 100,000,000. The Claimants say that following the 2017 decision of the Island Court (Land), they are the custom owners and they should have been given compensation, as custom owners, of the acquired land, instead of the Second Defendant whose status as a custom owner was removed by the 2017 decision of the Island Court (Land).

9. Sonia Nixon, Acquiring Officer for the Department of Land Records and Survey, deposes in her sworn statement of 19 January 2024 in support of the First Defendant's position, that the compensation was done under s 9(1)(a) of the LA Act, was based on a determination for developer's (the Second Defendant's) costs, and was not a determination for the custom owner. The claimants say the valuation took into account the market value of the land, not just the developer's costs, and as such, the compensation should have been paid to the custom owners of the land, not the

developer who no longer has a declared interest in the land (or, if the custom ownership of the land is found to be in dispute, to the Custom Owner Trust Account (COTA) under s 14A of the LA Act pending resolution of the dispute).

Discussion

10. Rule 4.11 provides as follows:

> **Amendment of statement of the case**
> **10.11** (1) A party may amend a statement of the case to:
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> (a) better identify the issues between the parties; or
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> (b) correct a mistake or defect; or
>
> (c) provide better facts about each issue.
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> (2) The amendment may be made:
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> (a) with the leave of the court; and
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> (b) at any stage of the proceeding.
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> (3) In deciding whether to allow an amendment, the court must have regard to whether another party would be prejudiced in a way that cannot be remedied by:
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> (a) awarding costs; or
>
> (b) extending the time for anything to be done; or
>
> (c) adjourning the proceedings.

11. Mr Wells proposes to amend the claim by:

(a) adding the words "*any and all*" to his plea in para 5 that any and all compensation sums are to be remitted into the Custom Owner Trust Account (COTA);

(b) adding a new subparagraph c to his plea at para 13, "The Compensation determined in favor of the Second Defendant was not made in accordance with the LA Act";

(c) adding the words "*did not take into account the value of the purported 'developments and improvements' (because they were minuscule) but instead took into account the market value of the custom land*" to his plea at para 14 that the compensation valuations were unreasonable and unfair to the custom owners for the reason stated in the proposed amendment;

(d) several amendments to the prayer for relief, including:

i. an alternative Order that "*the First Defendant remit such compensation into COTA in accordance with section 14A of the LA Act if the Court deems that there is dispute as to custom ownership of the lands*" and if "*the court deems that there is no dispute, an Order that the First Defendant compensate the Claimants for the acquisition of their custom lands in accordance with section 14 of the LA Act;*"

ii. an Order that the Second Defendant pay the Claimants "*compensation for his subdivision of the Claimants' lands*" with 5% interest;

iii. "*an Order to permanently restrain the Second Defendant and his agents from entering onto, subdividing and selling land within the Claimants' custom land boundary without the express permission of the Claimants.*"

12. Mr Wells states the grounds on which the proposed amendments are sought are that the Claimants are the custom owners of the Biria land; that the land is being developed by the Second Defendant without the Claimants' permission; that the Republic should not have paid the Second Defendant VT 100,000,000 as compensation for the Biria land it compulsorily acquired on 7 November 2017; and that the Second Defendants should have compensated the Claimants for the Republic's acquisition of Biria land.

13. Mr Tari opposes the amendment. He submitted that the Second Defendant was the declared custom owner until 2017 when the Island Court (Land) quashed the Nakamal's decision and the Supreme Court quashed the Veriondali Area Land Tribunal's decision. He submitted the development stopped after the Island Court (Land)'s decision of 13 October 2017. He submitted the sworn statement of Sonia Nixon, Acquiring Officer for the Department of Land Records and Survey dated 19 January 2024 confirms the payment of VT 100,000,000 was "*a determination for developer costs, and was not a determination for [the] custom owner.*" Mr Tari also submitted that the Second Defendant cannot compensate the Claimant because the Claimant is claiming for custom owners' interests whereas Sonia Nixon deposed that the compensation was not for customs owners' interest.

14. This application is not the place to resolve the substantive claim. On Sonia Nixon's evidence, it may be that the determination of compensation for custom ownership, as distinct from developer's costs, is yet to come (and this is, in fact, pleaded in the defence at paras. 9(b) and 10(b)). Or it may be that this determination, in the words of s 9(1)(a) of the LA Act, takes into account the market value of the land as subdivided, in which case it is certainly possible to argue that the custom owners of the land are entitled to compensation for the compulsory acquisition of their land.

15. This application is also not the place to determine who are the custom owners of Biria land if indeed that is in dispute. The Court of Appeal gave clear direction to the Island Court "*to now finally determine exactly, and definitively, who the custom owners of Belbarav are*" assuming that includes to a greater or lesser extent Biria land.

16. In deciding whether to allow an amendment to the claim, r.4.11(3) requires the Court to have regard to whether another party would be prejudiced in a way that cannot be remedied by awarding costs, extending time or adjourning the proceedings. The prejudice caused by refusing leave must be balanced against the risk to the respondents of further delay and the risk to the public interest in letting a less well-defined claim go to trial more quickly. I can see no injustice to either defendant if leave is granted to amend a claim in a way that better defines the issues and which, in the long run, and for that reason, may resolve the claim more accurately than would otherwise have been the case.

17. The fact that Mr Tari's opposition to the application addresses the substantive allegations in the application to amend the claim indicates that the application has succeeded in clarifying the issues to be tried (and perhaps also the issues awaiting resolution by the Island Court). It also indicates that the Claimants have provided better facts about each of the issues to be tried.

18. I therefore grant leave to the Claimants to amend the claim as proposed.

19. The party seeking leave usually bears the costs of an application to amend the claim. If the opposition had been merely tactical, then the respondents would bear the costs of the application. Given the uncertainty created by the many decisions in respect of custom ownership, I do not consider the opposition to the claim was poorly taken, so the costs of this application will therefore be borne by the applicant, to be taxed if not agreed.

DATED at Port Vila this 11th day of March, 2024

BY THE COURT

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Justice W. K. Hastings