

**IN THE COURT OF APPEAL OF  
THE REPUBLIC OF VANUATU**  
(Civil Appellate Jurisdiction)

Civil Appeal Case No. 11 of 2014

**IN THE MATTER OF:** An Appeal from the Supreme Court of the  
Republic of Vanuatu.

**BETWEEN:** ESTATE OF DAVID YAM KALMET,  
REPRESENTED BY WANO KALMET OF FAMILY  
KALMET

Appellant

**AND:** PATRICK HAINES  
REPRESENTING FAMILY  
SHEM KALOTITI

First Respondent

**AND:** DENNY KALIOKAS  
REPRESENTING FAMILY  
TOUMET & FAMILY MAKI

Second Respondent

**AND:** YOAN KALTAPANG  
REPRESENTING FAMILY  
KALRANG KALTAPANG

Third Respondent

**AND:** BREAKAS BEACH ESTATE LTD  
Fourth Respondent

**AND:** REPUBLIC OF VANUATU  
Fifth Respondent

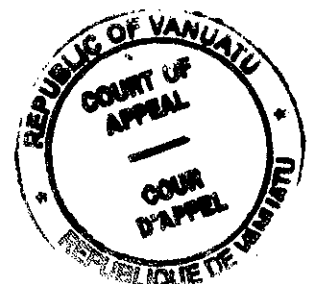
**Coram:** *Hon. Chief Justice Vincent Lunabek*  
*Hon. Justice John von Doussa*  
*Hon. Justice Raynor Asher*  
*Hon. Justice Oliver Saksak*  
*Hon. Justice Daniel Fatiaki*  
*Hon. Justice Dudley Aru*  
*Hon. Justice Mary Sey*

**Counsel:** *Mr. Roger Tevi for the Appellant*  
*Mr. George Nakou for the First, Second and Third Respondents*  
*No appearance for the Fourth Respondent*  
*Mr. Kent Tari for the Fifth Respondent*

**Date of Hearing:** 21 July, 2014

**Date of Judgment:** 25 July 2014

**JUDGMENT**



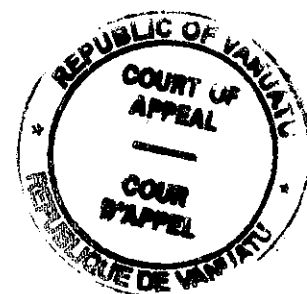
1. This is an appeal brought on behalf of Family Kalmet seeking to set aside a consent judgment the terms of which exclude Family Kalmet from any customary ownership rights in the land comprised in leasehold title 12/0844/129, and seeking to have their claim for customary ownership re-determined.

## Background

2. It is convenient to refer to the land in the subject lease as the EMIS land. Emis is the customary name of land situated in the Pango village within which the lease is situated.
3. Customary ownership of the Emis land was determined by the New Hebrides Native Court (NHNC) in a decision delivered on or about 2<sup>nd</sup> February 1972. That Court relevantly held:

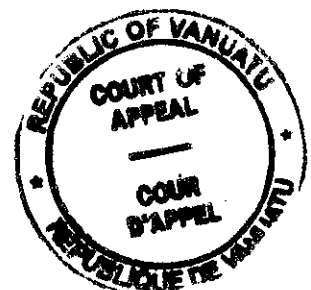
*"....., EMIS shall be regarded as a group holding in the collective ownership of those persons listed in the notes of evidence of this case as having working areas thereon, and specified in appendix "A" to this judgment; that such latter persons shall have the right to continue to make gardens or copra on those parts of it that they have hitherto used for such purposes. Those natives listed must clear their boundaries before 1st May 1972 and apply to the Native Court to mark and measure the boundaries by 1st May 1972. The Court will appoint a committee of 5 men chosen from amongst the listed owners by them to adjudicate any interior boundary disputes and there shall be an appeal from the decision of this Committee to the Native Court."*

4. Appendix "A" identified sixteen people by name.
5. In 2005 lease 12/0844/129 was registered in favour of Breakas Beach Estate Limited (Breakas) as lessee. The lease had been negotiated and granted by Bruce Kalotiti and David Yam Kalmet who became registered as the lessors. David Yam Kalmet (now deceased) represented Family Kalmet.
6. By Supreme Court proceedings in CC64 of 2005 brought in the name of Kalotiti Kaltabang & Ors. (who represented the interests of the family groups now represented by the first, second and third respondents in this appeal), the

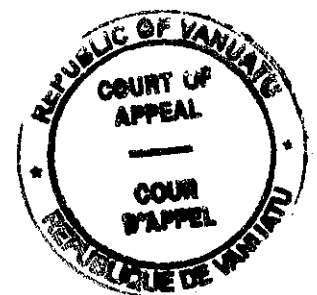


claimants sought rectification of the leasehold title by having themselves substituted as the lessors on the basis that they, not Bruce Kalotiti and David Yam Kalmet, were the correct custom owners of the Emis land within the Breakas lease. The claim was upheld in the Supreme Court on the ground that the claimants were the successors in customary title to the sixteen people identified in appendix A to the 1972 NHNC decision: see: Kalotiti Kaltabang & Ors. v. Bruce Kalotiti & Ors. Civil Case 64 of 2005, judgment of 4<sup>th</sup> May 2007.

7. The Supreme Court decision was appealed: Kalotiti v. Kaltabang [2007] VUCA 25. The Court of Appeal held, as had the Supreme Court, that decisions of the NHNC binding on the indigenous custom owners of land immediately before Independence became binding on them after Independence by virtue of Article 95 (2) of the Constitution. The Court of Appeal held that the rights and interests of the parties to the litigation as custom owners derived from the 1972 NHNC decision, and in particular through the sixteen identified people. Moreover, the Court of Appeal held that the 1972 NHNC decision was not now open to challenge. Had any of the parties to that case wanted to challenge its correctness on the basis that the rules of custom had not been properly followed it was possible and necessary for them to do so by way of appeal. There had been no appeal.
8. However in the course of argument before the Court of Appeal it emerged that the real dispute between the parties was not whether Bruce Kalotiti and David Yam Kalmet were successors in custom to a person identified in appendix "A", but whether there was land customarily owned by Family Kalmet included in the Breakas lease which was not Emis land. This aspect of the case had not been considered by the Supreme Court. Accordingly the appeal was allowed and the matter returned to the Supreme Court to determine this issue. The Court of Appeal, reflecting discussions that had occurred between the parties during argument, suggested a possible way forward that would involve one or more further surveys that identified the marks recorded on the plan attached to the 1972 NHNC decision for comparison with the survey and sub-divisional plan attached to the Breakas lease.
9. Following the Court of Appeal decision, the Supreme Court by order 16<sup>th</sup> October 2009 directed "*all owners of lots of land to go to the Land Tribunal or the Island Court to resolve custom ownership of the various lots of land*". This order is problematic in so far as lots that fell within the Emis land customary ownership had already been determined by the 1972 NHNC decision which was binding on the Supreme Court.



10. On or about 16<sup>th</sup> September 2009 the Pango Village Land Tribunal made a decision in favour of Family Kalmet as custom owners of lots 1 – 16 but that decision was set aside by the Supreme Court on 2<sup>nd</sup> July 2010.
11. Further on 2<sup>nd</sup> July 2010 a consent order was made in the Supreme Court recording agreement between all parties that within the sub-division which comprised 31 separate lots, for lots 17 – 31 Family John Baiden, Family Kalsrap Kerryolo and Family Jack Kalotiti were the custom owners. That left lots 1 – 16 in dispute in respect of which Family Kalmet claimed to be custom owners.
12. On 3<sup>rd</sup> December 2010 the Pango Village Land Tribunal handed down another decision, this time deciding that Family Kalmet were custom owners of lots 7 – 13. This decision was subject to a judicial review challenge to the Supreme Court, but the judicial review remains unheard as it has been overtaken by later events.
13. In 2013 the Supreme Court proceedings (CC64 of 2005) came under close judicial management. That led to a proposal from a member of the claimants that custom ownership of lots 1 – 16 be resolved in line with the 1972 NHNC decision by a five-man committee appointed by various custom ownership claimants. This proposal was reported at a conference on 5<sup>th</sup> August 2013, and promptly implemented by the parties. Family Kalmet was represented by their counsel Mr. Collin Leo at the conference.
14. A five-man committee was appointed (exactly how is not apparent on the information before this Court). The committee conducted a hearing and received oral evidence and submissions on 10<sup>th</sup> September 2013.
15. A written report and recommendations from the committee was considered at a conference on 14<sup>th</sup> August 2013. Family Kalmet's counsel (Mr. Leo) did not appear at the conference as he was out of town, but Family Kalmet was represented by the son of David Yam Kalmet, and the minute of the conference records that other members of Family Kalmet were also present.
16. The minute records a detailed consideration of developments in the proceedings, and important rulings based on the 2007 decision of the Court of Appeal. In particular the conference judge held that the Court of Appeal decision determined that Family Kalmet is not one of the custom owners of the Emis land, and that the only possible claim of Family Kalmet was in respect of other land if any was included in the Breakas lease.



17. The conference judge recorded his understanding from those at the conference, including Family Kalmet, that it is accepted that Emis land comprises all the land in the Breakas lease. The judge noted that given that consensus, any further survey was unnecessary. The minute is there referring back to the suggestion made by the Court of Appeal as to a possible way forward to determine if land, other than Emis land, was included in the Breakas lease.
18. The minute notes that the chairman of the five-man committee was present at the conference by its chairman Mr. George Kalran, and their report was read out. The report is annexed to the minute. The committee made recommendations that did not include Family Kalmet as custom owners of lots 1 – 16.
19. The committee, as disclosed in its report, proceeded on the assumption that all the land within the Breakas lease was Emis land. The committee stated its findings as follows:

*"Findings by the Emis Five Men Committee"*

*All parties to this dispute agree that Lot 1 – 16 of the Breakas Lease is on Emis Land.*

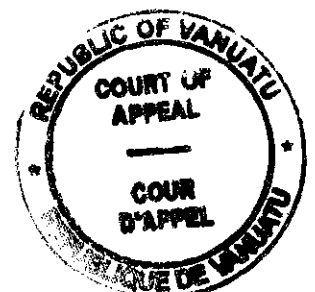
*All parties to this dispute agree that Kalmet or David Kalmet is not listed in the Appendix "A" of the 1972 New Hebrides Native Court Judgment.*

*The Court of Appeal (Appeal Land Case 11 of 2007) states any other persons to be later included in Appendix "A", other than that specified in the 1972 NHNC Judgment, must have the consent of the 16 Custom Owners listed in the Appendix "A" of the 1972 NHNC Judgment. This consent has never been given to Family David Kalmet whose name does not appear in the Appendix "A" of the 1972 NHNC Judgment.*

*David Kalmet's father is Kalmet, Kalmet is the brother of Shem Kalotiti, Kalmet and Shem Kalotiti are grand-children of Kalpram who was given EKONPAL, a subland of Emis, by the original landowner of Emis, Karielol.*

*Since Kalmet is not in Appendix "A", the interests of Kalmet or the descendants of Kalpram can only be represented through Kalmet's brother, Shem Kalotiti, whose name is in harmony with the Appendix "A" of the New Hebrides Native Court Judgment.*

*For this reason, David Kalmet cannot be included in the Lessor section of the Breakas lease situated entirely on Emis. Family Kalmet*

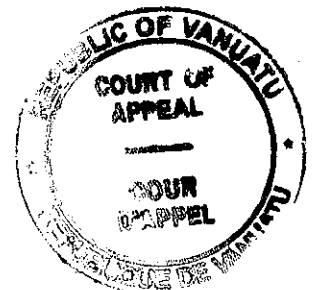


*has no say on Emis Land. If Family Kalmet wish to express interest on EKONPAL, Emis they will have to do so via Family Shem Kalotiti who is legal custodian of Kalpram's interest on Emis. Family Shem Kalotiti has made representation above. However, Family Shem Kalotiti is to show consideration to the interests of Family Kalmet on Emis as Shem Kalotiti and Kalmet Kalotiti are both descendants of Kalpram and a full custom reconciliation is recommended between Family Shem Kalotiti and Family Kalmet Kalotiti."*

20. After referring to the findings of the committee, the minute records that a consent position was presented to the Court with a view to it being recorded as a consent judgment. The minute sets out the terms of the consent position which would determine the respective interests of the claimants to the several lots within Breakas lease. The minute concludes:

*"These draft consent orders are distributed for consideration by all the parties. Counsel are to respond by memorandum by 6 September 2013 confirming:*

- a) *That these draft orders represent the consensus reached by all those deriving rights of custom ownership from the 1972 NHNC decision;*
  - b) *David Yam Kalmet and his family did not maintain any claim to EMIS land and accordingly the land covered by lease 12/0844/129 for all the reasons set out above and as per the report from the five person committee (annexed)."*
21. On 17<sup>th</sup> October 2013 Family Kalmet filed a memorandum in response, signed on their behalf by Mrs. Nari. The nature and detail of the issues raised in the response indicates close input by Family Kalmet. The response complains of a lack of independence on the part of some members of the five-man committee, about the appointment process of the committee, about involvement of other custom owners in the preparation of the report on the ground of conflict of interest, about a failure to consider evidence adduced by representatives of Family Kalmet, and about errors in the 1972 NHNC decision which wrongly denied the custom ownership of Family Kalmet. Reliance is also placed on the 2010 decision of the Pango Village Land Tribunal. The response concludes by Family Kalmet asking the Supreme



Court to direct a fresh hearing in the Village Land Tribunal to determine custom ownership.

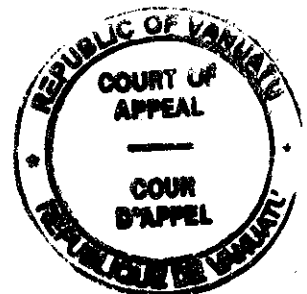
22. The several matters that are set out in the response are, in substance, those advanced in the present grounds of appeal.
23. Notwithstanding Family Kalmet's response, the proposed consent position set out in a draft record of settlement continued to be circulated amongst all interested parties.
24. On 18<sup>th</sup> December 2013 a further conference was called. The minute records that the conference was called for the purpose of obtaining signatures of all parties to the proposed record of settlement. The document before the conference for formal approval bears the heading of the substantive proceedings in CC64 of 2005, and is entitled "RECORD OF SETTLEMENT INCLUDING CONSENT ORDER". A further document attached reads:

*"We confirm that these consent orders record the settlement reached by those who have asserted custom ownership of EMIS land and in resolution of this proceeding"*

The attached document was then signed by those at the conference which included all but Mr. Burton, a director representing Breakas Beach Estate Limited. The minute records that Mr. Burton would be brought to the Court office to sign the acknowledgment. This later happened.

25. Those who signed the acknowledgment were representatives of the six families who are the successors in custom of the sixteen people identified in appendix "A" to the 1972 NHNC decision being the claimants in the proceedings; the claimant's counsel Mr. Nakou; Mr. Bruce Kalotiti Kalotrip, one of the first defendants; Mrs. Nari as counsel for Mr. David Yam Kalmet, the other of the first defendants; Mr. Burton; and the Solicitor General.
26. The Record of Settlement in parts material to this appeal record:

*"1. Reference is made to the Minute of the conference held on 14 August 2013 and the consent position reached by the parties to this case. That consent position or outcome was then distributed for consideration by the parties to ensure its accuracy. Following a further conference on 25 November*

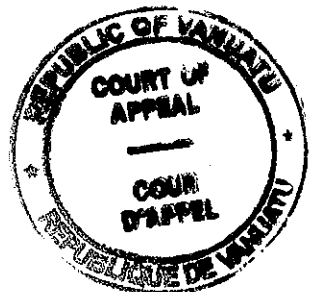


2013, and with one qualification and the correction of a typographical mistake, the parties confirmed that their agreement is reflected in and embodied in these consent orders.

2. The only qualification is to note that EMIS land is more extensive than the land within lease title 12/0844/129 although the land within lease title 12/0844/129 is wholly contained within EMIS land.
  3. The first defendant David Yam Kalmet accepts that he does not have any direct claim to EMIS land and by extension the land covered by lease 12/0844/129 (and Strata Plan 0001)."
27. The balance of the Record of Settlement contains terms identifying the present custom owners who do not include Family Kalmet, particulars of the rectification required to the Land Leases Register, and providing for the distribution of rental to be received from the lessee under the Breakas lease.
28. The matter came on for further hearing in conference on 11<sup>th</sup> April 2014, and the court was invited to enter judgment by consent in terms of the Record of Settlement. Mrs. Nari again appeared as counsel for David Yam Kalmet, representing Family Kalmet. The minute records the position taken by Mrs. Nari:

*"Mrs. Nari recently filed an application on behalf of David Kalmet first of all seeking an order that Wano David Kalmet be appointed as a personal representative of him, David Kalmet having died in August 2012. Also sought is an order for rehearing the claim relating to lots 1 – 16 by an independent and newly constituted five-member committee with the consent of the 16 families involved. A further order is sought that no payment of money held in trust for the custom owners since the last order of the Court on 18 December 2013 is to be made by the second defendant until completion and settlement of these matters.*

*As I pointed out to Mrs. Nari she has signed the consent order document on behalf of David Yam Kalmet and although the order was not formally being made until I signed the document today, the reality is that if her client is dissatisfied with any aspect of the consent*



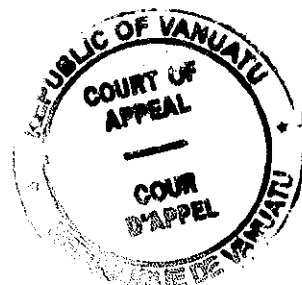


*orders then his proper and only remedy is to appeal to the Court of Appeal. No doubt if he wishes to do that then he may wish to apply for a stay of implementation of the consent order to preserve his rights. Mrs. Nari says that her clients say that she signed the consent orders under a misapprehension as to their instructions and so it (sic) on that basis that apparently they are likely to wish to appeal."*

29. Notwithstanding the recent application which had been filed by Family Kalmet on 7<sup>th</sup> April 2014, the conference judge signed the Record of Settlement and entered the judgment in terms of the consent. It is plain that the judge took the view that Family Kalmet is bound by the Record of Settlement which was signed on their behalf at the conference on 18<sup>th</sup> December 2013.

### **Grounds of appeal**

30. Family Kalmet has taken up the course suggested by the conference judge. In the appeal to this Court Family Kalmet seeks to set aside that part of the consent order that notes that David Yam Kalmet accepts that he does not have any direct claim to Emis land (paragraph 3 of the Record of Settlement), and those further parts of the consent order that effectively exclude Family Kalmet from any interest in lots 1 – 16. Family Kalmet is not claiming any interest in the balance of the Breakas lease.
31. The grounds of appeal are detailed and complex. It is not necessary to set them out at length. Written submissions in support of the grounds identified three broad issues raised by the appeal.
32. Issue 1: whether the Supreme Court order dated 11<sup>th</sup> April 2014 (the consent judgment) complied with the 2007 Court of Appeal judgment and directions. It is submitted that the Supreme Court failed to follow the further survey suggestion made by the Court of Appeal, and instead acted on the report of the five-man committee.
33. Issue 2 and Issue 3: Both these issues question whether the Supreme Court took into account the 1972 NHNC judgment when considering and accepting the committee report as the basis of its orders. The submissions on these issues allege conflict of interest and procedural irregularities on the part of the committee

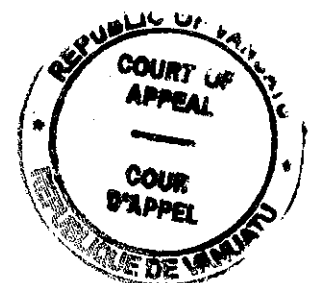


and that the committee failed to apply evidence discussed in the 1972 NHNC decision which Family Kalmet argues supports its claim.

34. In response, the first, second and third respondents contend that the appeal should be dismissed because the appellant's claim is defeated by the 1972 NHNC decision which awarded custom ownership to others, and because they are bound by the Record of Settlement.

## Discussion

35. As the notice of appeal seeks to set aside a consent judgment, a logical starting point is a consideration of the terms of the judgment in so far as they affect the appellant, and the circumstances under which the relevant consent was said to be given. In this case the consent judgment records the settlement between the parties set out in the Record of Settlement. On the face of the Record there is no express term that benefits Family Kalmet. On the contrary, it reads as if Family Kalmet is giving up all claims to custom ownership of land within the Breakas lease for nothing in return. However, that is not the correct analysis of the settlement. The settlement, as the form of acknowledgement attached to the Record states, is "*in resolution of this proceeding*". The effect of the settlement is to release Family Kalmet and the other first defendant in CC64 of 2005 from a very large liability to pay the costs of the long running proceedings to the successful claimants in exchange for the acknowledgment that they have no claim to custom ownership.
36. The record of settlement records a contract that binds Family Kalmet as one of the parties to the settlement. The relevant consent upon which the consent judgment is based is the consent purportedly given on 18<sup>th</sup> December 2013 when the acknowledgment was signed on behalf of Family Kalmet by Mrs. Nari.
37. At the commencement of the hearing of the appeal counsel for Family Kalmet sought to place before the Court information, including oral evidence from Mrs. Nari, about the circumstances in which she signed the acknowledgment. If those circumstances were relevant to the outcome of this appeal, sworn statements should have been filed from all of those people whose evidence was to be relied on. This would likely have led to the Court of Appeal referring the matter of consent back to the Supreme Court so a single judge could hear the relevant witnesses. In a case like this where an issue of consent arises there is likely to be cross-examination of the appellant's witnesses, and possibly evidence in reply from the respondents. The trial judge would have to make findings of fact whether



counsel who gave the consent acted within the authority of the clients at the relevant point in time when counsel purported to give consent: Harvey v. Phillips [1956] 95 CLR 235.

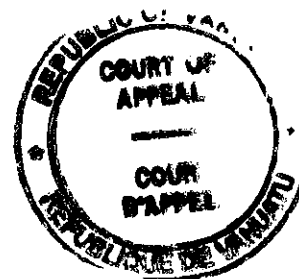
38. However, rather than embark on this course the Court of Appeal directed counsel for the appellant to develop Family Kalmet's case that on the merits of the material before the Court the consent judgment was wrong in so far as it excluded Family Kalmet from custom ownership of any land in the Breakas lease.
39. Unless Family Kalmet can demonstrate such an error, there will be no ground for the Court of Appeal to set aside a judgment which correctly records the legal position, even if there is unresolved doubt about Mrs. Nari's authority to sign the acknowledgment.
40. Counsel confined the merits argument of Family Kalmet to the first issue identified in his written submissions, namely whether the consent judgment complied with the Court of Appeal judgment and directions. The passage in the Court of Appeal judgment relied upon reads:

*"As a starting point for this enquiry a survey plan of the land said to be EMIS is necessary".*

41. Family Kalmet argues that the consent judgment in substance bypassed this starting point because no survey plan was made of the land said to be Emis land.
42. This argument immediately directs attention to why no survey plan was made. The reason appears in the minutes for the conferences of 5<sup>th</sup> August 2013 and 14<sup>th</sup> August 2013. The minutes of 5<sup>th</sup> August 2013 note that all those involved as custom owners have decided that rather than have a new survey plan prepared they would operate off the survey plan attached to the Breakas lease. Family Kalmet was represented at that conference.
43. The minute for the conference on 14<sup>th</sup> August 2013, at which Family Kalmet was represented by Sam Kalmet, after detailed consideration of the 2007 Court of Appeal decision, notes that it is accepted that Emis land comprises all the land in the Breakas lease and that, given this consensus, *"it is unnecessary to have a survey plan undertaken to address the matter raised by the Court of Appeal"*. In short, there was agreement by all parties, including Family Kalmet, that a further

survey was not required because there was agreement that all the land in the Breakas lease was Emis land.

44. General agreement on this point was also recorded in the first paragraph of the findings of the five-man committee set out para. 19 above.
45. The Record of Settlement, and the consent judgment based on it excludes Family Kalmet from any custom ownership interest in lots 1 – 16 not on the basis of the recommendations of the committee, but because there was general agreement that (a) all the land in the Breakas lease is Emis land and (b) that David Yam Kalmet does not have succession rights in Emis land from any person named in appendix "A" to the 1972 NHNC decision.
46. These two fundamental points of agreement were clearly set out in the minute of 14<sup>th</sup> August 2013. The minute was distributed to all interested parties including Family Kalmet at the time but was not challenged as to accuracy.
47. On the hearing of this appeal the Court directed counsel for Family Kalmet to the statements recording these two points. Counsel confirmed that both points are agreed by Family Kalmet. The consent judgment therefore records correctly the legal position of Family Kalmet.
48. As we understand the arguments now being advanced by Family Kalmet in support of their claim to customary ownership in lots 1 – 16, they, in one way or another, are challenging the conclusion reached by the NHNC that custom ownership of Emis land was vested in the sixteen people named in appendix "A". Submissions now made are that evidence before the NHNC, in particular the evidence of the witness Lilly, supports a finding that David Yam Kalmet had an interest in Emis land, a conclusion that is also said to be borne out by evidence that Family Kalmet for decades worked on the land now marked as lots 1 – 16. However as the conference judge noted in the minute of 14<sup>th</sup> August 2013 custom ownership of the Emis land was conclusively decided by the 1972 NHNC decision. The Court of Appeal in 2007 expressly rejected an argument that the 1972 NHNC decision should not be followed because it was not in accordance with custom.
49. As far as the consent judgment excludes Family Kalmet from any interest in the Breakas lease, that is a conclusion which follows directly from the 1972 NHNC decision and from the two agreed facts discussed above. The consent judgment in this respect is correct as a matter of law, and it is not dependent on the report of



the five-man committee. The committee simply noted that to be the position agreed by all those who were participating in the hearing before the committee.

50. The material before this Court discloses no basis whatsoever for doubting the legal correctness of the consent judgment so far as it excludes Family Kalmet from custom ownership rights in the Breakas lease. The judgment reflects the legal position that sooner or later the Supreme Court was bound to declare regardless of the consent of Family Kalmet.
51. The reference of the question of custom ownership to the Pango Village Land Tribunal was pointless. Custom ownership was already decided by the 1972 NHNC decision. The Pango Village Land Tribunal was bound by that decision and had no jurisdiction to reach any other conclusion.
52. The appeal must be dismissed and the ordinary rule that costs must follow the event must apply. The appellants must pay the respondents' costs of this appeal on the standard basis.

DATED at Port Vila, this 25<sup>th</sup> day of July, 2014.

BY THE COURT



Hon. Vincent Lunabek  
Chief Justice.

