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

Civil Case No.114 OF 2005

BETWEEN: MICHEL KALNAWI KALOURAI

Claimant

AND: THE REPUBLIC OF VANUATU

First Defendant

AND: THE MINISTER OF FINANCE AND ECONOMIC MANAGEMENT

Second Defendant

AND: THE MINISTER OF LANDS

Third Defendant

Coram: *Chief Justice Vincent Lunabek*

Counsel: *Jack Kilu for the Claimants*

Alain Obed for the First, Second and Third Defendants

JUDGMENT

Introduction

1. This case concerns a claim by Michel Kalourai on behalf of the Naflak Teufi Tribe of Ifira relating to compensation for land taken by the Government of Vanuatu. The land in question encompasses Vanuatu's main Airport at Bauerfeild Port Vila and other land in Port Vila. It is known as the Marobe land.

2. The Claimants accept the Government's authority to compulsorily acquired the land for public purposes (see Public Land Declaration Order 26 /1981, Article 77 of the Constitution). Their complaint is that the Government have failed to recognise their rights as customary owners of the land and that they have failed to pay the compensation due to the Claimants for the compulsory acquisition of their land. I treat the various defendants as "the Government" in this claim.

3. The Defendants accept that the land in question was acquired by them for public purposes in 1981 under the Public Land Declaration Order 1981. They say compensation has already been paid for the land then taken and the claim must therefore fail. In 1992 an agreement was reached with the Erakor, Pango and Ifira communities regarding compensation and this agreement paid compensation to the Ifira community (amongst others) including for the Marobe Land claimed by the claimants.

Pre-trial issues

4. The Defendants claimed Michel Kalourai (the Claimant) was not entitled to represent the Naflak Teufi Tribe in these proceedings. The Court found otherwise. In a Judgment of 8th November 2008 the Court concluded Mr. Kalourai had standing to bring these proceedings.

5. In November 2005 the Defendants applied to strike out the proceedings as follows:
   a. A claim that the proceedings did not disclose a reasonable cause of action.
   b. That the claim was statute barred by virtue of the Limitation Act [CAP 212].

c. That compensation had already been made to the customary owners by the Government (in 1992) when the land was taken. Any dispute about the compensation was now between the custom owners.

6. In April 2006 the application to strike out the claim was dismissed by the Court. The Court was satisfied there was reasonable cause of action. The Court pointed out that a large part of the claim had not been responded to in the Defendants' pleadings. The claimant had filed a claim in 1999 for a declaration they were customary owners of the Marobe land. This claim was ultimately upheld by the Courts. The Claimant's said their cause of action in this case therefore did not arise until they were finally declared customary owners of the Marobe land by the Vanuatu Supreme Court in 2003, 2 years before this claim was filed. Thus the claim was not barred by the Limitation Act.

   Finally the issue of whether compensation for the land had been previously paid was to be resolved at trial.

Background Facts

7. In 1981 by virtue of the Public Lands Declaration Order number 26, the Government declared certain areas within the Urban Physical Planning Zone of Port Vila would become public land. Compensation was to be made to the customary owners of the land compulsorily taken. Section 9D of the Land Reform Amendment Act 2000 (following the earlier legislation) only allowed for compensation to be paid if the Minister of Lands was satisfied that the person who was to receive the compensation was the "*custom owner of the land*".

8. It was common ground that within the Port Vila Public Land area the custom owners were from the Erakor, Pango and Ifira communities. It was their land that had been compulsorily taken in 1981.The Government began negotiations with these communities in 1992. Settlement was reached and an agreement entered into in 1992. The agreement included payment of compensation to the Ifira community. During the negotiations there were disputes about the boundaries of the land between the Erakor, Pango and Ifira communities and disputes within the communities themselves as to which areas related to which tribes.

9. One such claim involved the Naflak Teufi tribe (the claimants) and the land known as the Marobe Land. This land was in part within the land taken by the Government in the 1981 compulsory acquisition order. In 2003 the Supreme Court settled the customary ownership disputes relating to the Marobe Land along with other land in the area. The Naflak Teufi Tribe were declared the custom owners of parts of the Marobe Land in the Port Vila urban area.

The Dispute

10. The Claimants say that the Government was wrong to proceed to negotiate a settlement in 1992 for compensation with members of the Ifira Community. They say there was disputed customary ownership of the compulsorily taken land at that time. The 1992 compensation agreement should not have been entered into while there was uncertainty about customary ownership of the Ifira Land. The Claimants say they tried to stop the settlement of the dispute and the payment of compensation at this time. They wrote to the Government advising of their dispute and protesting against any settlement before a resolution of ownership. Proceedings were issued by the claimants to try to prevent the

compensation payments being made but the litigation was never pursued and heard.

11. The Claimants say that the compensation payments from 1992 relating to their Marobe Land was paid to others in the Ifira Community. This was in breach of Section 9 D of the Land Reform Amendment Act. Some of those who received the compensation payments were not the customary owners of the land. The Government had been put on notice regarding Naflak Teufi's claim to the Marobe Land but had wrongly proceeded to pay compensation despite the tribe's claim they should not do so. The Claimants say they have now been declared the customary owners of 2,135,125 square meters of land within the Port Vila urban area known as the Marobe Land. They are entitled to compensation for the rent unpaid on the land since 1994 and the capital value of the land taken by the Government in its 1981 acquisition order given they are the declared custom owners of the land. The 1992 settlement agreement, the claimants say did not compensate them as the custom owners for taking the Marobe land.

12. The essence of the Government's case is that in 1992 the Government made a compensation payment to the Ifira community. This was to compensate the whole of that community for all the land taken in the Port Vila Public area. That included the land which is the subject of the current claim, the Marobe land. They say the fact that individual tribes within the Ifira community have now been declared owners of part of land within the Port Vila public area makes no difference to the validity of the compensation paid. If the Claimants considered they were unfairly treated by the wider Ifira community when distributing the funds received from the Government after the 1992 settlement then the claim should have been brought against that community. Finally the Government says

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that a Settlement Deed entered into by the Government and George Kano representing the Claimants and relating to this land settled all such disputes arising from this land in 2004.

Land Rental Claim

13. Part of this claim seeks compensation from the Government for unpaid rent on the Marobe land from 1994 until 2005. I consider this aspect of the claim first.

14. The claimants claim for land rental is based on the declaration by the Supreme Court in 1993 that they were the custom owners of the Marobe land. They submit they were therefore entitled to the land rental. The Government's response is that in 1981 it declared the relevant Marobe land was compulsorily taken. From that time the Government became the owner of the land. Thus the claimants have no right to any land rental payments from the Marobe land from 1981 onwards.

15. The claimants in response to this submission say that the Government did not have rights with respect to the Marobe Land from 1981 onwards because they had not paid valuable consideration for land to the Naflak Teufi tribe and thus did not then "own" the land. They say section 15 of the Land Leases Act provides that an owner's rights are complete only after payment of valuable consideration. Thus the Government's ownership rights were not complete in 1981 or afterwards given no payment had been made to the true owners of the Marobe Land, the Naflak Teufi Tribe at that time or later.

16. I reject the claimants' claim for land rental from 1994. First section 15 of the Land Leases Act has no application to land taken compulsorily by the Government of Vanuatu for public purposes. The Land leases Act is concerned with the creation and disposition of leases of land and their registration. The statute could not by its terms have any application to the compulsory taking of the ownership of land by the Government. Secondly in any event section 15 does not say that the transfer of a leasehold interest is contingent on payment of consideration. And in any event even if the section applied an obligation to pay compensation would be valuable consideration under the Act.

17. I am satisfied the 1981 order declared from that date the Government was the owner of the relevant part of the Marobe land (along with other land). Other than an entitlement to compensation all other rights to that land including the right to land rental for the claimants ended at that date. This aspect of the claim fails.

2004 Deed of Settlement

18. Before considering the claimants' case for compensation I turn to the Government's claim that a Deed of Settlement signed in 2004 by George Kano and the Government settled all disputes relating to compensation for taking of this land. The Government case is that this settlement deed prevented the claimants from suing the Government with respect to the compulsory taking of the Port Vila Land in 1981. Thus, whatever the merits of the claimant's claim for compensation for taking of the Marobe Land it cannot succeed because the 2004 Deed settled all the claimant's claim.

19. I reject the Government's claim as of the effect to the Deed of Settlement. I am satisfied that the Deed of Settlement did not settled any compensation claim for the disputed land.

20. The introduction to the Deed reveals Mr. George Kano's interest in the land. It says:

"Whereas the Efate Island Court on October 28th ,2004 declared that according to custom of Efate the Releasor inherited the customary rights of his late father Pastor George Kano who is the custom owner and representative of the family of late Pastor George Kano who are the custom owners of one part of Marobe Land".

21. The Deed describes how the Government holds rental payments relating to the land, the Government agrees to make payment of the land rentals to Mr. Kano.

22. The indemnity clause in the Deed provides that Mr. Kano indemnifies the Government from any claim which "may hereafter arise out of or in connection with the claims". The Deed may be pleaded as an indemnity in any proceedings "in connection with any of the matters referred to in this Deed". It is this indemnity which the Government submits prevents the current claim before the Court.

23. Even accepting that the Deed of Settlement relates to the Marobe Land the Deed is not concerned at all with compensation for the loss of this land. The indemnity clause is only provided with respect to proceedings where the cause of action relates to rental payments with respect to the Marobe land. The main part of this claim relates to compensation for the value of land compulsorily taken. I therefore reject this argument. The Deed of Settlement does not prevent the claimant bringing these

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proceedings. The Deed may affect any claim for land rentals for the Marobe Land but I have already rejected this claim. (see paragraph 17)

The 1992 settlement and the Compensation claim

24. The fundamental question raised by this claim is whether the 1992 settlement resolved all compensation disputes relating to the Ifira land including the Marobe Land?

    Did the 1992 agreement for compensation between the Government and representatives of the Ifira community (together with the other two communities) covered all land within the Ifira community taken in the 1981 order relating to Port Vila and are the claimants thereby prevented from seeking compensation for the compulsory acquisition of the Marobe land?

25. In **John Kalomtak Wiwi Family -v- the Minister of Lands [2005] VUCA 29; Civil Appeal Case 22 of 2004 (18 November 2005)** a similar issue arose before the Court of Appeal. The Wiwi Family case was also concerned with the 1981 compulsory acquisition order relating to the urban boundaries of Port Vila. The facts were as follows. The Erakor Village was included in the land which was declared public land by the 1981 declaration. Thus custom owners were deprived of their land by virtue of the order. In July 1992 an agreement was reached between the Government and representatives of the custom owners of the Erakor Village. This same agreement, also provided for compensation for land taken belonging to the Ifira community with respect to the urban land around Port Vila.

26. The compensation agreed upon in the 1992 agreement was paid by the Government to the representatives of the Erakor Village. However subsequently the John Wiwi Family claimed it was the custom owner of the Erakor land. The Wiwi Family said that in 2000 Chief Waya Tenene and the Erakor Council Community had confirmed his family was the customary owner of the land.

27. The Wiwi family issued proceedings claiming compensation for the land taken.The Supreme Court rejected the Wiwi Family claim. They appealed.

28. The Court of Appeal concluded as follows:

a. The Government had the power to acquire and hold land
b. In 1981 it acquired the Erakor village land as part of the land compulsorily acquired for the Port Vila urban area.
c. The 1992 agreement was in full settlement of rights to compensation by the custom owners
d. No one challenged the legality or propriety of the compensation agreement at the time
e. The Government of the time paid the compensation to the representatives of those whom it considered lost their land in the 1981 order.
f. There was no fraud or lack of knowledge or understanding of what was happening by the Wiwi Family in 1992 when the agreement was reached.

29. The Court of Appeal therefore confirmed the Supreme Court had been right to strike out the Wiwi Family proceedings against the Government challenging the 1992 agreement for compensation.

30. These proceedings before this Court are effectively identical to the Wiwi family case save for one detail: the fact of objection to the compensation Agreement by the Naflak Teufi Tribe.

31. The 1992 Agreement (clause D) said;

"The Government and the former custom owners acting through their duly authorised representatives had desired of affecting an agreement for compensation for loss of use of the said land in accordance with the said Act".

32. The Agreement then set out the compensation payable.

It said: "As compensation for the loss of use of the said land by the former custom owners prior to the signing of this agreement, the Government pays and the representatives accept, on behalf of the former custom owners (receipt is hereby acknowledge) the sum of VT275.400.000 in final settlement for the said loss payable as follows".

The Agreement detailed the payment to the three communities including to the Ifira community of VT110.160.000 and a similar sum to the Erakor community

33. Finally as to indemnity the Agreement said:

"The representative of the custom owners their issue successors in title and their authorised personal or legal representatives also either appointed or authorised shall indemnify the Government from any claim

that the money has not been properly paid out or further claims by others to such payment or to the said land".

34. The share of the money for the Ifira community was then paid to that community. The July 1992 Agreement therefore provided for full compensation for all the Port Vila land taken to the custom owners. This area included the Marobe Land the subject of this claim. Thus the terms of 1992 agreement appear to settle compensation for the Ifira community for all land taken in the Port Vila urban area.

35. The Court of Appeal noted in the Wiwi Family decision that the Government's compensation for the Ifira community agreement could have been challenged at the time of the 1992 agreement including by Judicial Review. No such challenge was made.

36. Here the Naflak Teufi Tribe did challenge the Government's decision regarding compensation shortly after the 1992 Agreement. The issue for this Court is how does that challenge effect, if at all the Court of Appeal's conclusions in the Wiwi Family case.

37. Vanuatu's Constitution (Article 75) and the relevant Land Reform Acts unsurprising provide that the compensation for compulsory taken land is payable to the custom owners of the land. The Claimants argument is that the Government should not have reached any settlement with the Ifira community in 1992 when there remained outstanding claims before Tribunals or Courts were the custom ownership of the affected land was disputed. This was the basis of their challenge to the compensation agreement in the 1990's.

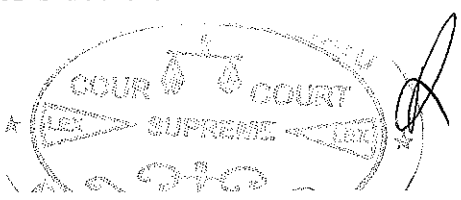
38. Section 1 of the Land Reform Act defines "customary owner" relevantly in this context. While the Act was wholly repealed in 1992 its effect survived given the Act related to compensation for land taken in 1981 and the operation of section 11 (1) (c) of the Interpretation Act (Cap 132). This preserved the Land Reform Act for past events.

Custom owners are there defined as " The personal or persons who in the absence of a dispute the Minister is satisfied are the custom owners of the land".

39. The Minister was authorised to pay compensation to those custom owners. The claimants submitted the Minister had to be satisfied the compensation was paid only to "*properly declared land owners*" I reject that submission. The Minister was free to pay compensation to any organization that he considered represented the custom owners. This is, as the Court of appeal observed in Wiwi Family case what the Minister did relating to the Erakor community.

40. I am also satisfied that this is what the Minister did relating to the Ifira community. The Ifira community in turn had the responsibility to ensure that compensation was divided so that each custom owner (individual group) received their fair share of compensation payable to the community.

41. The Marobe Land case the subject to these proceedings began before the Efate Island Court early in 1993. This was after the 1992 compensation agreement relating to the Ifira Land had been signed. In this detail therefore this case is identical to the Wiwi family case. Here, at the time of the compensation agreement in July 1992 the Claimants had not filed any proceedings before the Island Court claiming custom ownership of the Marobe Land. In those circumstance the Minister's decision as to who



the compensation be paid to cannot be criticised. He identifies the Ifira community as the representative of owners whose land had been compulsorily taken. He entered into a compensation agreement with them. This process was, as the legislation anticipated.

42. Even if the Minister had been aware that some of land within the Ifira community had disputed ownership at the time of the 1992 agreement the Minister was entitled to reach his own conclusion about custom ownership and compensation. Those who wished to challenge the Minister's decision were free to do so in the Courts. Naflak Teufi Tribe did object to the Minister's decision about compensation. They brought proceedings before the Supreme Court. In the end this litigation came to nothing. There was no injunction or other Court Order setting aside the Settlement Agreement nor any order stopping payment of the compensation. I am satisfied therefore that the essential facts of this case are identical to the Wiwi case and this Court is bound by the Court of Appeal's conclusions.

43. The Naflak Teufi Tribe did not have to wait until the Supreme Court confirmed their customary ownership of the Marobe land in 2003 before they brought these proceedings. In any event the order by the Supreme Court in 2003 as to the custom ownership of the Marobe land could only be an historic finding of ownership of the land. The Government had owned the land since 1981, when it had compulsorily taken the land. No doubt the Ifira community were aware before the 1992 settlement that the compensation for the taking of the Ifira community land had been discussed with the Government. They did not have to wait until the 2003 Supreme Court appeal decision regarding the land to bring these proceedings. They were free to bring proceedings at least from 1992 and to pursue them to judgment in the Supreme Court.

44. I therefore reject the claim by the Claimants that their cause of action arose in 2003 only after the Supreme Court issued its Judgment regarding custom ownership of the Marobe Land. As I have noted a claim challenging the compensation agreement did not require as an essential element a declaration by the Supreme Court as to who the custom owners of the land were.

45. The proceedings now before this Court were eventually issued in 2005. This was 13 years after the compensation agreement was entered into and 24 years after the land was compulsorily taken. These delays illustrate that this claim is in any event many years outside the limitation period. It is clearly statute barred. (see section 3(1)(d) of the Limitation Act [CAP 212], actions for recovery of any sum by virtue of any Act must be brought within 6 years from the accrual of the cause of action).

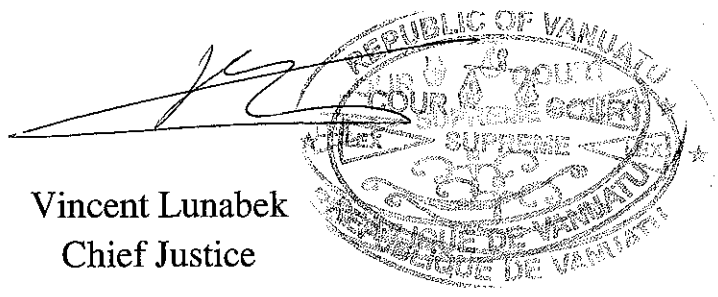
46. More importantly however I am satisfied that at the time of the Settlement Agreement in 1992 the Minister acted lawfully. He complied with his statutory obligation to pay compensation for the land taken in the 1981 order to those he considered were custom owners. I am satisfied that at the time of the compensation agreement the Minister had appropriately reached an agreement with those who represented the custom owners of the land compulsorily taken. I am satisfied therefore the Ifira people including the claimants have already been compensated for the land taken at Port Vila in the 1981 order including the Marobe Land. The Claimant's dispute is in effect a complaint that the Ifira community did not fairly share its compensation with the Naflak Teufi tribe. The settlement entered into by the Ifira people and the Government in 1992 effectively

prevents this claim. For the reasons given there will therefore be Judgment for the Defendants.

Costs

47. The defendants are entitled to one set of costs on the claimants' claim. They should file a joint memorandum identifying the amount of the costs claim within 14 days from this judgment. If the claimants dispute the amount of the costs claim they should file a response within 14 days of receipt of the defendant's costs claim.

DATED in Port Vila this 11th day of December, 2014
BY THE COURT



Vincent Lunabek
Chief Justice