

BETWEEN: FAMILY NGWELE as represented by Sam
Ngwele, Peter Ngwele, Willie Toa Ngwele,
Hollingsworth Ala Ngwele
Claimant

AND: Sale Banivinala
First Defendant

AND: INTENDED TOKATARA AREA LAND
TRIBUNAL as represented by Chief Joseph
Vira Lingi (Chairman), Chief Markson Moli,
Chief Amos Nako, Chief Fredson Talai, Chief
David Manga and Chief Alick Aru
Second Defendant

Coram: Vincent Lunabek CJ

Counsel: Mr Justin Ngwele for Claimant
Mr Bill Bani for First Defendant
Ms Florence Williams for Second Defendant

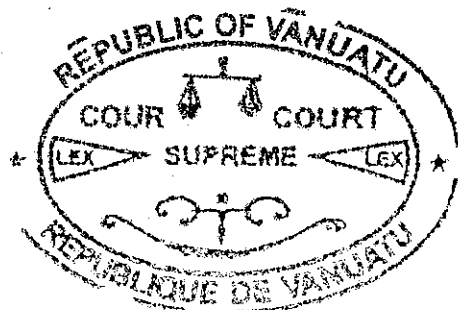
Date of Hearings: 25 -26-27 November 2014

Date of Judgment: 28 November 2014

REASONS FOR JUDGMENT

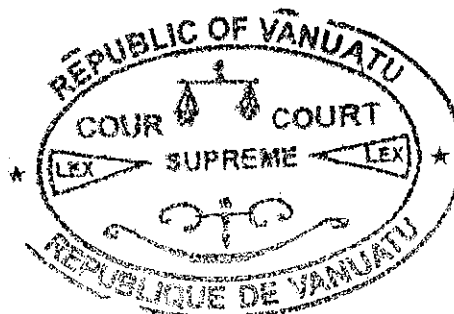
THE CLAIM AND ITS DEFENCES

1. In these proceedings, the claimant filed a claim on 21 June 2014 pursuant to Rule 16.25 of the Civil Procedure Rules of 2002. The claimant claims that Family Ngwele (as represented in the claim) is the declared custom owner of the land subject to the NduiNdui Health Centre and the Mission area pursuant to the decision of Valihai Ward Land Tribunal ("VWLT") dated 14 April 2008.
2. The claimant says that subsequent to the decision of the VWLT of 14th April 2008, there has not been any appeal lodged by the First Defendant within the required appeal period of 21 days. By reason thereof and pursuant to section 33 of the Customary Land Tribunal Act [Cap 271] ("the Act"), the decision of the VWLT is final. However, the claimant says despite the said decision of the VWLT, the First Defendant without the consent of the



claimant entered into an occupied the land declared to the benefit of the claimant.

3. The Secretary of the Second Defendant Intended Tribunal (IT) issued a notice for a meeting to consider the dispute/appeal concerning the land the subject of these proceedings. Following which the claimant applied for a restraining order to restrain the said Tribunal from sitting to hear the appeal of the First Defendant against the decision of the VWLT dated 14 April 2008. That application was refused by the Court.
4. The claimant then filed the present claim seeking for orders to:
 - (i) Enforce the VWLT's declaration dated 14 April 2008; and
 - (ii) Prohibit the First Defendant:
 - (a) from occupying all the custom land within which the NduiNdui Health Centre and Mission area are located; and
 - (b) to remove all structures which he has erected on all custom land within which the NduiNdui Health Centre and Mission area are located.
5. The First Defendant Sale Banivinala was the unsuccessful party to the VWLT's decision of 14 April 2008. He files a defence to the claim on 25 November 2014. He says he denies the claim (at paragraph 7) that without the consent and / or authorisation of the claimant he has entered onto and occupied custom land declared to the benefit of the claimant.
6. He states that according to his lodged Notice of Appeal dated 21st April 2008, no prior consent or authorisation was required from the claimant. He says he has filed a notice of appeal on 21st April 2008 and that he personally hand delivered his appeal to the chairman of the area council of chiefs of West Ambae, Chief Loren Tari on 25th April, 2008.
7. He denies paragraph 11 of the claim that the decision of VWLT is final. He states that VWLT's declaration of 14 April 2008 is not final and binding as there is an appeal pending.
8. The Second Defendant is the intended Tribunal (IT). Ms Florence Williams informs the Court that the Second Defendant filed a defence. The records of the Customary Land Tribunal Management Unit show contradictory information about the existence of a notice of appeal by the First Defendant. However, she says the Second Defendant will abide by any orders of the Court. The Second Defendant is filing a sworn statement of one Godden Arnhatpat of the Customary Land Tribunal Office and will make submissions to assist the Court.



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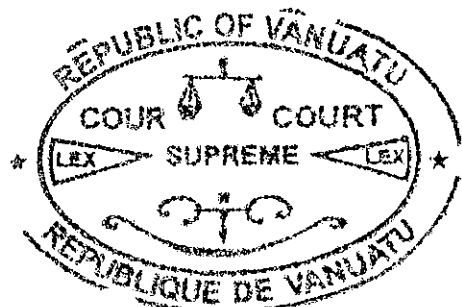
9. There are two issues for court determination. I set them out below.

THE ISSUES:

1. Whether there is a notice of appeal on foot?
2. Whether the notice is valid?

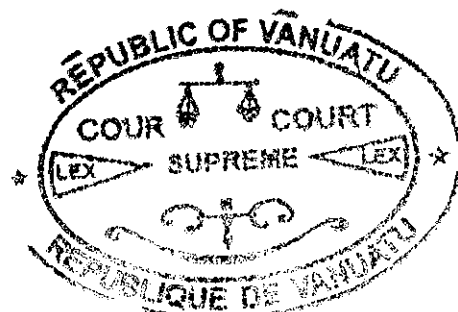
THE EVIDENCE

10. Sam Ngwele files a sworn statement on 19 March 2014 in support of the claim. By consent of Counsel, his sworn statement is admitted. He attached to his statement a copy of the report from the VWLT recording the decision which was signed off by the Chairman and Secretary of the VWLT; a copy of the "*Form blong recordem decision blong Land Tribunal*" signed off by the Chairman of VWLT; a copy of "*Kastom Ona Blong Graon Form*" signed off by the Department of Lands.
11. Other material and correspondences attached to Mr. Ngwele's sworn statement were from Mr. Alicita Vuti, senior Customary Land Tribunal Officer. Most of those are challenged by the First Defendant. Mr. Alicita Vuti is not a witness in this case. Mr. Sam Ngwele could not attest to their truthfulness apart from the basic fact of their existence.
12. Mr. Ngwele deposes that after the decision of the VWLT of 14 April 2008, the First Defendant who was the unsuccessful party was given 21 days to lodge an appeal. He deposes that no appeal was lodged within 21 day appeal period by the First Defendant.
13. The Defence of the First Defendant is supported by 4 sworn statements filed respectively on 25 November 2014 by Jethro Moli, the First Defendant Charlie Banivinala himself, Loren Tari and Jimmy Vuti. They are subject to cross-examination by the other sides.
14. Jethro Moli is the first witness of the First Defendant. He testified that he drafted the Appeal Letter of the First Defendant Charlie Banivinala against the decision of the VWLT dated 21 April 2008. He says he was the spokesman of the First Defendant before the VWLT. He was there when the VWLT gave its verbal declaration in favour of the claimant. He saw that Sale (Charlie) Banivinala was not happy at all with the VWLT's verbal declaration. Charlie Banivinala asked him to draft his notice of appeal. He drafted that notice of appeal on 21st April 2008 and Sale (Charlie) Banivinala signed it on the same date of 21 April 2008. He provided a copy of the notice of appeal he drafted for the First Defendant which was signed by the First Defendant on 21 April 2008. After his cross-examination, his evidence does not shift and remains the same.



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15. Sale (Charlie) Banivinala gave evidence. He says Jethro Moli drafted his notice of appeal against the decision of the VWLT on the 21 April 2008. He signed his notice of appeal on 21 April 2008. He states that he hand delivered his notice of appeal dated 21 April 2008 to Chief Loren Tari who was the Chairperson of the Area Council of Chiefs of West Ambae on 25 April 2008. He provides a copy of his notice of appeal dated 21 April 2008. He gave evidence to the effect that when he hand delivered his notice of appeal to Chief Loren Tari, he informed him that: "Hemia Appeal blong mi agensem decisen blong Valihai Ward Land Tribunal long saed blong NduiNdui HealthCentre mo Mission graon mo mi wantem se area Land Tribunal hemi lukluk long Appeal blong mi". Chief Loren Tari told him that his council will seat and consider his appeal.
16. He says after some weeks, the members of the West area Land Tribunal informed him that his notice of appeal was in order but they informed him that they were seeking advice from Alicita Vuti at the Customary Land Tribunal Office Unit in Vila in respect to his appeal. He mentioned and referred to Joseph Doe (Secretary); Joseph Tagaro (Chairman) and Chief Sakias Fila (Member) as members of the area Land Tribunal.
17. He testified he waited after he filed his appeal from 2008 to 2010 but his appeal was not heard. From 2008 to 2009, he sought assistance from one Gilbert Toko to get his appeal heard but to no avail.
18. In 2010, he sought assistance from one Jimmy Vuti to get the Area Land Tribunal to hear his appeal but again to no avail.
19. He testifies that sometime in 2010 he and Jimmy Vuti contacted Chief Loren Tari while he was in Vila. He says while they had in contact with Loren Tari, he (chief Loren Tari) was meeting Alicita Vuti in Alicita Vuti's Office in Vila in respect to his appeal. He says in 2013 at two different times the Tokatara Area Land Tribunal (IT) tried to deal with his appeal but on both instances the claimant stopped the IT to deal with his appeal against the VWLT's decision of 14 April 2008. Sale (Charlie) does not move from his evidence despite his challenging cross-examination.
20. Loren Tari is the third witness for the first Defendant. His evidence is to the effect that in 2008, he was the chairman of the Area Land Tribunal of West Ambae. He was challenged and he corrected that he was the chairman of the area council of chief of West Ambae but not the area Land Tribunal. He said he received from Charlie Banivinala, the First Defendant his notice of appeal against the decision of the VWLT on 25 April 2008. On 23 May 2008 he had a meeting with the members of the council in which they decided that the notice of appeal of the First Defendant is in order. Thereafter three members of the Council informed the First Defendant of their decision. On the same date of 23 May 2008, he went to the market place and purchased a telephone refill and contacted Mr Alicita Vuti via phone on the same day (23 May 2008). Alicita told him they should wait to deal with the appeal until



he (Alicta) first considered the matter. Loren Tari did not hear anything from Alicta until he (Loren Tari) went to Vila for a medical treatment in 2010.

21. In Vila, Loren Tari went to see Alicta in his office and asked Alicta as to why he told him to wait for him but Alicta never come back to him. He testified Alicta told him to wait when he was in his office, then, he said Sale Banivinala rang him (Loren Tari) to follow up his appeal with Alicta Vuti. He testified that Alicta Vuti told him: "you no talem long Sale Banivinala se you come long office". ("Do not tell Sale Banivinala that you come to his office). Alicta told him to go outside and that he will meet him again the next day.
22. He met Alicta 3 or 4 days later at James Wango's office. He said this time Charlie and Jimmy Vuti phoned him (Loren). Alicta asked him: "who i wring?"(Who was calling you?) He told Alicta: "Sale Banivinala". Alicta told him in language: "Appeal tikei, Appeal tikei" which means ("I no gat apil. I no gat apil"). (There is no appeal. There is no appeal). From that day, he never saw Alicta again until his testimony in Court.
23. Despite a lengthy cross-examination, his evidence does not shift. His evidence is very clear that he was chairman of West Ambae Area Council of chiefs but not the chairman of the West Ambae Area Land Tribunal. He tried to set up the Area Land Tribunal but it was not possible. This old man of 79 years of age is an impressive, honest and reliable witness.
24. Jimmy Vuti is the last witness of the First Defendant. He gave evidence to the effect that in 2010, Charlie Banivinala sought his assistance to advance his appeal against the VWLT dated 14th April 2008.
25. He had contacted Alicta Vuti by phone in 2010 and Alicta told him "Hamas, hamas be mi mas talem se ino gat apil, ino gat apil". ("For how much it takes, I must say there is no apil. There is no apil").

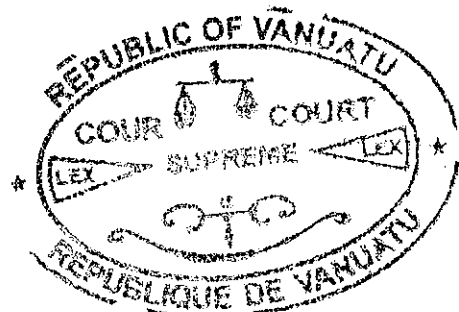
He says Alicta received information by way of emails to say that there is no appeal.
26. The statement of Gooden Arnhapat , on behalf of the Second Defendant, is accepted and is used by the court to the extent of its relevance and reliability.

THE LAW AND ITS APPLICATION

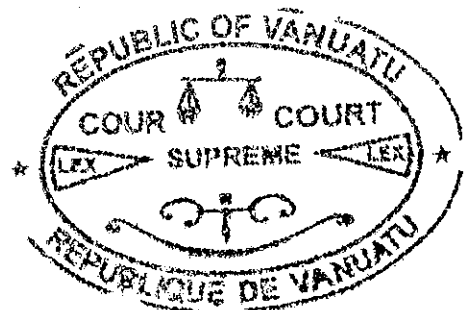
27. I now deal with both issues in turn.

ISSUE 1: Whether there is a notice of appeal on foot?

28. The VWLT is a first instance land tribunal in a customary ward division (like a village level). Its decisions get appealed to the Custom Area Land Tribunal because there is no custom sub-area in Ambae.



29. Section 17 of the Act provides for procedures of appeal to the Custom Area Land Tribunal. It provides (when relevant) for a person who is an unsuccessful party to a village or ward tribunal to give a notice of his appeal within 21 days after the announcement of that decision to the chairperson of the Council of Chiefs of that Custom Area. The notice must be in writing in Bislama, French, English or another language of the person giving the notice; and specify the grounds of appeal; and contain a description, and specify the location, of the land; and the names of the parties in dispute.
30. In the present case, the subject land covering NduiNdui Health Centre and Mission Area is located on the Western part of Ambae. The court is informed by all Counsel and it is not disputed that Ambae is divided into 4 custom areas with their respective area council of chiefs. West Ambae is one of those four custom areas. Loren Tari was the (then) chairman or chairperson of the area council of chiefs of West Ambae from 2008 to 2010. As the chairperson of the council of chiefs of West Ambae custom area, Loren Tari would be the right person to receive or be given any notice of appeal from any unsuccessful party to a first instance (village / ward) Land Tribunal as required by section 17(2) of the Act.
31. The VWLT announced its decision (orally) over the subject land in favour of the claimant on 14 April 2008. Mr. Banivinala, the first Defendant, signed his notice of appeal against that decision on 21 April 2008. He has hand-delivered (given) his notice of appeal to Chief Loren Tari, the Chairperson of the Council of Chiefs of West Ambae Custom Area on 25 April 2008.
32. The First Defendant's notice of appeal is written in Bislama and is against the decision of the VWLT dated 14 April 2008; it specifies the grounds of appeal; it contains a description and location of the land covering Nduidui Health Centre and Mission area ; and it specifies the names of the parties.
33. The original of the notice of appeal could not be shown nor found. Whether it is with the secretary of the intended custom area Land Tribunal or sent to the Customary Land Tribunal Unit in Port Vila, it is now immaterial. The copy of such a notice of appeal is exhibited in the evidence. It was dated 21 April 2008. The crossing out of the initial date of "21 April 2008" on the notice of appeal of the First Defendant and replacing it with the date of "5 February 2010" is an unfortunate action. It is not the making of the First Defendant. I am satisfied on the evidence that 21 April 2008 is the date the notice of appeal of the First Defendant was made. It was signed by the First Defendant on 21 April 2008; and it was hand delivered (given) to Loren Tari, the chairperson of the council of chiefs of West Ambae, the relevant custom area, on 25 April 2008.
34. Mr Moli gave evidence to the effect that the date of "5 February 2010" was put by somebody else but not him (as he drafted the First Defendant's letter



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of appeal) to render the notice of appeal out of the relevant time period. Based on evidence, the date of "5 February 2010" is disregarded.

35. There is overwhelming evidence in support of the case of the First Defendant. I am satisfied that there is a notice of appeal on foot within the requirements of section 17 of the Act. The claimant fails to prove on the balance of probabilities that there was no notice of appeal on foot. I answer to issue 1 in the affirmative (yes). Given the time and the circumstances of this case, the copy of the notice of appeal of the First Defendant dated 21 April 2008 be threatened and used as the Notice of Appeal of the First Defendant to challenge the decision of VWLT of 14 April 2008.

36. I now turn to issue 2.

ISSUE 2: Whether the notice of appeal is valid?

37. The claimant raised the issue of the validity of the notice of appeal of the First Defendant based on two grounds.

38. The First ground is that the First Defendant has signed a hand written letter of appeal dated 4 February 2010. This purported letter of appeal was attached to a letter by Joseph Doe Bani, Secretary of the Area Land Tribunal dated 12 October 2010 to the Land Tribunal Coordinator, Mr Alicita Vuti, (see sworn statement of Godden Arnhambat – GA6).

39. The First Defendant's counsel objected to the admissibility and reliability of the purported letter of appeal of 4 February 2010.

40. I have excluded this letter of 4 February 2010. Mr Godden Arnhambat cannot assist the court with the truthfulness of its contents. Mr Joseph Doe is not called to give evidence either by the claimant nor the first and second Defendants.

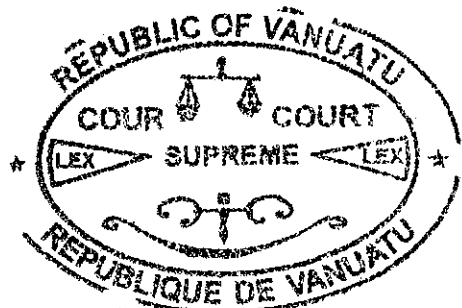
41. The attached letter of appeal is not in accord and does not make sense with the terms and content of the Area Land Tribunal Secretary's letter of 12 October 2010.

42. I set out in full the letter of Mr Joseph Doe Bani, Secretary of the Area Land Tribunal of 12 October 2010 for ease of reference.

*Mr. Joseph. Doe. Bani
C/o SARALOCKAMBU
Nduindui
West AMBAE,*

Wednesday 12th October 2010

To: Land Tribunal Court coordinator



MR. Alecta Vuti
Ministry of Justice Justice
C/o: Malvatu Mauri

**Subject: VALI HAI WOD LAND TRIBUNAL DECISION 14TH APRIL 2008
BETWEEN FAMILY CHARLIE BANIVENEALA -V- FAMILY NGWELE**
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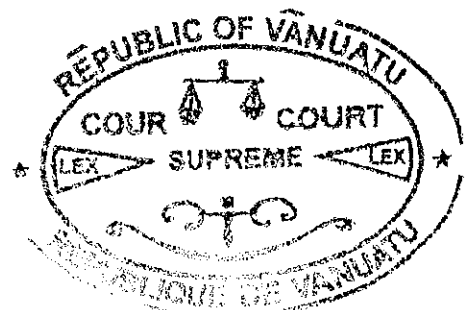
Mi olsem secretary blong area level Land Tribunal we I suppose blong harem appil blong Mr. Charlie, BANIVENEALA concernem decision we Wod Land tribunal (Custom sub area long Land tribunal Act. No. 7 of 2001) I makem long case ia antap.

Letter ia hemi blong confirm se hemi tru, mifala I been recivim appeal letter blong Mr. BANIVENEALA, dated 21 April 2008. Yu save luk mi attachem copy blong appeal letter ia. However due to, some misunderstanding long mifala (AREA Level) mo long Wod Level, Case ia I been stap olsem for over two years.

So mi stap write blong requestem office blong yu blong assessem mo ficilitatem hearing blong APEAL IA.
Thank you,

Joseph. DOE. Bani
(SECRETARY BLONG AREA LAND TRIBUNAL)

43. By the terms of the letter of 12 October 2010, the attached purported letter of appeal dated 4 February 2010 is contrary to the logic and good sense.
44. The court cannot rely on it. It is excluded. As I found, the First Defendant's notice of appeal is the letter of appeal dated 21 April 2008. It was made within the requirements of section 17 of the Act. I reject the arguments of the claimant on this point.
45. The second ground is that the claimant refers to section 18(1) of the Act and submits that because the Chairperson of the council of chiefs of the custom area, Mr Loren Tari, fails to convene a meeting of the council within 21 days after receiving the notice, that failure renders the notice of appeal dated 21 April 2008 invalid.
46. I reject this submission also. Section 18 (1) of the Act does not deal with the validity of an appeal. It does not affect the validity of the notice of appeal of the First Defendants of 21 April 2008. My answer to issue 2 is that the notice of appeal of the First Defendant dated 21 April 2008 is a valid notice of appeal against the decision of the VWLT of 14 April 2008. Section 18 of the Act provides for the chairperson of the council of chiefs of the custom area of the subject land to convene a meeting of the council within 21 days after receiving the notice.



47. The council must establish a custom area land tribunal to determine the appeal. In this case, although, the chairperson of the council convened a meeting of the council of chiefs of the custom area on 23 May 2008, that is 7 days after the 21 days required period, the validity of the First Defendant's notice of appeal is not affected by that failure.

FURTHER BACKGROUND

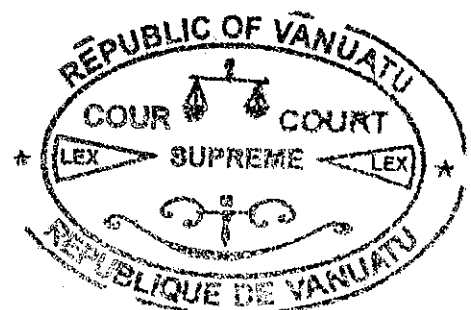
48. I accept that on 23 May 2008 the chairperson of the council of chiefs of the custom area of the subject land convened a meeting of the council and the council confirmed the notice of appeal of the First Defendant dated 21 April 2008 (and received by the chairperson of the council on 25 April 2008) was in order. There seems no doubt on the evidence that a great deal of the evidence of the First Defendant infers interference of the customary Land Tribunal coordinator, Mr Alicita Vuti, causing the delay by the Area Land Tribunal to deal with the First Defendant's appeal. Such evidence is not challenged.

49. I note that on 23 May 2008, Mr Alicita Vuti was contacted by phone by Chief Loren Tari for assistance and advice on the appeal of the First Defendant dated 21 April 2008 (and received on 25 April 2008). The chairperson and members of the council may seek advice to establish the custom area land tribunal after they were satisfied that the notice of appeal of the First Defendant was in order; on the qualifications of the chairperson and members of the tribunal and its secretary; on provision of training before hearing the appeal (see ss. 18, 25, 35, 36, 37, 38 and 40 of the Act). Mr Alicita Vuti told Loren Tari the chairperson of the custom area council of chiefs not to deal with the First Defendant's appeal of 21 April 2008 because he (Alicita) will look at it first and come back to the chairperson and the members of the council. I accept the evidence of Loren Tari, that Mr Alicita Vuti never come back to him until Loren Tari went to Vila in 2010, and met with him to follow up from their telephone discussions of 23 May 2008 about the notice of appeal of the First Defendant and its hearing.

50. I reject the date of 9 June 2008 to be the date of Loren Tari's telephone contact to Mr Alicita Vuti. On the evidence 23 May 2008 was the date of that telephone contact between Loren Tari and Alicita Vuti. The date of 9 June as recorded by Mr Vuti in his written letter of 16 June 2008 must be mistaken. I held that it is so.

51. Under those circumstances, the claim is dismissed in its entirety.

52. The claimant issued proceedings in the Supreme Court as Civil Case No.239 of 2013. The Notice of Appeal was instituted pursuant to section 17 (1) and (2) of the Customary Land Tribunal Act [Cap. 271] (the Act). The Act was repealed by Parliament by the Customary Land Tribunal (Repeal) Act No.34 of 2013 with effect from 20 February 2014. In place of this Act



Parliament enacted the Custom Land Management Act No.33 of 2013 which took effect also on 20 February 2014.

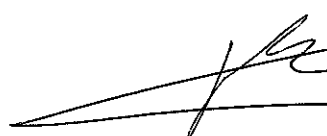
53. As the Notice of Appeal of the First Defendant is currently pending before the Land Tribunal. The disputing parties should adopt the common sense approach to make progress towards having their dispute heard under the Custom Land Management Act. This means that Section 5 (4) of the Custom Land Management Act becomes operational.

COSTS:

54. The First and second Defendants are entitled to his costs against the claimant on the standard basis to be agreed or taxed.

DATED at Saratamata, Ambae this 28th day of November 2014

BY THE COURT


Vincent LUNABEK
Chief Justice

