

***KALOTITI V KALTAPANG [2007] VUCA 25 AND  
RATUA DEVELOPMENT LTD V MATHEW NDAI AND  
OTHERS [2007] VUCA 23: TWO DISTURBING  
CUSTOMARY LAND CASES***

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**INTRODUCTION**

Two recent decisions of the Court of Appeal of Vanuatu demonstrate some serious problems that are becoming increasingly common in Vanuatu nowadays, as persons who are not the true custom owners enter into a lease of land with an innocent third party and then that lease is registered under the *Land Leases Act* [Cap 163]. The decisions in these two cases indicate that there are deficiencies in the legislation so far as protecting the rights of the true custom owners.

***KALOTITI V KALTAPANG***<sup>1</sup>

Although this case is recorded by PacLII later in time than *Ratua Development Ltd v Mathew Ndoi*,<sup>2</sup> it will be considered first in this case note, because it demonstrates a wider range of issues and serves as a prelude to the kind of action which was attempted by the true custom owners, unsuccessfully, to protect their interests in the issues raised by the earlier case.

**Summary of the Facts**

Two ni-Vanuatu, Bruce Kalotiti and David Yam Kalmet, from Pango village near Port Vila, signed a lease whereby they granted to a company a lease of an area of land in Pango village for use as a resort. This lease was registered. On the leased land a resort was built which was called Breakas Beach Resort. Soon after construction on the resort had commenced there was an outcry by some other members of Pango village, that they were the rightful owners of the land that had been leased, and they objected to the lease.

For a period of time construction was obstructed and had to come to a standstill. Civil proceedings were brought in the Supreme Court by seven persons, headed by Kalotiti Kaltapang, who claimed that they were the custom owners of the land which had been leased to Breakas Resort. They sought an order rectifying the lease and replacing the names of Bruce Kalotiti and David Yam Kalmet as lessors and inserting their own names as lessors. They also sought an order that the premium of VT83,000,000 which had been paid to Bruce Kalotiti and David Yam Kalmet be returned and paid to them. The ground upon which the seven claimants claimed that they were the true owners of the leased land was that they were the descendants of some sixteen persons who had been found to be the owners of the land by a New Hebrides Native Court in

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<sup>1</sup> [2007] VUCA 25 <http://www.paclii.org>.

<sup>2</sup> [2007] VUCA 23 <http://www.paclii.org>.

February 1972. The Supreme Court accepted this ground and made the orders sought, including that the names of the claimants be inserted in the lease as lessors in place of Bruce Kalotiti and David Yam Kalmet. The displaced lessors then appealed to the Court of Appeal.

### **The continuing legal validity of a decision of a court made in Condominium times**

The Protocol respecting Hew Hebrides, which was signed by Britain and France in 1918 and ratified in 1922, established a Joint Court and also provided for Native Courts to be established by Joint Regulations. These Native Courts were to have, according to Article 7(A) of the Protocol, jurisdiction over all civil cases 'in which natives alone are concerned.'

In February 1972, a Native Court gave judgment in respect of certain pieces of land at Pango Village called Eluknfalep and Emis. In respect of the first piece of land, Eluknfalep, the Court ruled that it was owned by one person, Kalran. Concerning the second piece of land, Emis, the Court ruled that it was owned by the sixteen persons whose names were set out in the Appendix to the judgment.

The plaintiffs in the proceedings brought in the Supreme Court claimed to be descendants of the sixteen persons named in the Appendix referred to above, and that the lease granted to Breakas resort extended over the Emis land. Bruce Kalotiti and David Yam Kalmet argued that the judgment of the Native Court ceased to be of any legal effect at the time of Independence. It was the legal effect of the judgment of the Native Court which captured most of the attention of the Supreme Court and the Court of Appeal, although neither court accepted the argument of the displaced lessors that the judgment of the Native Court ceased to have effect at the time of Independence.

### **The Court of Appeal decision**

The Court of Appeal relied upon Article 95(2) of the *Constitution* and noted:

In our view it is beyond doubt that decisions of Native Courts that were binding on indigenous custom owners of land immediately before Independence became binding on them after Independence by virtue of Article 95(2) of the *Constitution*.<sup>3</sup>

Article 95(2) of the *Constitution* provides that:

Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom.

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<sup>3</sup> Above n 1.

Certainly the argument that the judgments of courts prior to Independence ceased to have effect at the time of Independence, thus wiping out all existing legal rights and obligations created by such judgments, is not an attractive one. The Court of Appeal went further and said:

The argument that on Independence, a vacuum arose where all rights and liabilities established under the former regime disappeared defies common sense, and is contrary to what happened in fact and in law immediately following Independence. In fact, citizens of the Republic continue to exercise the rights and obligations that had existed under earlier laws.<sup>4</sup>

One may question, with respect, however, whether Article 95(2) of the *Constitution* was the appropriate provision to rely upon for continuing the validity of the Native Courts after Independence. The Native Courts were not established by the Protocol, they were authorised to be established by the Protocol, but they were actually established by Joint Regulations made by the Resident Commissioners acting together. Because the Native Courts were established by Joint Regulations rather than by British or French laws, a more sure legal foundation for the continuing validity of the decisions of Native Courts after Independence would seem to be Article 95(1) of the *Constitution* which provides as follows:

Until otherwise provided by Parliament all Joint Regulations and subsidiary legislation made thereunder in force immediately before the Day of Independence shall continue in operation on and after that day as if they had been made in pursuance of the Constitution and shall be construed with such adaptations as may be necessary to bring them into conformity with the Constitution.

Indeed the Court of Appeal seems to acknowledge this when it noted that:

Article 95 continued all Joint Regulations and subsidiary legislation made thereunder as if made in pursuance of the Constitution, and they remained in force until Parliament replaced them ...to the extent that they were not incompatible with the independent status of Vanuatu, and wherever possible taking due account of custom,<sup>5</sup>

which is clearly a reference to Article 95 (2) of the *Constitution*.

The Court of Appeal seems to have conflated or confused the 'Joint Regulations and subsidiary legislation made thereunder' which were continued in force by Article 95(1), with the 'British and French laws' that continued in force by Article 95(2). In the view of the writer, with respect, the two forms of law are quite different and distinct. In this case, it does not matter very much whether one relies upon Article 95(1) or Article (2) of the *Constitution*, but there might be situations where it would matter which sub-article of Article 95 was relied upon as continuing in legal effect after Independence in respect of a judgment of a court that was made before Independence.

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<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

It must also be said that the four cases cited by the Court of Appeal as authorities to support their proposition that judgments of the courts in Condominium times continued to be of legal effect, even although the courts themselves ceased to exist after Independence, do not appear to lend very substantial support for that proposition: *Andre Colardeau v Jean-Yves Manmelin and others*;<sup>6</sup> *Picardie Holdings (N.H.) Ltd and Johnston v Societe Civile Jean Ratard and others*;<sup>7</sup> *T v R*<sup>8</sup> and *Dinh Van Tho v Etat Francais*.<sup>9</sup> Only one of those four cases, *Andre Colardeau v Jean-Yves Manmelin and others* (above) seems to recognise the continuing effect after Independence of a judgment of a court given before Independence, and the point appears to have been assumed without argument.

It is a pity that Article 95 of the *Constitution* did not contain a provision that expressly referred to judgments and orders of courts and public officials made under Joint Regulations and subsidiary legislation, as well as to the Joint Regulations and subsidiary legislation. The British practice at the time, as demonstrated in the provisions made with regard to the neighbouring country of Solomon Islands, was to continue in force all existing laws, which were defined to include not only Acts of Parliament of the United Kingdom, Orders of Her Majesty in Council, Ordinances, rules and regulations, but also orders or other instruments having effect as part of the law.<sup>10</sup> A similarly worded provision would have put beyond all doubt that judgments of courts given before Independence remained in force after Independence, even after the courts that had issued them no longer existed.

### **Subsidiary issues of interest**

#### *Individual ownership of customary land*

There are some people in Vanuatu today who claim that all land in the country is owned collectively and that there is no individual ownership of land. This was a sentiment that seemed to be to the fore at the National Land Summit in 2006, and indeed a paragraph of the first resolution was so expressed, although it appears that this was subsequently not approved by the Council of Ministers.

The decision of the New Hebrides Native Court in February 1972, which was the subject of discussion by the Court of Appeal in the case which is the subject of this Case Note, and which was upheld as binding by the Court of Appeal, does not support the view that individual ownership of customary land is not recognised or possible in Vanuatu. The decision of the New Hebrides Native Court stated very clearly that ‘Kalran has an *individual right* within the Reserve to such land on Eluknfalep as he or his father have planted or consistently used for gardening’<sup>11</sup> (emphasis added).

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<sup>6</sup> [1980] 1 Van LR 1.

<sup>7</sup> [1980] 1 Van LR 5.

<sup>8</sup> [1980] 1 Van LR 7.

<sup>9</sup> [1981] 1 Van LR 16.

<sup>10</sup> *Solomon Islands Independence Order 1973* (UK) s 2.

<sup>11</sup> Above n 1.

This decision makes it very clear that the concept of individual ownership of customary land was not a foreign concept unknown to the custom of New Hebrides before Independence.

*Document recording individual custom owners should be noted on the register of leases*

The Court of Appeal made what can only be described, with respect, as an excellent suggestion, when it stated:

The identification of the present day custom owners is an essential prerequisite for any order for rectification of the Breakas lease. It is not necessary that each of these people be named as lessors on the Register, but *it is desirable that the Register in some way records or refers to another document which enables the identity of the custom owners beneficially entitled to the profits of the lease to be identified* (emphasis added).<sup>12</sup>

There is at present no legislation requiring that the names of all the beneficial owners of land which is the subject registered lease appear on the lease or the register, or be recorded in any written document that is available for inspection. Very often one finds that ni-Vanuatu sign a lease as lessors on behalf of others, often referred to as Family A or Family X, but with no precise record of who are regarded as falling within that description. This opens up wide opportunities for confusion and uncertainty in the future, leading to acrimony and open hostility and violence and acrimonious disagreement, which may well extend to the lessee who is in no way responsible for the original cause of the confusion. The suggestion made by the Court of Appeal seems to be an admirable way of avoiding such uncertainty and confusion and should be incorporated into legislation so that it is a statutory requirement for the registration of all leases entered into on behalf of others.

*Uncertainty of judgment*

It is not often that a judgment of a court is held void for uncertainty. *R v Fenny Stratford Justices, ex parte Watney Mann (Midlands) Ltd*<sup>13</sup> is one of the few examples of a court judgment held to be void on that ground. It may be that the judgment of the Native Court of February 1972 will face the same fate. The reason is that it is now proving very difficult to determine where the boundaries of the Eluknfalep land and the Emis land lie. As will be discussed in more detail shortly, the Native Court did expressly require that the owners of both pieces of land must clear their boundaries so that they could be marked and measured, but there is no evidence that this was done. Consequently, today there is much uncertainty as to where the boundaries lie. This was an issue that was not considered by the Supreme Court. The Court of Appeal directed that the Supreme Court consider the matter and determine the boundaries. The Court of Appeal added some helpful advice as to how this might be done, but if, at the end of the day, the Supreme Court is not able to determine where the boundaries of the two pieces of land are today, what is to become of the judgment of the Native Court? Is it to be regarded as void and as of no lawful effect?

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<sup>12</sup> Ibid.

<sup>13</sup> [1976] 1 WLR 1101.

*Subsequent requirement not a condition subsequent*

Often when a grant is made by a private person there is some requirement that must later be complied with. For example, a grant of land may be made by a person to another person, and the grantor may state that the grantee must mark out the boundary of the land and pay the outstanding rates and taxes on the land by a certain date. If the grantor does not expressly state what is to happen if the boundary is not marked out and if the rates and taxes are not paid, the question then arises as to whether the grant is to be implied as dependent or conditional upon fulfilment of these requirements. Thus, if the boundary is not marked and the rates and taxes are not paid, the grant fails to take effect. In the case of grants by private persons, it would be quite common to imply that the fulfilment of the requirement is a condition subsequent and if it is not complied with, the grant ceases to have effect, especially if there is a gift over to another person in the case of non-compliance of the requirement by the grantee.

The Native Court, after referring to the individual right of Kalran to the Eluknfalep land, went on to note:

The Court orders Kalran to clear the bush from the area immediately surrounding his coconuts and garden land before 15<sup>th</sup> February 1972 in order that this area may be marked out and measured to avoid disputes.<sup>14</sup>

The court made a similar requirement with regard to the sixteen persons whom it held were the owners of the Emis land. There was no evidence before the Court of Appeal to indicate that Kalran or the others had cleared the bush or that the area had been marked out and measured. Indeed the Court of Appeal was prepared to infer that these things had not happened. However the court considered that this did not affect the order that Kalran had an individual right of ownership of the land:

The 1972 NHNC judgment anticipated that Kaslran, and those other people named in Appendix A who had gardens or copra on the EMIS land would clear their boundaries and that their boundaries would be marked out...There is no evidence that that these events happened, and the inference is that the boundaries were not properly marked out as envisaged by the judgement. In our opinion it does not follow that a failure to mark out the boundaries renders the 1972 judgment meaningless or of no continuing relevance.<sup>15</sup>

The Court of Appeal did not expressly consider whether the requirements as to clearing the boundaries and marking and measuring the areas might be considered to be conditions subsequent, upon which the first order was dependent, so that if they were not complied with, the order as to the ownership of the land would not take effect. Presumably this was not argued by counsel.

If the point had been argued there could be several responses. First, the transaction here was not a grant by a private person but a judgment of a court, and it was more appropriate to interpret the two sentences in the judgment as two separate orders of

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<sup>14</sup> Above n 1.

<sup>15</sup> Ibid.

the court with the first not depending on the second for its validity. Secondly, the second order was clearly ancillary to the first and merely a means for implementing the first, and if it was not fulfilled, it did not mean that the first ceased to have effect, but only that it was more difficult to implement.

*Substitution of successful claimants as lessors*

If persons are able to successfully establish that they are the true custom owners of land that has already been leased by people who were not the true custom owners, what is to happen then to the lease? Is it to be regarded as binding on the true custom owners, or can the true custom owners re-negotiate the terms of the lease? Can the custom owners indeed say that they do not want to lease the land at all, and tell the lessees to leave the land?

This was an issue which did not seem to arise in the proceedings before the Court of Appeal in *Kalotiti v Kaltapang* because the seven claimants apparently wished to be substituted as lessors in the existing lease, and all that the Court of Appeal was concerned about was to ensure that each of the claimants could establish that he or she was a descendant of the sixteen persons named in Appendix A. In fact, this had not been clearly established when the case was before the Supreme Court which was another reason why the case was returned to the Supreme Court, so as to enable that court to properly investigate and determine whether each claimant was in fact a descendant of those sixteen original owners.

However once the claimants are shown to be descendants of the original sixteen custom owners, and so entitled to own the customary land which has been leased, what is to happen if some or all of these newly established custom owners wish to re-negotiate the terms of the lease, in order, for example, to obtain a higher premium or rental, or wish not to have that lease at all? If the resort company refuses to re-negotiate, and refuses to leave the land, can the custom owners then drive the resort company off their land, bag and baggage, as trespassers? Can the true custom owners lodge a caution against the lease to ensure that no further transactions are undertaken with regard to it?

These were the kind of questions that did not arise for decision by the Court of Appeal in *Kalotiti v Kaltapang*, but some of them at least did arise for decision by the Court of Appeal in the next case to be considered in this case note.

***RATUA DEVELOPMENT LTD V MATHEW NDAI***<sup>16</sup>

**Summary of the facts**

The facts of this case and some of the legal issues involved form, as it were a sequel, to the facts and issues of the preceding case.

In this case, a lease of Ratua Island near Santo had been granted to a development company by persons who claimed that they were the true custom owners and the lease was then registered. Subsequently, two persons claimed that they were the true

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<sup>16</sup> Above n 2.

owners of the island, and their lawyers lodged a caution which was accepted by the Director of Land Records and registered against the lease registered by the company on 26 October 2005. They also brought proceedings in the Supreme Court for an order under section 100 of the *Land Leases Act* [Cap 163] to rectify the register by cancelling the lease on the basis that the registration was based upon fraud or mistake.

The lessors then applied to the Supreme Court for an order striking-out the proceedings on the ground that the claimants had not had their ownership of the island confirmed by a customary land tribunal. The Supreme Court declined to strike-out the proceedings for an order rectifying the register, and refused also to order the removal of the caveat. The development company appealed to the Court of Appeal against the refusal to strike-out the proceedings and also the refusal to remove the caveat, but withdrew the first ground of appeal at the hearing before the Court of Appeal, which was left with the issue of whether the caveat should be removed.

### **The Court of Appeal decision**

#### *The removal of the caveat*

Section 93 of the *Land Leases Act* [Cap 163] authorises the lodging of a caution in the following circumstances:

(1) Any person who- (a) claims any interest in land under an unregistered instrument or otherwise; (b) claims a benefit under a trust affecting a registered instrument...may lodge with the Director a caution in the prescribed form forbidding the registration of any person as transferee of, or any instrument affecting, that interest, either absolutely or conditionally.

There were two grounds upon which the Court of Appeal held that the caution did not comply with the above section and thus should not have been accepted by the Director of Land Records, and should therefore be removed. The first of these concerned formal invalidity and the second concerned the lack of interest in the land.

#### *Formal invalidity*

The caution failed to follow the form prescribed by the Act, namely LR Form 19; firstly, because it did not state the names and addresses of the persons lodging the caution as required by the Form, but only stated the name and address of their lawyers; and secondly, because the document did not state, as required by the Form, the appropriate section and subsection of the Act under which the caution was entitled to be lodged. The court commented:

A caution effects a substantial detriment to the rights of a registered lessee. It should only occur when the statutory regime is strictly complied with.<sup>17</sup>

#### *Lack of interest in land*

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<sup>17</sup> Ibid [3].



The more substantial ground upon which the Court of Appeal held that the caution must be removed, and the ground which is of more significance to this case note, is that the court held that the 'interest in land' which is referred to in section 93 of the Act as justifying the lodging of a caution against leased land, does not include custom ownership of the leased land.

The Court of Appeal examined the Act and concluded:

The system of registration and protection of title created by the Act applies to one type of estate in land only, the leasehold estate....It is self-evident from these provisions that the persons whose titles are registered and protected are the proprietors of the leasehold estate in land, that is, the lessees. The Act does not provide for registration of the interests of custom owners of land (most custom land in Vanuatu is not even subject to leases). Nor does it seek to regulate the custom ownership of land. There is indeed no specific place for the identification of lessors in the register. Although we assume that their names are recorded as part of the brief description of the lease in the property section of the register, it is clear that the property section is intended to record and identify the details of the lease, not the lessors. ...We are satisfied that the phrase '*any interest in land*' in s.93(1)(a) must be read as meaning '*any interest in a registered lease*', ie any interest in land under the Act....To read s. 93(1)(a) in the way contended for by the [persons claiming to be the true custom owners] would be to allow cautions to be used in a way which is quite inconsistent with their purpose and the scheme of the Act....We are satisfied that the caution in this case cannot be sustained. ...The caution lodged by the [persons claiming to be the true custom owners] ...registered on 26 October 2006 shall be removed from the register forthwith.<sup>18</sup>

### **Subsidiary issues of interest**

If the custom owners cannot protect their interests against leases which have been registered under the *Land Leases Act* [Cap 163] by way of cautions, what can they do? The Court of Appeal was not called upon directly to decide this question, but it made some observations.

#### *Rectification of register to cancel lease or substitute owner as lessor*

Section 100 of the Act authorises the court to rectify the register where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake, which is the power which the persons claiming to be the true custom owners in *Kalotiti v Kaltabang* (see earlier) were seeking.

However the powers of the court under this section are limited and cannot be exercised so as to affect the title of a lessee for value who is in possession unless the lessee had knowledge of the fraud or mistake, or caused or substantially contributed to it by his own act, neglect or default:

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<sup>18</sup> Ibid [22], [25 – 26], [29]. [33].

100 (1) Subject to subsection (2), the Court may order rectification of the register by directing that any registration be cancelled or amended where it is so empowered by this Act or where it is satisfied that the registration has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the interest for valuable consideration unless such registered proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

Thus the powers of rectification of the register at the request of persons who claim to be the true custom owners are limited: the registered title of a bona fide lessee for value who is in possession and has not contributed substantially to the fraud or mistake cannot be disturbed, and the only remedy is to be substituted as lessor.

As the Court of Appeal observed:

In a case where the title of the registered proprietor of the leasehold interest is not protected by s.100 (2) of the Act, a custom owner claiming to be the party who should be the lessor may have available to him a remedy by way of cancellation of the registration of the lease which shows another person as lessor....In cases where the title of the registered proprietor of the leasehold interest is protected by s.100(2) of the Act, the lease cannot be cancelled, but rectification could nevertheless be ordered under s.100(1) by requiring the removal of the person wrongly named as lessor, and the substitution of the true custom owner.<sup>19</sup>

### *Indemnity*

The *Land Leases Act* [Cap 163] does provide another remedy which may be available to a true custom owner namely compensation, or indemnity. Section 101 of the Act provides that persons are entitled to be indemnified by the Government of Vanuatu if they suffer ‘damage by reasons of: (a) any rectification of the register under this Act; (b) any mistake or omission in the register which cannot be rectified; or (c) any error in a copy of or extract from the register, or from any document or plan ....certified under this Act.’

Section 102 of the Act limits the amount of indemnity that may be awarded, and states that such indemnity shall not exceed ‘(a) where the register is not rectified, the value of the interest at the time when the mistake or omission which caused the damage was made; or (b) where the register is rectified, the value of the interest immediately before the time of rectification.’

This indemnity section provides only for indemnity to the extent of the value of the interest of the claimant. If the word “interest” as it is used in section 102 of the *Land Leases Act* [Cap 163] is to be interpreted in the same way that the Court of Appeal has

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<sup>19</sup> Ibid [31 – 32].

held should be adopted for the word “interest” as it appears in section 93 of the Act, that is interest in the registered leasehold and not ownership of customary land, this would seem to allow for no indemnity to be paid to the custom owner. If that interpretation is adopted, it will mean that, in reality, the only feasible remedy available to a true custom owner will be substitution as lessor.

*What further action should be taken to avoid such situations?*

It is clear that once a bona fide lessee for value is in possession, the only practicable remedy provided by the Act is for the true custom owner to be substituted as lessor, whether or not he or she wishes to be a party to the lease. The Court of Appeal was clearly unhappy about the situation disclosed in this case, which it considered was likely to re-occur. It considered that the provisions of the *Land Leases Act* [Cap 163] were not appropriate in themselves to cope with the problems arising from leases being granted by people who are not the true custom owners of the land that has been leased:

In all of this we are not unmindful of the problems which exist and which we anticipate will escalate when leases are registered having been granted by persons asserting that they are the custom owners and thus able to be lessors but where there is a serious dispute and challenges as to their position. It is not going to disappear and requires action. Using processes created to deal with lessee rights and interests to cover the problems of lessors is unsustainable.<sup>20</sup>

There are a number of different suggestions that could be considered to try to avoid the situation that arose in this case, for example, public notice on land that is to be leased and in nearby public places as well as in provincial and area offices to alert possible custom owners; a waiting period after the signing of a lease before it takes effect; a requirement that only custom owners who have had their ownership confirmed by an island court or a customary land tribunal can make grants of leases.

*Tardiness in the Land Records section of the Department of Lands*

Finally, the Court of Appeal drew attention to the fact that the caution which had been lodged with the Director of Land Records and registered by him on 26 October 2005 was clearly not in the form prescribed by the *Land Leases Act* [Cap 163] and that this was the second case in the current sessions in which the court had discovered that cautions had been accepted and registered, although they were not in accordance with the Act, the earlier case being *Inter- Pacific Investment Ltd v Sulis*.<sup>21</sup> The court noted:

This case is the second with which we have dealt in these sessions which has demonstrated that the Director has been significantly failing to scrutinize cautions lodged to ensure that the prescribed form is properly completed and that a claim of the type required by s.93 (1) is made. The caution provisions are an important and an integral part of the Act. The proper functioning of the system requires that they are rigorously complied with.<sup>22</sup>

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<sup>20</sup> Ibid [34].

<sup>21</sup> [2007] VUCA 26 <http://www.paclii.org>.

<sup>22</sup> Above n 2 [35].

## CONCLUSION

These two decisions of the Court of Appeal demonstrate some interesting, but disturbing, facts:

- (i) The granting of leases by persons who are not the true custom owners is a not an uncommon occurrence in Vanuatu, and is likely to become more prevalent.
- (ii) It is likely to be very difficult, if not impossible, to determine the boundaries of land that was adjudicated before Independence.
- (iii) The *Land Leases Act* [Cap 163] does not permit the true custom owners to lodge a caution against a registered lease granted by persons who are not the true custom owners.
- (iv) A lease which has been granted by persons who are not the true custom owners and which has been registered, may be cancelled or amended where the registration has been obtained by fraud or mistake, but not so as to affect the title of a lessee who has acquired the lease for value and without notice of such fraud or mistake, and who has not caused or substantially contributed to that fraud or mistake. This means that a registered lease can be amended to include the names of the true custom owners as lessors, but the lease itself cannot be cancelled, unless the lessee had knowledge of the fraud or mistake or caused or contributed to them.
- (v) It seems doubtful that the true custom owners can claim any indemnity or compensation from the Government if a lease granted by persons who are not the true custom owners is registered.

Every effort therefore must be made to ensure that leases are granted only by persons who are the true custom owners. This will require some changes to legislation and to administrative practices in the Department of Lands.