

**BETWEEN:**

**WEST TANNA AREA COUNCIL LAND  
TRIBUNAL  
REPRESENTED BY CHIEF NAKAT  
KILAPAPIN, JOHNNY NIMAU, NAKAU  
IARAU, IOTIL RAPRAPIR, BOB MARAI**  
Appellants

**AND:**

**NATMANING NATUMAN  
NAKOU NATUMAN, KODNY NATUMAN,  
NISIKAPIAL TUAKA, JOHN IARAMAPEN ,  
JAMES YOKAOAIU**  
Respondents

**Coram:**

*Hon. Chief Justice Vincent Lunabek  
Hon. Justice John Mansfield  
Hon. Justice Oliver Saksak  
Hon. Justice Nevin R. Dawson  
Hon. Justice Edwin Goldsbrough*

**Counsel:**

*Mr Justin Ngwele for the Appellants  
Mr Willie Jack Kapalu for the Respondents*

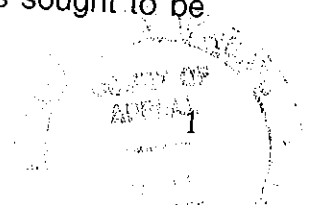
**Date of hearing:** 22<sup>nd</sup> November 2010

**Date of Judgment:** 3<sup>rd</sup> December 2010

## **REASONS FOR JUDGMENT**

### **Introduction**

1. This appeal raised important issues about the appropriate parties to an appeal to the Supreme Court from the decision of West Tanna Area Council Land Tribunal (the Land Tribunal). The Land Tribunal made under the Customary Land Tribunal Act No.7 of 2001 (the Act).
2. This appeal also raised the question about the role of the Land Tribunal when a claim is made to the Supreme Court under s.39(1)(a) of the Act. That also is important. The Land Tribunal is necessarily a party to such an appeal because it is the order of the Land Tribunal which is sought to be

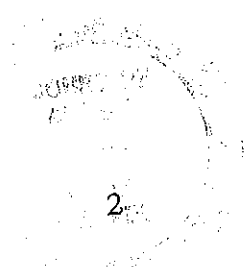


set aside. However, as the primary decision maker, the Land Tribunal most commonly will indicate that it will simply accept the Supreme Court decision and will not take an active part in the proceeding. It will then not be vulnerable to any costs order or incur costs by participating in the proceeding. It might of course endeavour to assist the Supreme Court by ensuring the Supreme Court is properly informed about the issues, its procedures, and its reasons for its decision: see the discussion about that role in **R v. Australian Broadcasting Tribunal; ex parte Hardiman** (1980) 144 CLR 13 at 30.

3. The important point is that the Land Tribunal can adopt that limited role once the proper parties are before the Supreme Court.
4. It is necessary to explain how the issues arise.

### **Background**

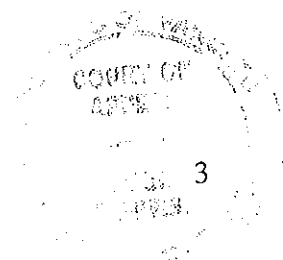
5. This is an appeal against part of the ruling of Fatiaki J dated 29<sup>th</sup> July 2010 in which the primary judge declined to strike out the claim as against the second named respondents.
6. The case arose as a result of the decision of the West Tanna Area Council Land Tribunal issued on 29<sup>th</sup> May 2009 that Taniwanu land belonged to Nakou lawha of Louniparu. The Land Tribunal held that Natmaning Natuman of Lousinganu was the losing party.
7. There followed a claim for Judicial Review, amended on 24<sup>th</sup> September 2009, seeking two orders that-
  - (a) The decision of the Land Tribunal dated 29<sup>th</sup> May 2009 be quashed; and
  - (b) Costs of and incidental to the proceeding be awarded to the Claimants.
8. The persons named in the amended Judicial Review Claim were-



- (a) Natmaning Natuman, Nakou Natuman, Kodny Natuman, Nisikapial Tuake, John Iaramapen and James Yokaoaiu as Claimants;
  - (b) The Attorney General as First Defendant; and
  - (c) West Tanna Area Council Land Tribunal represented by Chief Nakat Kilaplapin, Johnny Nimau, Nakau Iaraum, Lotil Raprapir and Bob Morai as Second Defendants.
9. The Claim for Judicial Review was filed pursuant to Section 39(1)(a) and (2) of the Act. The Grounds relied upon as summarised were-
- (a) The Land Tribunal lacked jurisdiction to hear and determine the dispute.
  - (b) There were irregularities in the procedures requiring service on the Claimants as lessors and lessees, and on over 100 inhabitants on the over 400 hectares of land in dispute, in breach of the Act; and
  - (c) The Claimant Natmaning Natuman had already been declared custom-owner of part of the land by the Native Court.
10. Upon those grounds the Claimants sought orders that the decision of the Land Tribunal be cancelled.

#### **Application by Solicitor-General**

11. Before the Judicial Review proceeding was heard, on 13<sup>th</sup> October 2009 the Solicitor General filed an application seeking orders that-
- (a) The Judicial Review Claim dated 24<sup>th</sup> September 2009 be struck out in relation to all but the first-named Claimant;
  - (b) The Claim be struck out against the Attorney-General as First Defendant;
  - (c) The Claimants pay the Attorney-General's costs of the application.
12. At a further hearing on 14<sup>th</sup> October 2009 counsel agreed to file and serve submissions on the preliminary issues as follows-
- (a) Who are the proper parties to an application invoking section 39 of the Act?



- (b) What is the appropriate court procedure or process for invoking section 39?
- (c) Is the Attorney General an appropriate party to a section 39 proceeding? And what is the meaning and effect of Rule 17.4 of the Civil Procedure Rules read with Section 5 of the Government Proceedings Act No.9 of 2007?

### **Ruling of 29<sup>th</sup> July 2010**

13. On 29<sup>th</sup> July 2010 the primary judge considered and ruled on the three preliminary issues as follows:-

- (a) In relation to parties, that the Claimants (now Respondents) were proper parties to the application. It is not necessary to indicate in detail the reasons of the primary judge for reaching that conclusion. That is because, as these reasons indicate, there was material relevant to that question which was not before the Court. The order rescinding leave to appeal which we make is not based on any view that the conclusion of the primary judge was not correct.
- (b) In relation to process, the most appropriate procedure or court process for invoking section 39 of the Act is by way of a claim for judicial review pursuant to Part 17 of the Civil Procedure Rules.
- (c) In relation to the Attorney-General, that the Attorney-General need no longer be joined as a party but that he could continue to act as counsel on behalf of the Land Tribunal.

The Attorney-General was then removed as the first Defendant.

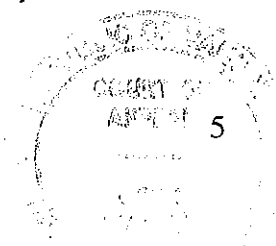
14. The Attorney-General on behalf of the Land Tribunal then sought Leave to Appeal on 10<sup>th</sup> August 2010 from that ruling, confined to the refusal to remove all the Claimants (now Respondents to this appeal) as parties other than Natmaning Natuman, who was accepted to be a proper party because he was described in the Land Tribunals' decision as the losing party. Leave was granted on 3<sup>rd</sup> September 2010. Thereafter the Notice of Appeal was filed on 11 October 2010 seeking orders that-



- (a) Part of the Ruling of the primary Judge dated 29<sup>th</sup> July 2010 in which an order to strike out the all but one of the Claimants as parties was declined be set aside;
  - (b) In lieu thereof, the Claim be struck out as against all but the first named Respondent (Claimant) Natmaning Natuman; and
  - (c) The Respondents pay the costs of the appeal.
15. The ground of the appeal was that the learned primary judge had misinterpreted section 39 of the Act by failing to give proper effect to the word "party".

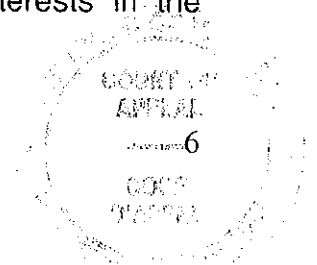
### **Appeal Hearing**

16. At the outset of the hearing of the appeal the Court inquired from counsel as to-
- (a) Who the parties were before the first level tribunal; and
  - (b) How the tribunal was constituted?
17. The material before the Court did not clearly address these two issues. Counsel for the Respondents informed the Court from the Bar table that there had been no proceeding in a Village Tribunal and that Natmaning Natuman was the only party at the Land Tribunal other than the successful person Nakou Yawha. The Court noted the Custom Owner Declaration Form on which the Land Tribunal declared Nakou Yawha as custom-owner of Taniwanu land. However he was not a party to the dispute. The Court noted also that Jack Natmaning Natuman is the registered proprietor of leasehold title No.14/2213/005 which apparently covers all or part of the land in dispute and that Nakou Ienatum, Kodny Iaramapen, Nisikapial Tuaka, James Yokaoaiu, and Imaelone are lessees of that land from Jack Natmaning Natuman. From the material, John Iaramapen and James Yokaoaiu were not present at the Land Tribunal hearing on 28<sup>th</sup> May 2009.
18. On a judicial review application under s.39 of the Act, clearly the parties should include the person or persons in whose favour the Land Tribunal made an order for custom ownership. This is because the judicial review



application might adversely affect those persons' interest. In this instance, that is Nakou Yawha. In that way, there is a party taking one position before the Court and another party taking the opposite position so the Court is best placed to make a just decision. That also means the Land Tribunal can adopt a neutral position, as discussed above.

19. The parties should also include any other persons who were parties to the dispute when it first arose. The first notification of a dispute under the Act is given under section 7 of the Act by the person or group of persons who have the dispute about the ownership or boundaries of custom land. That will lead to a single village or joint village land tribunal hearing. It makes a decision. Although it is not explicit, obviously all "parties" to the dispute are expected to participate, so the dispute is resolved fairly. Any party to the dispute may appeal to a custom sub-area land tribunal, or to a custom area land tribunal, under Parts 3 & 4 of the Act (depending on which Part applies). Those decisions may then be appealed so an island land tribunal, whether it is hearing an appeal under s.23 or rehearing it under s.24 must give notice to the parties to the dispute under section 25, and give all parties to the dispute the chance to be heard under section 27.
20. The term "the parties to the dispute" is not defined. Clearly any person to the initially-notified dispute will be a party. The term is not intended to be a restrictive one. Otherwise it would not be consistent with the way the various tribunals are to operate. However, especially because section 27 provides for all parties to be given a full and fair hearing, it is clear that the "parties" may include any party whose proper interests may be affected by the resolution of the dispute. Those parties will depend on the circumstances of the particular case. In certain circumstances, as the primary judge observed, those persons may include persons who under custom law may have an interest in the land in dispute even though they are not named in the original notice of dispute.
21. As the primary judge also observed, apart from the parties to the dispute in relation to customary land, there may be others with interests in the



customary land granted under the Land Leases Act [CAP.163] or in some other way. If their interests were potentially adversely affected by a decision of Land Tribunal, they may be entitled to have those rights preserved if they are recognised by section 79 of the Constitution of the Republic of Vanuatu.

22. In this matter, as the primary judge pointed out, it is not clear whether Jack Natmaning Natuman (presumably the same person as Natmaning Natuman) who apparently holds a lease over some 150 hectares of the land in issue, granted by Nakou lenatum and 5 others, is a party to the dispute and so entitled to participate in the hearing before the Land Tribunal. Nor is it clear who the 5 other persons are, or whether they or Nakou lenatum are, or were named as parties to the dispute. It is not clear whether the Respondents other than Natmaning Natuman are, or were named as, parties to the dispute.
23. In those circumstances, the Court intimated that it may withdraw the leave to appeal from the ruling of 29 July 2010 because the question raised by the appeal would necessarily be answered in a possible factual vacuum. The original notice of dispute and the identity of any persons who appeared, or were given the opportunity to appear, at any of the four levels of decision-making provided for by the Act, will primarily indicate who are the parties to the dispute.
24. Both Counsel acknowledged that, in the circumstances, that was an appropriate course of action. Counsel were not able to refer to the original notice of dispute or to indicate how the Land Tribunal came to consider the matter.
25. In light of those matters, the Court did not consider that the substantive appeal should progress beyond this point. Instead the Court considered that the leave to appeal granted by the primary judge on 3<sup>rd</sup> September 2010 should be withdrawn so that proper material could be given to the primary judge.



26. For the reasons given, and as acknowledged by both counsel, the Court rescinded the leave to appeal granted on 3<sup>rd</sup> September 2010. The effect of that order is that there is no appeal on foot for the Court to hear and determine. There was no order as to the costs of the appeal.
27. The matter will be returned to the primary judge for further management.

**DATED at Port-Vila this 3<sup>rd</sup> day of December 2010**

**BY THE COURT**

  
.....  
**Hon. Vincent Lunabek CJ**

  
.....  
**Hon. John Mansfield J**

  
.....  
**Hon. Oliver Saksak J**

  
.....  
**Hon. Nevin R. Dawson J**

  
.....  
**Hon. Edwin Goldsbrough J**