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

CIVIL APPEAL NO. 19 OF 2011

BETWEEN: **CHIEF JEAN MARIE VATU MOLMATAK TAFTUMOL and LUCIEN VATU**
Appellants

AND: **LOYROR LIN**
First Respondent

AND: **FAMILY TURA**
Second Respondent

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice Bruce Robertson
Hon. Justice J von Doussa
Hon. Justice Daniel Fatiaki
Hon. Justice Robert Spear

Counsel: Mr Robert Sugden for the Appellants
Mr Saling Stephen for the First Respondent
Mr Collin Leo for the Second Respondent
Mr Tom J Botleng for Pierrot Vatu and Victor Andre
Mr F Laumae Kabini in person
Mr Jimmy Karven in person (as a party interested in Land Claim No. 4 of 1992)
Mr N Morrison for James Tari
Mr J Ngwele for Government of Vanuatu

Hearing: 16 & 17 November 2011
Decision: 25 November 2011

JUDGMENT

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[1] The appellants seek leave to appeal to the Court of Appeal challenging orders made in the Supreme Court sitting in Santo on 12 December 2007. The appellants concede long delay but contend that it is in the public interest for the Court of Appeal to rule on and clarify a host of issues that have arisen in the litigation

involving different generations of the Taftumol Family in respect of the ownership and management of their custom land.

[2] Central to much of the dispute is who amongst the Taftumol Family should be conducting litigation arising out of Land Case No. 4 of 1992 which was commenced in the Santo/Malo Island Court.

[3] Before turning to the application now before the Court of Appeal it is necessary to identify the relevant participants in the Taftumol Family and to set out important parts of the background history.

The Taftumol Family

[4] In reciting the following family history we adopt names as they appear in the pleadings. With one exception chiefly titles to which the participants may be entitled are not used as they do not appear in the pleadings. In taking this course, we intend no disrespect to those concerned.

[5] In 1992 when Land Claim No. 4 of 1992 was commenced the paramount chief of the Taftumol Family was Chief Pierre Vatu Dakaru Taftumol. He was at that time an old man. He had three sons Loulou (Louis), Jean Marie Vatu and Lucien Vatu. In the Land Case No. 4 of 1992 Louis, as the eldest son, spoke on behalf of the Taftumol Family.

[6] A decision in Land Case No. 4 of 1992 was handed down on 14 June 1995. The various parties interested in the case promptly appealed against the decision to

the Supreme Court. The appeal proceedings are titled Land Appeal Case No. 4 of 1995.

[7] Long delays occurred before steps were taken to ready the appeal for hearing. These delays were beyond the control of the parties. By 2005 the Supreme Court was giving directions for the preparation of papers so that the appeal could proceed. By then Louis had died but Chief Pierre Vatu Dakaru Taftumol was still alive. His surviving sons Jean Marie Vatu and Lucien Vatu asserted in 2005 and still assert that they are the appropriate people to represent the Taftumol Family and should be recognized by the Courts as the family members with the paramount right to control litigation through all levels in the Court system.

[8] However, three grandchildren of Chief Pierre Vatu Dakaru Taftumol asserted a similar right. The grandchildren concerned were Pierrot Vatu (the son of Louis deceased), Victor Andre and Jean – Paul Angelo.

[9] After the decision in the Land Case No. 4 of 1992 was delivered, the grandchildren established the Taftumol Land Trustee as a vehicle to receive and distribute income from custom lands owned by the Taftumol Family. That Trustee is named as a party in some of the subsequent litigation, but it is now common ground that because of rifts which have developed within the family, the trustee is now defunct and no longer of any relevance.

[10] In late March 2005 Chief Pierre Vatu Dakaru Taftumol died. The title of paramount chief passed to his eldest remaining son Jean Marie Vatu. More recently the grandson Pierrot Vatu has also died. Presently, one side of the family dispute is

lead by Jean Marie Vatu and Lucien Vatu (the sons). The other side is lead by Jean-Paul Angelo and Victor Andre (the grandsons).

Land Appeal Case No. 4 of 1995 and subsequent Litigation

[11] Land Appeal Case No. 4 of 1995 was instituted and managed in the Santo Registry of the Supreme Court.

[12] An appeal to the Supreme Court is an appeal by way of re-hearing under section 22 of the Island Courts Act [Cap 167]. It is not merely a review: see Simeon Tula and Family v Jeffrey Weul and Others [2010] VUCA (Decision delivered 3rd December 2010).

[13] Section 22 as it read at the time Land Appeal Case No. 4 of 1995 was instituted provided:

> *"22. (1) Any person aggrieved by an order or decision of an island court may within 30 days from the date of such order or decision appeal therefrom to-*
>
> > *(a) the Supreme Court, in all matters concerning disputes as to ownership of land;*
> > *(b) the competent magistrates' court in all other matters.*
>
> *(2) The court hearing an appeal against a decision of an island court shall appoint two or more assessors knowledgeable in custom to sit with the court.*
>
> *(3) The court hearing the appeal shall consider the records (if any) relevant to the decision and receive such evidence (if any) and make such inquiries (if any) as it thinks fit.*
>
> *(4) An appeal made to the Supreme Court under subsection (1)(a) shall be final and no appeal shall lie therefrom to the Court of Appeal.*
>
> *(5) Notwithstanding the 30 day period specified in subsection (1) the Supreme Court or the magistrate's court, as the case may be, may on application by an appellant grant an extension of such period provided the*

application therefore is made within 60 days from the date of the order or decision appealed against".

[14] Section 22 (4), as will be seen, presents a problem for the present appellants.

[15] The three family groups who were contesting customary ownership in Land Case No. 4 of 1992 were the Taftumol Family, the Loyror Lin Family, and the Tura Family. Each of these family groups participated in the appeal. No issues emerged about the representation of the Loyror Lin Family or the Tura Family in Land Appeal Case No. 4 of 1995 or in subsequent litigation. However, by 11th March 2005 conflict in relation to the representation of the Taftumol Family surfaced between the sons and grandsons. Up until then Mr Felix Kabini and Mr James Tari had appeared several times on behalf of the Taftumol Family at conferences before Justice Saksak who was managing Land Appeal Case No. 4 of 1995 in Santo. Mr Kabini and Mr Tari had been instructed by the grandsons.

[16] On 11th March 2005 Mr Sugden on behalf of Chief Pierre Vatu Dakaru Taftumol forwarded a letter to the Santo Registry with a request that it be brought to the attention of Justice Saksak who had listed a further conference for 14th March 2005. Mr Sugden said he was acting for Chief Pierre in respect of <u>his</u> appeal (emphasis in the letter). The letter said Chief Pierre objected to junior family members attempting to take over family assets and asked that the appeal not be conducted by anyone other than himself. The letter went on to advise that Chief Pierre was about to commence proceedings against the grandsons, Taftumol Land Trustee, Mr Kabini and Mr Tari seeking damages from the grandsons for injurious falsehood and various restraining orders against them, and also orders against Mr

Kabini and Mr Tari restraining them from continuing to act for the Taftumol Family in Land Appeal Case No. 4 of 1995. The letter was before Justice Saksak when the conference occurred on 14th March 2005.

[17] On 14th March 2005 Justice Saksak made orders directing the filing of appeal books, further grounds of appeal and submissions.

Paragraph 5 of the orders provided:-

"The Taftumol Family be represented solely by Mr Kabini and Mr Tari of Trans-Melanesian Lawyers".

[18] On 16th March 2005 notice of this order was given to Mr Sugden, and he was advised by Mr Kabini that Justice Saksak had not accepted the submissions made by him in his letter of 11th March 2005.

[19] On 23rd March 2005 Mr Sugden on behalf of Chief Pierre commenced Civil Case No. 43 of 2005 in the Port Vila Registry of the Supreme Court. The proceedings named the three grandsons as the first three defendants, the Taftumol Land Trustee is the fourth defendant, and Mr Kabini and Mr Tari as the fifth and sixth defendants. The Statement of Case pleaded so called injurious falsehood claims against the first four defendants. The allegations included that they had taken over control of Chief Pierre's lands and assets; had entered into contracts granting rights to a third party to quarry gravel and coral and had facilitated quarrying on Taftumol Lands; had granted logging contracts on Taftumol Land; and had accepted compensation moneys for the compulsory acquisition of Taftumol Land. The Statement of Case then turned to the activities of Mr Kabini and Mr Tari whilst acting for the grandsons in matters affecting Taftumol Land. In particular it alleged

that they had acted for the first four defendants *"in pursuit of interests which (they) knew or ought to have known are not the interests of the other defendants"*, including in Land Appeal Case No. 4 of 1995. The reliefs sought included a claim for damages for injurious falsehood and for various declarations against the first four defendants to the effect that they had no rights in respect of Taftumol Lands, and against the fifth and sixth defendants orders requiring them to cease acting for the first four defendants in the Land Appeal Case No. 4 of 1995.

[20] Civil Case No. 43 of 2005 was apparently served on all defendants. On 3rd April 2006 the proceedings were listed for conference. Nothing had been filed by any defendant at that stage. Mr Tari appeared at the conference saying he acted for all defendants; he would be filing a defence and counter claim. By this time Chief Pierre had died and Jean Marie Vatu was substituted as claimant.

[21] No defence or counter claim was filed but on 7th August 2006 an application was made on the defendants' behalf by Mr Kabini to strike out the action.

[22] A further conference was called by the Court to consider the strike out application on 10th August 2006 but no defendant attended.

[23] On 26 October 2006 requests for judgment against all defendants were filed on the claimants' behalf.

[24] On 13th April 2007 a default judgment was entered against the first four defendants.

[25] Further conferences took place on 24th April 2007 and 25th April 2007 before Justice Bulu who had the management of the file in the Port Vila Registry. On this occasion Mr Kabini appeared, and informed Justice Bulu of the order made by Justice Saksak on 14th March 2005. This led to the conference being adjourned to 17th May 2007. No defence was filed on behalf of any defendant but on 16th May 2007 Mr Kabini wrote to the Port Vila Registry (and presumably provided a copy to Mr Sugden) withdrawing the strike out application. This caused Mr Sugden to obtain from Justice Bulu on 16th May 2007 a default judgment against Mr Kabini and Mr Tari.

[26] The terms of the two default judgments are important. As against the first four defendants the order read:

> " *The FIRST, SECOND, THIRD and FOURTH DEFENDANTS, having been served with the Supreme Court Claim and Response form herein and having failed to file a Response within 14 days or a Defence within 28 days after service of the said documents upon them, default judgment is entered against each and every one of them for the following orders:-*
>
> *(i) That they pay to the Claimant, damages for injurious falsehood, such damages to be assessed*
>
> *(ii) That none of them has any right of control or disposition over any land, money or thing on the basis that the land, money or thing belongs to the Taftumol family*
>
> *(iii) That each and every one of them is restrained from entering Taftumol lands without the Claimant's written permission*
>
> *(iv) That each and every one of them is restrained from exercising or attempting to exercise any power or control over any lands on the basis that the lands are Taftumol lands and is also restrained from representing that they have such power or control*

(v) That each and every one of them is restrained from exercising or attempting to exercise any power or control over any chose in action, money or thing that belongs to the Taftumol family and is also restrained from representing that they have such power or control

(vi) That each and every one of them forthwith deliver up to the Claimant or his lawyers; any land, money or thing that is the property of the Taftumol family.

(vii) That a date shall be set for the assessment of damages."

[27] As against Mr Kabini and Mr Tari the default judgment read:

> *"UPON READING the Sworn Statements of Service of Leiwia Leikarie Dick dated 17 May 2005 and 11 May 2007, proving to the satisfaction of the Court, personal service of both the Supreme Court Claim herein and Response Form, on each of the Fifth and Sixth Defendants, and neither of the Fifth and Sixth Defendants having filed a Response or a Defence, it is ordered that there be Judgment for the Claimant against the Fifth and Sixth Defendants in the following terms:-*
>
> *1. The Fifth and Sixth Defendants are hereby restrained from acting directly or indirectly for the first four Defendants or any of them, or upon their instructions in any matter, whether Court proceedings or not, that has any direct or indirect connection with lands, money or things that are claimed to belong to the Taftumol Family, in particular, to cease acting in respect of or in connection with Land Appeal Case No. 4 of 1995.*
>
> *2. The Fifth and Sixth Defendants pay the Claimant's costs to the date hereof of this action save for costs properly attributable to the other Defendants, the costs to be taxed if not agreed."*

[28] We return later in this judgment to discuss the validity of these default orders, and the conduct of the lawyers involved Civil Case No. 43 of 2005.

[29] On 13th June 2007 proceedings in Civil Case 43 of 2005, and the default judgments, were brought to the attention of Justice Saksak for the first time, and then in proceedings unrelated to Land Appeal Case No. 4 of 1995. With commentable restraint his Lordship observed:

"This is the first time my Court has ever been informed about Civil Case No. 43 of 2005 and it is regrettable that while the [grandsons] have opted to run their case in Luganville where they ordinarily reside, the [plaintiff in CC 43 of 2005 has] opted to ran a different proceeding with the same issues before another Judge. This is "judge-shopping" at its best and parties should be encouraged to adopt the common sense approach and agree to have the two proceedings consolidated into one and to proceed before only one Judge of their choice. But we can't have two Judges dealing with the same issues in two separate proceedings."

[30] No steps were taken by Mr Sugden or the sons to apply to Justice Saksak to reconsider the representation of the Taftumol Family in Land Appeal Case No. 4 of 1995 or to reconsider paragraph 5 of the order made on 14th March 2005.

[31] In the latter half of 2007, several conferences were called by Justice Saksak in the management of Land Appeal Case No. 4 of 1995. Notices were given as to hearing dates and as to the appointment of assessors to sit with the Court as required by s. 22 (2) of the Island Court's Act. The hearing date for the appeal was set for 12th December 2007.

[32] On 12th December 2007 the appeal case came on for hearing before Justice Saksak and two assessors. The Taftumol Family was represented by Mr Kabini, the

Loyror Lin Family by Mr Saling Stephens, and Tura Family by Mr Hilary Toa. After discussion in open Court about an issue identified by each counsel relating to the composition of the Island Court, a short adjournment was ordered. When the Court resumed counsel informed the Court that they were agreed that the appeal should be allowed by consent. The Court then made two orders, being the orders now under challenge before this Court.

[33] In the first order, the appeal was allowed by consent, the judgment of the Santo/Malo Island Court made in 1992 was set aside, and the land claim was referred back for rehearing before a differently constituted Court with a direction that the Court sit within 30 days. The other order, also made by consent read:

"*1. Family Taftumol shall continue to be represented by Chief Jean-Paul Angelo Taftumol and Chief Victor Andre Moltures.*

2. Until determination of the land dispute by the Santo/Malo Island Court, the parties, members of their respective familys, their agents, servants, workmen or ANY OTHER PERSON are restrained from carrying out any major development in the disputed land including issuing new leases and sub leases and creating any tenancy."

[34] . Land Case No. 4 of 1992 was reheard by the Santo/Malo Island Court and a decision was handed down on 26 August 2011. All dissatisfied parties have again appealed. All parties to the land case are parties to the new appeal either as appellants or respondents. The appeal is an appeal by way of rehearing.

[35] The grandsons represented the Taftumol Family in the rehearing of Land Case No. 4 of 1992.

[36] To complete the history, we record that Mr Sugden and the sons have escalated the family dispute to a new level by instituting contempt proceedings against all the grandsons and Mr Kabini and Mr Tari for non compliance with the default judgments entered against them, and Mr Kabini has countered by bringing contempt proceedings against Mr Sugden and his clients for instituting Civil Case No. 43 of 2005 and for attempting to interfere with the conduct of the Land Appeal Cases.

Jurisdiction of the Court of Appeal

[37] The Appellants' application for Leave to Appeal assumes that the Court of Appeal has jurisdiction to hear their substantive complaints about the Supreme Court Orders made on 12 December 2007. We consider the jurisdiction of this Court before dealing with the application for Leave to Appeal.

[38] The starting point must be s. 22 of the Island Court Act, and in particular s. 22 (4). The evident intent of the Island Courts Act is that questions of customary ownership of land will be decided in the first instance by an Island Court constituted by a Magistrate and by justices who by reason of their chiefly status and knowledge in custom will ensure that relevant custom is applied. That philosophy is maintained in s. 22 as the Supreme Court hearing an appeal in a matter concerning a dispute as to ownership of land will sit with two assessors knowledgeable in custom. The purpose of s. 22 (4) in providing both that the decision of the Supreme Court is

'final', and that no appeal shall lie to the Court of Appeal is to protect the decision of the Supreme Court both from general review by other Courts or public authorities, and from an appeal to the Court of Appeal. This double protection must be construed so as to further the philosophy that decisions about custom land ownership will be made by a Court which includes members relevantly knowledgeable in custom. However, to gain that protection a decision of the Supreme Court must be one made by a properly constituted bench of the Supreme Court exercising the jurisdiction given by s. 22.

[39] The terms of s. 22 (4) of the Island Courts Act plainly prevent an appeal to the Court of Appeal: see Matavare v. Talivo [2010] VUCA, decision delivered 30th April 2010. However, the Appellants seek to avoid the prohibition in s. 22 (4) by submitting that the Supreme Court did not properly exercise its appellant jurisdiction under s. 22. In support of that submission the Appellants refer to Family Molivakarua v Family Worahese [2011] VUCA, decision delivered 8th April 2011. Both these decisions of the Court of Appeal require careful consideration.

[40] In Matavare v Talivo the appellants sought leave to appeal against a decision of the Supreme Court given in a Land Appeal matter. The appellants sought to raise a number of errors in the Supreme Court going to findings on the merits of the claim. The Court of Appeal held that such an appeal from the Supreme Court was prohibited by s. 22 (4). However, evidence advanced by the parties established a case of apprehended bias on the part of the presiding Supreme Court Judge which by law disqualified the Judge. The Court of Appeal held that in those circumstances the jurisdiction of the Supreme Court to hear the appeal had not been validly invoked.

The purported hearing that preceded the Supreme Court's decision was a nullity. In reality the appeal had not been heard at all by a validly constituted bench of the Supreme Court. The Court of Appeal held that whilst it could not entertain an appeal it could in the exercise of inherent jurisdiction declare that the appeal jurisdiction of the Supreme Court had not been validly exercised. The Court of Appeal so declared and directed that the Island Court proceed to hear the appeal.

[41] In Molivakarua v Worahese the Court of Appeal at [20] said that by misreading s. 3 (1) of the Island Courts Act the Supreme Court had fallen into error and therefore *"did not properly exercise its jurisdiction in this respect"*. At first glance, this passage could suggest that an error of law arising from the erroneous construction of a statute would be a sufficient ground for the Court of Appeal to declare that the Island Court had not properly exercised its jurisdiction, thus rendering the decision a nullity. The Appellant's submissions sought to expand these remarks of the Court of Appeal to suggest that any error of law by the Supreme Court would mean that the Supreme Court had failed to exercise its jurisdiction under s. 22.

[42] The remarks of the Court of Appeal in Molivakarua v. Worahese must be understood in the context of the facts of that case. It has been necessary for us to go back to the original Supreme Court file for that purpose. The land in question in that matter was on Malo Island. The Appellants in the Supreme Court appeal were the respondents in the Island Court. They complained that the Island Court decision in favour of the Molivakarua Family was wrong on the merits as findings of fact were made by the Island Court against the weight of the evidence and which were not in

accordance with Malo custom. The grounds of appeal did not allege that the Island Court was wrongly constituted because its members did not have the knowledge required by s. 3 (1) of the Island Court's Act. The grounds of appeal merely postulated that the errors about Malo custom made by the Island Court were contributed to by the members of the Court not being familiar with the particular customs in the area of the subject land.

[43] When the appeal came on for hearing in the Supreme Court there was a challenge to the validity of the constitution of the Supreme Court on the ground that one of the assessors had a conflict of interest. That challenge was rejected, and is not presently relevant. The presiding judge then directed attention to the meaning of s. 3 (1). Without embarking on a consideration of the complaints about the findings of the Island Court set out in the notice of appeal, the Supreme Court ruled that the Island Court was not properly constituted as the justices who comprised the Court did not meet the requirements of s. 3 (1) as to knowledge in custom, and on that ground set aside the Island Court decision.

[44] The Court of Appeal held that the Supreme Court Judge had misread s. 3 (1) and, contrary to his view, the Island Court was properly constituted. It is against this background that the Court of Appeal said that by misreading s. 3 (1) the Supreme Court had fallen into error and "*did not properly exercise its jurisdiction in this respect*". In reality the Supreme Court had failed to embark on a consideration of the grounds of appeal, and had completely failed to exercise its appellate jurisdiction. The grounds of appeal advanced by the appellant had simply not been the subject of a hearing.

[45] Molivakarua v. Worahese, like Matavare v. Talivo, are exceptional cases, and must be recognized as such. They lend no support to the proposition that the inherent jurisdiction of the Court of Appeal recognised in Matavare v. Talivo will be exercised when the Supreme Court has made an error of law in the consideration of an appeal. The inherent jurisdiction (perhaps more properly classified as supervisory) will be enlivened only where the jurisdiction under s. 22 of the Island Courts Act has not been exercised, and the appeal in reality has not been heard.

The application for leave to appeal

[46] As s.22 (4) of the Island Courts Act provides that an appeal does not lie to the Court of Appeal from a decision of the Supreme Court, that prohibition cannot be circumvented by bringing an application for leave to appeal. The application for leave to appeal in this case must be dismissed for that reason.

[47] The supervisory jurisdiction of the Court of Appeal recognised in Matavare v. Talivo is not a remedy that arises by way of appeal, but by way of direct intervention by the Court of Appeal. A party seeking the exercise of this power must apply direct to the Court of Appeal. However we again emphasize that it will only be in exceptional cases that the Court of Appeal will entertain such an application.

[48] It must also be emphasized that the grant of a declaration is a discretionary remedy. In the case of the supervisory jurisdiction, the Court of Appeal is not likely to favourably exercise its discretion where there has been delay on the part of the party seeking to challenge the validity of the Supreme Court decision, and is not

likely to do so where other parties have already acted on the decision under challenge in ways that cannot be easily reversed.

Alleged jurisdictional failures

[49] Mr Sugden's clients, the sons, contend that the Supreme Court on 12 December 2007 erred in assuming jurisdiction to determine the appeal from the Island Court by making the consent orders under challenge. Those grounds are as follows:

Ground 1:

The presiding judge erred in law in proceeding to hear and determine the Appeal when to his knowledge, the Taftumol Family were represented by two men Jean Paul Angelo and Victor Andre who were doing so in contempt of a Judgment against them in Supreme Court Civil Case No. 43 of 2005 and not by authorized representatives of the Taftumol Family.

Ground 2:

The presiding judge erred in law and in fact in deciding that the two men were the authorized representatives of the Taftumol Family, against the claim of Appellants that they were the authorized representatives and should conduct the Appeal, without hearing the Appellants and with no jurisdiction to decide that issue.

Ground 3:

The presiding judge erred in law in ordering that "*Until determination of the land dispute by the Santo/Malo Island Court, the parties,... or ANY OTHER PERSON... are restrained from .... Issuing new leases and subleases and creating any tenancy.....*" when he had no jurisdiction to make this Order and made it contrary to

the power given to the Minister of Lands under Section 8 of the Land Reform Act in respect of disputed land.

Ground 4:

Part only of the land subject to the Island Court decision dated 14th July 1995 was under appeal in Land Appeal Case No. 4 of 1995, and the Supreme Court had no jurisdiction to set aside declarations of custom ownership which were not under challenge.

[50] Before addressing these grounds individually, we record what happened in the Supreme Court on 12th December 2007. The Land Appeal was called on before a properly constituted bench of the Supreme Court comprising a Supreme Court Judge and two assessors which the Court had appointed. The appeal was called. Counsel appeared for each of the three parties, Taftumol Family, the Loyror Lin Family and the Tura Family. Counsel appearing for the Taftumol Family was Mr Kabini in accordance with paragraph 5 of the orders made by Justice Saksak on 14th March 2005. Those orders were still in force, and no application had been made by the sons to Justice Saksak to recall or reconsider that order.

[51] Included in grounds of appeal filed by the parties, was an allegation that the Magistrate presiding at the hearing of Land Case No. 4 of 1992 was related to the wife of the principal member of the Tura Family, that she was the owner of a plot of land in the area claimed by the Tura Family, and that her brother was also the owner of land within the claimed area. These assertions were affirmed by affidavit from the Tura Family. Each of the counsel drew the Court's attention to these matters

which were not in dispute, and which demonstrated an interest in the proceedings which disqualified the presiding Magistrate from sitting on the case.

[52] The Supreme Court adjourned the matter for a short time, and when the Court reconvened, all three counsel indicated their view that the decision of the Island Court had to be set aside because of the interest held by the presiding Magistrate, and to this end indicated that they each consented to an order dismissing the appeal. The Court thereupon made the two consent orders now under challenge.

[53] The thrust of the submissions to this Court made by Mr Sugden on behalf of the sons is that the outcome of the hearing on 12th December 2007 could have been different had the Taftumol Family been represented by the sons, not by counsel appointed by the grandchildren. As the disqualifying interest held by the presiding Magistrate plainly rendered the decision of the Island Court invalid, nothing which different counsel for the Taftumol Family could have said could have altered the position.

[54] The Supreme Court had embarked upon the hearing of the Land Appeal, and the consent orders were made by it in exercise of the jurisdiction given to it under s. 22 of the Island Courts Act. The appeal was determined on its merits, namely that the decision was rendered invalid by the presiding Magistrate's disqualifying interest in the proceedings. This is not a case where there has been a failure on the part of the Supreme Court to exercise its appellate jurisdiction.

[55] We turn now to the particular grounds of appeal.

[56] Ground 1 alleges that the presiding Judge in the Supreme Court erred in law when he knew that Mr Kabini was appearing for the Taftumol Family in contempt of the default judgment made in Civil Case No. 43 of 2005. There is a threshold problem. Whilst the presiding Judge had learned about the default order in other proceedings on 13th June 2007, he had on that occasion been informed that an application was on foot to set aside the default judgments. Thereafter he was given no further information about Civil Case No. 43 of 2005. Mr Sugden and his clients cannot be heard to complain that the Supreme Court heard Mr Kabini when they had failed to make application to the presiding Judge to recall the order made on 14th March 2005, or to give him any further information about the status of the default judgment.

[57] Had they done so, it can be assumed that the presiding Judge would have given careful consideration to the default judgment against Mr Tari and Mr Kabini, and in particular that he would have considered the validity of the default order.

[58] The default order on its face had been obtained in contravention of Part 9 of the Civil Procedure Rules No. 49 of 2002. Those rules make provision for a judgment in default of a defence on a claim for a fixed money amount, or on a claim for damages, in which event the Court has power to enter judgment for damages to be assessed. Part 9 makes no provision for entering judgment in default on claims of any other kind. Part 9 makes provision for obtaining a summary judgment, but an application for that purpose would require the claimant to file affidavit evidence sufficient to establish the claimant's entitlement to judgment.

[59] The default judgment against Mr Kabini and Mr Tari was plainly bad on its face, and provided no ground upon which the Supreme Court should not have heard Mr Kabini, particularly as the order made on 14th March 2005 directing him to represent the Taftumol Family remained in force. There is no substance in the first ground of alleged jurisdictional error.

[60] We also consider there is no substance in the second ground of alleged jurisdictional error. If Mr Sugden and the sons were dissatisfied with the order made on 14th March 2005 it was open to them to apply to Justice Saksak to recall the order. Absent any such application, the Judge was entitled to manage the appeal having regard to the order directing Mr Kabini and Mr Tari to conduct the appeal on behalf of the Taftumol Family.

[61] Further, the assertion in the second ground of alleged jurisdictional error that the Supreme Court was without jurisdiction to decide who should represent the Taftumol Family is not correct. The Supreme Court plainly has jurisdiction to manage the conduct of a matter before it, including dealing with questions as to the representation of parties. For the reasons already canvassed, the Judge in this case was not to know that Mr Sugden and the sons were continuing to challenge the authority of Mr Kabini to conduct the appeal. Had an application been made to him to reconsider the question of representation, a question may then have arisen whether the jurisdiction to decide the custom issues necessary to resolve the Taftumol Family dispute lay with the Supreme Court in its appellate jurisdiction under s. 22. or whether the issue was one that had to be referred back to an Island Court to resolve

in exercise of the special jurisdiction given to Island Courts under section 10 of the Island Courts Act to administer the customary law prevailing within the territorial jurisdiction of the Court. However it is not necessary for us to decide that question in this case. It is sufficient for present purposes to note that the issue was not a live one before the Supreme Court on 12th December 2007.

[62] The third ground of alleged jurisdictional error concerns the scope of the injunctive order made by consent which bound besides the parties and their agents "*any other person*". It is contended that the Court lacked jurisdiction to make this order as it was contrary to the power given to the Minister of Lands under section 8 of the Land Reform Act. It is correct that the Minister is given the power of management over land the subject of a custom ownership dispute. However, s.8 does not give the Minister an absolute discretion to make whatever management decision the Minister thinks fit. The Minister's exercise of the managerial powers are subject to review by the Courts and, where appropriate, the Court has jurisdiction to restrain the Minister from acting in a particular way. This ground is without substance.

[63] The fourth ground of alleged jurisdictional error must fail because the Island Court, on account of the disqualification of the presiding Magistrate, was not properly constituted. It could not therefore make any order that had validity. Even though there may not have been a challenge by way of an appeal against some part of the subject land, the whole of the judgment was invalid and all findings made in it are inevitably of no validity.

[64] The four grounds of alleged jurisdictional error are not made out. As we have indicated, in this case the Supreme Court was exercising the jurisdiction given to it by s. 22 and in our opinion no appeal can lie against the orders made on 12th December 2007 by reason of s. 22 (4) of the Island Court's Act. The fact that the orders were made by consent cannot alter that conclusion.

The conduct of the lawyers

[65] We consider that the conduct of the lawyers involved in Land Appeal Case No. 4 of 1995 and in Civil Case No. 43 of 2005 calls for comment and disapproval by this Court. As Justice Saksak observed when he was first made aware of the default orders in Civil Case No. 43 of 2005, the lawyers in the course of these proceedings engaged in quite unacceptable *"judge-shopping"*. The grandsons sought to prosecute their interest through the Supreme Court Registry in Santo whereas the sons sought to prosecute their competing interest through proceedings in the Supreme Court Registry in Port Vila. Both common sense and good professional conduct required the lawyers for the parties to ensure that the parties engaged in one venue to ensure that the issues between them were properly ventilated before the one Judge.

[66] In the contempt proceedings brought by Mr Kabini, it is alleged that Mr Sugden and his clients were guilty of contempt in issuing Civil Case No. 43 of 2005. We do not think that the fact of issuing those proceedings constituted a contempt. The proceedings covered a wide range of issues that were not before Justice Saksak in Land Appeal Case No. 4 of 1995. To raise those issues, separate proceedings were necessary. However, the serious mistake of the claimants and their lawyer in

Civil Case No. 43 of 2005 was not to bring the proceedings immediately to the attention of Justice Saksak in so far as they sought orders which conflicted with the representation order he had made on 14th March 2005, and in failing to ensure that appropriate steps were taken to apply to Justice Saksak to review that order. The defendants in civil case 43 of 2005 and their advisors are also to be criticized for their arrogant disregard of the obligations which rested on them to respond to the service of the proceedings on them, and thereafter to attend at the conferences called by the Judge managing the proceedings in Port Vila.

The contempt proceedings

[67] We record that a measure of common sense descended on the lawyers involved during the hearing before this Court, and in the result Mr Sugden acknowledged that the default judgments obtained by him in Civil Case No. 43 of 2005, save for the judgment for damages to be assessed against the first four defendants, were improperly obtained and are invalid. We record that he indicated that the proceedings alleging contempt of the default judgments in Civil Case No. 43 of 2005 were therefore withdrawn. We also record that Mr Tari and Mr Kabini indicated that in those circumstances they too withdrew their proceedings for contempt. It is to be hoped that the important issues within the Taftumol Family can now be more rationally addressed.

The recent Appeal from the Decision in Land Case No. 4 of 1992

[68] As we indicated earlier in this judgment, there is now on foot a new appeal from the decision handed down in the Island Court on 26th August 2011. The appeal will be by way of re-hearing, and all those claiming interests in the subject land have

the opportunity to present their claims on their merits. The issue of representation of the Taftumol Family may again arise. If it does, which members of the Taftumol Family should speak for the Family either personally or through an appointed lawyer, is a matter to be determined according to custom. It is important that where a question of representation of a family interest in a land case arises that it be properly determined according to law. If necessary the hearing of the appeal will have to wait determination of the custom issues.

[69] The determination of custom rests with the Island Court exercising its jurisdiction under section 10 of the Island Courts Act. We consider that where a dispute as to representation of a family interest arises in a land case, that dispute must be brought before the Island Court if the family members are unable to reach agreement. The Island Court will comprise justices knowledgeable in custom as required by the Act, and will take into account evidence of custom which the parties placed before it. This will involve a separate application to the Island Court, and the justices who comprise the Island Court on this application should not sit as justices on the land case to avoid any possible suggestion of conflict or perceived bias arising from involvement in both matters.

[70] If members of the family are then dissatisfied with the representation order made by the Island Court, they can appeal. Under s. 22 the appeal will be made of the Magistrates Court. The decision of the Magistrates Court will be final and binding on the parties. The land case can then proceed with the family represented in accordance with the ultimate representation order.

Conclusion

[71] We consider that the grounds of alleged jurisdictional error advanced by Mr Sugden and his clients fail. The Supreme Court on 12th December 2007 was properly exercising its appellate jurisdiction. In any event, even if we were of the opinion that the Supreme Court had fundamentally failed to exercise its appellate jurisdiction on 12th December 2007 we would not declare that the orders made that day were invalid. To do so would put in question the validity of the re-hearing of Land Claim No. 4 of 1992. Interested parties have been through the re-hearing, and the new decision is now subject to an appeal where those parties that are dissatisfied still have the opportunity to argue their claims.

Costs

[72] There remains the question of the costs of the parties. No doubt considerable costs have been incurred for no good purpose in Civil Case No. 43 of 2005. Costs in those proceedings are not before this Court, but should any party seek costs in those proceedings the observations of this Court will no doubt be taken into account.

[73] On the present application now before the Court of Appeal, the so called appellants have failed on every ground, and subject to hearing the parties on the question of costs, we consider the Loyror Lin Family and the Tura Family should obtain their costs in this Court. Other parties who have appeared before this Court did so as they had indirect interests in the outcome. Because of their presence before the Court, it was possible for those involved in the contempt proceedings to commit to their withdrawal. That is a benefit for them. Our tentative view is that there should be no order in this Court as to costs either for or against Mr Sugden, Mr

Kabini, Mr Tari, Jean-Paul Angelo and Victor Andre. Mr Jimmy Kaven and the Government of Vanuatu are not parties to the present application. Whilst they were present in Court during the hearing, they took no part in it. Again, it is our tentative view that there should be no order for costs for or against them. We will hear the parties should any of them seek an order for costs which differs from our tentative view.

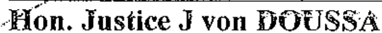
[74] For the foregoing reasons both the Application for Leave to Appeal and the application to invoke the supervisory jurisdiction of the Court of Appeal are dismissed.

DATED at Port Vila, this 25th day of November 2011

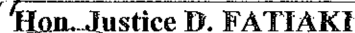
BY THE COURT

Hon. Chief Justice V. LUNABEK

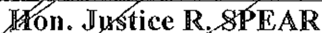
Hon Justice B. ROBERTSON



Hon. Justice J von DOUSSA



Hon. Justice D. FATIAKI



Hon. Justice R. SPEAR