

BETWEEN: BARAK SOPE, KALPOKOR KALSAKAU, NATOIKA
TAIWIA, TAPALU LAURU, PETER TULANGI,
IETONGA AYONG, KIRKIR BAKOKOTO, VIRASEN
BAKOKOTO, EDDIE KALPUKAI, KALTAKI LABAN,
JEFFREY TOKATAAKE, TOM KALSAL, TARILASI
SAUREI, JOSEPH SAUREI and WILLIE LOKIN
Appellants

AND: TEIRIKI PAUNIMANU MANTOI KALSAKAU III,
MASSING LAURU, KALPOVI MANGAWAI, BUTUA
BAKOKOTO, CHARLEY AIONG, TWARA
KALONIKARA and MANDREA KALORIB
First Respondents

AND: IFIRA TRUSTEES LIMITED
Second Respondents

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice Bruce Robertson
Hon. Justice John Mansfield
Hon. Justice Oliver Saksak
Hon. Justice Dudley Aru
Hon. Justice Mary Sey

Counsel: Robert Sugden for the Appellants
Mark Hurley for the Respondents

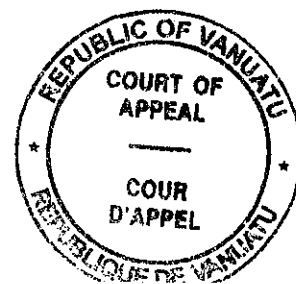
Date of Hearing: Tuesday 12 and Wednesday 13 November, 2013

Date of Judgment: Friday 22 November, 2013

JUDGMENT

INTRODUCTION

1. This appeal arises from serious, and regrettable problems in the Ifira community. It is the more regrettable because the starting point of the relevant events was an aspirational decision by that community, or at least by three of the leaders of the community.



2. On 26 June 1978, the Ifira Trust was established:-

“... to promote the economic and social welfare and the health education and general well-being of the beneficiaries both collectively and individually...”

And Clause 1(b) defines the “*beneficiaries*” of the trust as:

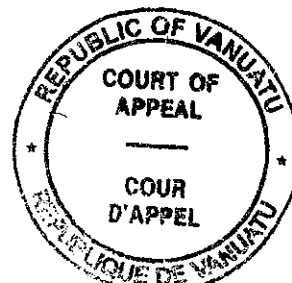
“... the indigenous people or any of them declared by the Council of Ifira Island as being members of the four clans the members of which clans comprise the class of people known as Ifira Islanders.”

3. Shortly before that, Ifira Trustees Limited (ITL) was incorporated. It had 3 shareholders: the Paramount Chief of the Ifira people, Chief Graham Kalsakau, Barak Sope (Mr Sope) and Kalpokor Kalsakau (Mr K Kalsakau). The shareholders then appointed the directors so that ITL properly conducted its role as trustee. It became the trustee of the Ifira Trust.
4. The Companies Act refers to those who hold shares as members of the company. To avoid possible confusion because we need to refer to members of the Ifira community we have instead referred to them as shareholders. It is important to recognize that the operations of ITL as a company are governed by the Companies Act [Cap 191]. Separately it has duties as the trustee of the Ifira Trust. Thirdly and separately, there is a question of the relationship between the shareholders of ITL and the Ifira people.
5. In that context, in August 1999 Chief Graham Kalsakau III passed away. It is common ground that – despite the Articles of Association of ITL providing for the transmission of shares in a conventional way – his share was then “*transferred*” to the next Paramount Chief, Chief Teriki Paunimanu Mantoï Kalsakau III (Chief PM Kalsakau III). It appears that no executor or administrator of the deceased estate of Chief Graham Kalsakau has been appointed, so his share in ITL has not in fact been transferred. In practice, the vote attached to his share has been exercised (as intended) by his successor. As soon as possible, that position should be regularized and in the longer term the Articles of ITL should be changed to provide for the transmission of the Paramount Chief’s share to the next Paramount Chief.

THE EVENTS LEADING UP TO THE PRESENT APPEAL

(a) 1978-1998

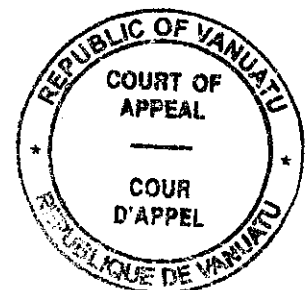
6. Between 1978 and the early part of 1999, over 20 years, the Ifira Trust operated apparently successfully, with ITL as its trustee. The evidence suggests that it developed or acquired significant assets over that time, that it operated very profitably, and that it distributed the available funds in an appropriate way to the Ifira people. The details are



set out in the interim judgment of the trial Judge Fatiaki J: Ifira Trustees Ltd and Others v. Barak Sope and Others 6 September 2013 at [5] – [6].

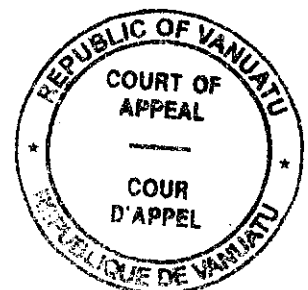
(b) 1999 - Trouble Arises

7. In 1999, there emerged some discontent about how ITL was operating as trustee of the Ifira Trust, and consequently because they are the human faces of ITL how its directors and its shareholders were managing and organizing ITL.
8. One sign of that discontent is the Power of Attorney granted by Chief PM Kalsakau III on 9 October 1999 purportedly pursuant to Article 17 (a) of Ifira Trust Deed and “*in accordance with*” his powers as Paramount Chief. He appointed 29 named persons acting collectively as his attorney, including to remove “*all current constituents*” of ITL, to call a meeting of the Ifira people to “*announce re constitution*” of ITL and to take steps to replace trustees and to “*reconstitute*” the Trust Deed. On this appeal it was accepted that the Power of Attorney was of no special significance, except as an indication of that discontent. It is therefore not necessary to address it further.
9. The discontent was further shown by a meeting of “*Beneficiaries*” called by notice of 10 November 1999. Its purpose was to remove “*all current constituents*” of ITL and for their replacement, and for the restructuring of the ITL. It called on those constituents to tender their resignations. It was expressly copied to the Paramount Chief and to “*All existing boards*” of IFT. The meeting was to take place on 3 December 1999.
10. The notice of meeting obviously had immediate impact.
11. On 25 November 1999, Mr K Kalsakau resigned as the Chairman and as a director of the ITL. He did not then agree to transfer his share as a shareholder of ITL and he has not done so since then. So he remains a shareholder of ITL.
12. On 3 December 1999, Mr Sope also resigned as a director of the ITL, and as his letter said, he also resigned as a member that is as a shareholder. The primary judge found that he intended to do so. However, he did not then sign a transfer of his one share to any other person, so he remains a shareholder of ITL.
13. As noted at [4] above, Chief PM Kalsakau III is the holder of the other issued share.
14. The Ifira Community meeting on 4 December 1999 lasted some 4 hours. There were 204 Ifira beneficiaries present at the start, and 123 others. The three shareholders were present. Mr Sope referred to those village elders who had passed away, and who had struggled in setting up the Ifira Trust. Letters of resignation of 8 directors of ITL



(including those of Mr K Kalsakau and Mr Sope) were tabled. Their resignations were "accepted".

15. On the hearing of the appeal it was accepted that the meeting was not a meeting of the shareholders of ITL, despite the presence of the 3 shareholders, so the "acceptance" of the resignations by the meeting had no legal effect. For the same reason, the next resolution to terminate the appointment as directors of the ITL those directors who had not resigned also had no legal effect. In each case, the resolutions represented the wishes of those attending the meeting. However, the resignations of 8 of the directors were apparently given to ITL, so they were effective resignations in that way.
16. The meeting then turned to the proposal to appoint new directors of ITL, and to change its Articles of Association. In broad terms, the proposed change was to restructure the Articles so that there were directors representing the Warakali (Family) groups of the Ifira people, rather than (as was apparently understood by those present) the Matarau (Clan) groups. It is unclear why the existing share structure represented Clan groups, as there were 4 clan groups and only 3 shareholders.
17. The meeting resolved to appoint the new board of ITL. Although some concerns were expressed about the process, the meeting purported to elect 31 persons as directors of ITL. As that was not a meeting of the shareholders of ITL, the resolutions of the meeting were also of no legal effect. They indicated to the three shareholders the wishes of the meeting about who the shareholders should appoint as directors, because the appointment of directors is a responsibility of shareholders at a shareholder's general meeting.
18. The Paramount Chief, who had been "elected" as chairman of the board of ITL, made comments thanking Mr K Kalsakau, Mr Sope and the village elders who had contributed to the setting up of the Trust. The meeting also resolved that the new Board of Directors of ITL should consider what compensation should be paid to the former directors of ITL, but that their view should be brought back to the Ifira community for decision.
19. Those resolutions highlight the need to recognize, and the failure to give effect to, the corporate structure of ITL. It is a trust company, governed by its Memorandum and Articles of Association. The beneficiaries of the Ifira Trust are not the shareholders (members) of ITL. The three shareholders were, and remained at 1999, the Paramount Chief, Mr K Kalsakau, and Mr Sope. It is the function of the shareholders of the ITL to have an annual general meeting of ITL, and to elect the directors, and to decide upon their remuneration.
20. Those resolutions also show that the critical issue in this case for all the parties, for ITL and for the Ifira Trust, is the relationship between the shareholders of ITL and the beneficiaries of the Trust. It is addressed later in these reasons.



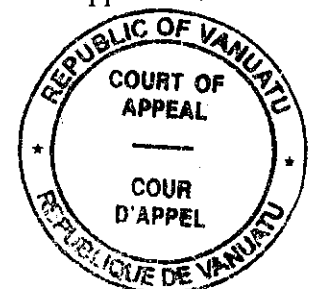
21. However, it is useful to recap what, as a matter of the internal administration of ITL at and from 4 December 1999, is the effect of its Articles of Association and the proper application of the Companies Act:-
- 1) the three shareholders remained as shareholders, with the rights and responsibilities attached to that role;
 - 2) the directors had been reduced by the resignations of Mr K Kalsakau, Mr Sope and others, provided (as is assumed) that notice of those resignations had been given to ITL;
 - 3) there may have been remaining directors of ITL who had not resigned;
 - 4) the shareholders of ITL could, at a special general meeting, resolve to change the Board by appointing new directors and/or removing some existing directors, including giving effect to the wishes of the Ifira community; and
 - 5) the Memorandum and Articles of Association of ITL had not been changed and could not be changed except by a special general meeting of the members of ITL, passed in accordance with s. 14 of the Companies Act.

(c) 1999 – 2010

22. Between 1999 and 2010, the operations of ITL as Trustee of the Ifira Trust were managed by the 31 persons appointed by the Community meeting of 4 December 1999. Mr K Kalsakau and Mr Sope stepped away from any role in its operations. The Annual Reports of ITL over this period recorded those 31 persons as directors, and Chief PM Kalsakau III, Mr K Kalsakau and Mr Sope as the shareholders.
23. Consequently, ITL and the Ifira Trust continued to function over this period, apparently successfully, even though irregularly in terms of the Articles of Association of ITL and the Companies Act.
24. There is no suggestion that any of the persons involved in the management of ITL or on behalf of the Ifira Trust acted other than in good faith and in the interest of the beneficiaries of the Ifira Trust.
25. In those circumstances, it is not necessary to refer to the events over this period. Very sensibly, the parties to the Supreme Court case and on this appeal are focusing on the future.

(d) Late 2010 to present

26. On 15 September 2010, a meeting convened by the Paramount Chief of the Ifira community. It was to progress the proposed changes to the Articles of Association of ITL. It appointed a Farea Committee, including Mr K Kalsakau and Mr Sope. Mr Sope then re-asserted his role as a shareholder of ITL to be responsible, with the other shareholders, for the appointment of the directors of ITL and in that way to control the operations of ITL, including in its role as trustee of the Ifira Trust. He is opposed to the

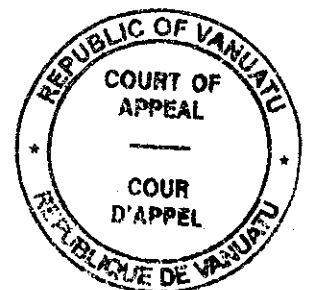


amendment to the Memorandum and Articles of Association to change the shareholding to reflect the Warikali rather than the Matarau groups, and will not support calling a shareholder's meeting for that purpose.

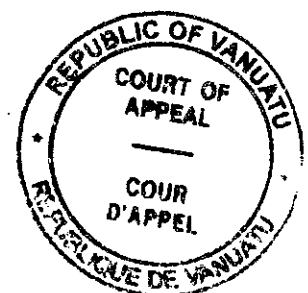
27. During this period, the Articles of Association of ITL were not in fact changed to give effect to the decision at the 4 December 1999 meeting to change Matarau to Warikali.
28. On 16 October 2010 a further meeting of the Ifira community took place. Perhaps reflecting the degree of disputation in the community, it decided to remove the 31 Warikali directors, and to replace them with 7 named persons including Mr K Kalsakau and Mr Sope.
29. Clearly ITL was becoming potentially dysfunctional to the detriment of the beneficiaries of the Ifira Trust. As an illustration, on the same day as the Supreme Court proceeding was commenced, the Annual Return of ITL was lodged (by the 31 Warikali directors group) asserting that the share capital of ITL had been changed and that 278,000 shares had been issued to those 31 persons jointly.
30. That led promptly to proceedings in the Supreme Court, including a series of interlocutory injunctions giving directions as to how ITL should operate pending a final decision in the Supreme Court action (and on this appeal).

THE SUPREME COURT ACTION

31. It is clear that there has been some refinement by the parties of the contested issues for the purposes of this appeal.
32. For the Supreme Court Trial, the parties agreed on the issues to be decided:
 - (1) The validity of the Power of Attorney of 9 October 1999;
 - (2) Whether Mr Sope "*resigned*" as a shareholder of ITL by 4 December 1999;
 - (3) (a) Do the shareholders of ITL hold their shares in trust; and
(b) If so, are the shareholders bound to amend the Articles of Association pursuant to the resolution of the meeting of 4 December 1999;
 - (4) Whether Mr K Kalsakau and Mr Sope resigned as directors of ITL on or before 4 December 1999;
 - (5) Whether the shares held by Mr K Kalsakau and Mr Sope should be transferred as a result of any resolution at the meeting of 4 December 1999, and if so to whom.
 - (6) Whether, as a result of the meeting of 4 December 1999, the original three shareholders should be required to conduct an extraordinary general meeting of ITL, and to pass resolutions:-
 - (a) Amending the Articles of Association of ITL to change Matarau to Warakali, and



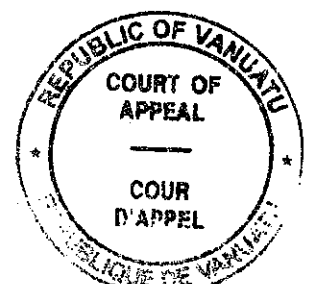
- (b) Appointing as the directors the 31 persons who would represent each of the Warakali;
 - (c) Transferring the shares of Mr K Kalsakau and Mr Sope;
 - (d) Allocating further shares to each of the representatives of the Warakalis;
- (7) Whether the proposed revised Memorandum and Articles of Association of ITL considered by a later "*Beneficiaries Meeting*" was properly adopted.
33. As noted above, issues (1), (2) and (4) were not contentious by the time of the appeal. The central issue remaining is, therefore, essentially the nature of the relationship between the shareholders of ITL and the Ifira community. In this judgment the expression "*Ifira community*" is to be treated as synonymous with the beneficiaries of the Ifira Trust, even though there may be some doubt whether all members of the Ifira community are eligible beneficiaries – that was not a matter debated on the appeal.
34. That central issue is issue (3) (a) in [32] above, and the answer to it will inform the answers to issues (3) (b), (5), (6) and (7) in [32] above.
35. Before addressing that issue, it is convenient to refer to the interim judgment and to the final judgment and orders of the primary judge.
36. In the careful and thorough interim judgment, for much the same reasons as we have explained for our decision on the central issue in (3) (a) above, Fatiaki J concluded that each of the three shareholders of ITL held their shares '*in trust*' for and on behalf of the beneficiaries of the Ifira Trust (his quotations). We have refined that expression, and treated the share held by Chief PM Kalsakau III a little differently.
37. The next conclusion followed from that step.
38. Fatiaki J found as a fact that Mr Sope intended to resign as a shareholder of ITL by his letter of 3 December 1999. That finding is not now challenged. What is challenged is whether, in the circumstances, it was correct to order under s. 120 of the Companies Act that the register of members of ITL be rectified by removing him as a shareholder of ITL.
39. Then the primary judge concluded that he should give effect to the resolutions at the meeting of 4 December 1999. In doing so, he recognized that the meeting was not a meeting of the shareholders of ITL, but he considered in its circumstances it had properly changed the directors of ITL as the Articles of Association were facilitative only, as the shareholders of ITL were present at the meeting, and as it was a meeting of the beneficiaries of the Ifira Trust so its directors and shareholders were bound by its resolutions.



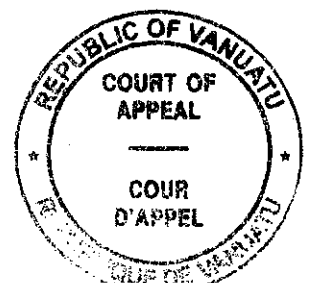
40. He then adjourned the case until later in September 2013 to give the parties one further chance to hold a further meeting to see if they could reach some agreement about the future. They could not do so.
41. As foreshadowed in the interim judgment, by the final judgment of 18 September 2013, orders were made removing Mr K Kalsakau as a shareholder and directing his share be transferred to a named person who he was told is the current representative of the Warakali Kalsakau. He directed under s. 136 of the Companies Act the remaining shareholder Chief PM Kalsakau III, to convene a special general meeting of ITL to pass the necessary resolutions to implement and ratify the decisions made at the 4 December 1999 meeting. The terms of the changes to the Memorandum of Association to be adopted were specified, including the listing of 30 Warakali. The resolution about the appointment of the directors was also specific: to appoint Chief PM Kalsakau III as Chairman and a representative of each of the 30 Warakalis as directors. The terms of the share restructuring were also specific: the shares of Mr K Kalsakau and Mr Sope were to be transferred to named persons who, he was told, were the current representatives of their respective Warakalis, and a further 28 shares issued to each of the other 28 Warakalis so its current representative would be the shareholder.

THE RELATIONSHIPS OF THE ITL SHAREHOLDERS TO THE BENEFICIARIES OF THE IFIRA TRUST

42. The primary judge in the interim judgment at [14] said the shareholders in ITL held their shares with the same trusteeship as ITL owed to the Ifira Trust and its beneficiaries. His Lordship described them as "*nominee shareholders*".
43. In our view, although it is necessary to refine the definition of the relationships a little, those observations are apt. The shareholders of ITL do not hold their shares as personal assets for their own benefit, and it would be a breach of the trust of ITL (and a contravention of its duties as trustee) for ITL through its directors (for example) to declare a dividend in favour of its shareholders. That much is plain, and it was not contentious.
44. However, it is necessary to refine a little the description of the relationship. We substitute for the declaratory order of the primary judge a declaration that the shareholders of ITL (other than the Paramount Chief) hold their shares as nominees for the Ifira Community. It is in that way, that the shareholders of ITL are accountable to the Ifira community. The consequence of nominee status is that, by proper resolution of a meeting of the beneficiaries, the shareholders may be required to transfer their shares to others who the beneficiaries consider may better represent them. The position of the share held by the Paramount Chief is explained above. The responsibilities of the Paramount Chief then attach to his role as a shareholder.



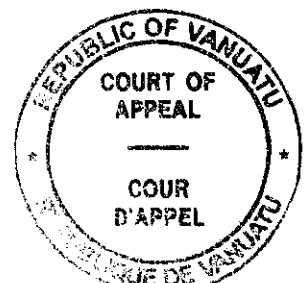
45. The support for such a conclusion is ample. First it is the nature of the Ifira Trust, and the purpose of ITL to be the trustee. The early material shows that in 1978 the set up of the Ifira Trust and ITL was achieved by the then Paramount Chief, Mr K Kalsakau, Mr Sope and the village elders. Mr Sope confirmed that at the meeting on 4 December 1999. It was not a creation of the Paramount Chief, Mr K Kalsakau and Mr Sope for their personal benefit. There is other evidence to the same effect. That includes the Declaration of the "*Ifira Island Community*" to vest certain lands in ITL so that they would benefit all the Ifira community; it is undated but its contents show it was made in about 1980 at or shortly after Independence.
46. Indeed, counsel for the appellants accepted that some such relationship existed, although the detailed analysis of its legal character was not fully exposed.
47. The alternative is that the shares of Mr K Kalsakau and Mr Sope must remain in their names, or may be transferred by them to persons who are remote from or unrelated to the Ifira Community, and upon their respective deaths may be transmitted in accordance with the terms of their Wills. The Ifira community would have no control over these processes. There is no basis at all for thinking that was intended in 1978.
48. The conduct of Mr K Kalsakau and Mr Sope both prior to, and at, the meeting of 4 December 1999 is consistent with that conclusion.
49. The issue confronting the primary judge about how the shareholders should have responded to the resolutions passed at the meeting on 4 December 1999 leads to the focus on the difference between them holding their shares as trustees for the community, or as nominees for the community. The duties of ITL as trustee of the Ifira Trust are clear. Whether ITL is in breach of those duties, including whether it complies with its duties as a trust company and under the Companies Act, can be assessed by the beneficiaries, and if necessary by the Court: see for example *Ifira Trustees Ltd v. Family Kalsakau* [2006] VUCA 23.
50. There is no such clear way to define the nature of, and the foundation for, a trust (in the formal sense) by which the shareholders hold their shares as Trustees rather than nominees of the Ifira community. There is no declaration of trust. The concept of a constructive trust is not applicable because this is not a case where the shareholders claim to hold their shares in ITL for their personal benefit and should be prevented from doing so: see e.g *Muschinski v. Dodds* (1985) 160 CLR 583. It was assumed in argument that those duties, and the terms of the asserted trust, are the same as those of ITL. But, as here, the shareholders (or at least Mr K Kalsakau and Mr Sope) genuinely believed that it is not in the interests of ITL to have a Board and shareholders representing all the Warikali, because that would inhibit ITL operating properly for the benefit all the Ifira



community. They may be right or they may be wrong. These views meant that they were expected to support action which they, as shareholders, thought was not appropriate. This would be a breach of duty in their minds if they acceded to that resolution and a breach of trust in the minds of the Ifira community (assuming the meeting of 4 December 1999 was properly convened according to this normal rules) if they did not.

OTHER MAIN ISSUES

51. Once the relationship of the three shareholders to the Ifira community is clearly identified, much falls into place.
52. It is not necessary to consider in detail the appellant's submissions about the status of the 4 December 1999 meeting. At best, it was an expression of the then will of the Ifira community or a significant number of them. It is common ground that, apart from the "appointment" of 31 new directors who for the last 12 or so years have run ITL, the meeting was not a meeting of ITL. There has been no general meeting of the shareholders of ITL to change its Memorandum or Articles of Association, or to restructure its shareholding, or any steps by which any of its three shareholders have transferred their shares. The meeting of 4 December 1999 did not nominate persons to replace Mr K Kalsakau and Mr Sope as shareholders, so that they could be ordered to transfer their shares at that time.
53. In addition, it is not clear from the recent meetings that the views of the Ifira community are still the same. It is now nearly 14 years since that meeting. The composition of the Ifira community may have changed, or its views may have become more refined. It has not, either in 1999 or in the last few years, clearly said that it wants its nominees Mr K Kalsakau and Mr Sope to be replaced by named persons. It has not clearly said whether it wants the shareholders to change the issued share capital in any particular way. It has not nominated other particular persons to be allocated particular number of shares. Indeed, the fact that the Paramount Chief recently appointed Mr K Kalsakau and Mr Sope as two of the members of his Farea committee may indicate that the views in 1999 may no longer be held by the Ifira community.
54. In our view, the material before the primary judge should have led to the conclusion that the Ifira community should have a further meeting or meetings to consider those things relating to ITL, but did not support the view in mandatory terms that the effect of the resolutions on 4 December 1999 should now be adopted.
55. In such a meeting, the Ifira community can make binding decisions about whether it wants to nominate other persons to hold the shares presently held by Mr K Kalsakau and Mr Sope. They must transfer their shares to such new nominees.



56. At such a meeting, the Ifira community can also express its wishes about the share capital of ITL, and the terms of its Memorandum and Articles of Association, and the persons it wants as directors of ITL. Those views should be considered by the registered shareholders, and its directors, but they are not legally bound to implement them in every respect, because they have duties to ITL under the Companies Act and to ITL to ensure it serves the best interests of the Ifira Trust.

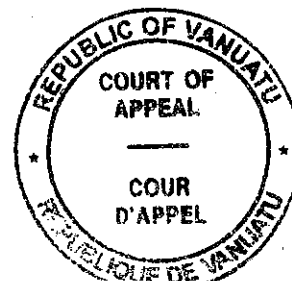
57. In addition, whilst it is easy to understand why the primary judge made the orders he did to try and bring some finality to the apparently warring sections of the Ifira community, we do not consider that s. 120 of the Companies Act was sufficient to support the orders made about removing Mr K Kalsakau and Mr Sope from the register of members. Their names were properly entered on to the register of members of ITL. No named persons had been put forward by the Ifira community to replace them. Mr Sope's resignation as a shareholder, without more, was ineffective at law to transfer his share to any other person. In the case of Mr Kalsakau, he had simply remained as a registered shareholder. Those in charge of ITL since 1999 have continued to file Annual Returns including them both as shareholders.

In those circumstances we do not consider that any aggrieved person was entitled to seek to rectify the register of members (even though some of the evidence touched on the status of Mr K Kalsakau and Mr Sope. It was not shown in addition that their names had been entered on the register of shareholders in error. Nor was it shown that they had ceased to be shareholders, so the criteria for the exercise of the power under s. 120 (1) (a) or (b) did not exist.

58. We note that s. 121 prohibiting the notification of any trust over the shares held by them does not prevent the shareholders from holding shares as nominees of the Ifira community, so they may be replaced by other nominees of the Ifira community. Whilst they are registered as shareholders, they must perform the roles and duties of shareholders of ITL.

59. For much the same reasons, whilst we will understand the reasons why the primary judge made the orders he did, we do not consider that the 4 December 1999 resolutions concerning the Memorandum and Articles of Association of ITL had any legal effect. They were not resolutions of ITL by its shareholders. The requirements of the Companies Act, and the Memorandum and Articles of Association to change the structure of ITL were not complied with.

60. Such a resolution of the Ifira community should be considered by the shareholders as nominees of the Ifira community. One may expect that, generally, the views of the community will be given effect. For the reasons we have given, these views do not



necessarily have to be given effect by the shareholders (or by the directors), although the shareholders may then expose themselves to be replaced by other nominees, and the new nominees may by proper resolution replace the directors.

61. In this matter, the directions by the primary judge went somewhat beyond the terms of the resolutions of 4 December 1999. It is not necessary to go into detail. In our view those declarations should be set aside.

Some Subsidiary Issues

62. (1) Pleading Point

Counsel for the appellants strongly submitted that what has been addressed above as the central issue – the legal relationship between the shareholders of the Ifira Trust and the Ifira community – was not pleaded, so the appellants did not have an opportunity to give evidence about the background circumstances in which the Ifira Trust was set up and why the retention of the Matarau as the basis for shareholding must be retained.

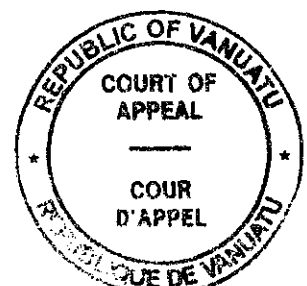
63. That submission is not accepted. The issue was clearly signaled by paragraphs 6 and 7 of the amended statement of claim, by the agreed statement of issues and by the fact that the change to the Articles of Association proposed at the meeting on 4 December 1999 was from Matarau to Warikali. It was the subject of some evidence (including from Mr Sope), and was the subject of detailed submissions. Even if it is the case that, with hindsight, the appellants might have called more evidence on that issue at the trial (and it is not clear that they have made that hindsight decision), the fact that they did not do so is not a consequence of the pleadings and identified common issues preventing them from doing so.

64. (2) Power of Attorney

As noted above, neither party on the appeal sought to make anything of the Power of Attorney, other than as evidence of discontent. That was an appropriate position to adopt.

65. The Power of Attorney first relied on clause 17 (a) of the Trust Deed as its source of power. The circumstance for that source of power to arise did not exist. Relevantly that circumstance was the insolvency and potential winding up of ITL. There is no evidence to suggest ITL was in that position.

66. Secondly, the Power of Attorney relied on the Paramount Chief's powers in his own right. There was no focus in the course of the evidence on the power/entitlement of the Paramount Chief to, in effect, delegate his powers and responsibilities as a shareholder of ITL to a group within the Ifira community, and in the circumstances to 31 persons who must act collectively. It may be a real question where the Paramount Chief (as all parties agreed) holds the share by virtue of being Paramount Chief. Whether there is such an



entitlement should await a proper opportunity to be resolved, if in fact there is any ongoing concern in the Ifira community about it. There can be no doubt, in any event, that the Paramount Chief can take such advice as he chooses.

67. (3) The Trustee

The Trustee ITL has now developed to a point where it has a number of operating subsidiary entities. The Court did not have the details of those matters explained. It was not necessary to do so.

68. It is assumed that ITL holds all or a majority shareholding in its subsidiaries. Each company must comply with the management and reporting by its board and its members obligations imposed under the Companies Act. The directors of each company must make decisions in the best interest of the particular company of which they are directors.

69. (4) The Ifira community meetings

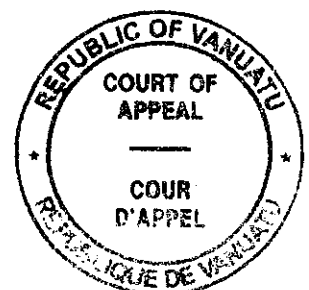
There was little focus on this issue in the appeal hearing. In our view, its meetings (at least so far as they relate to ITL and the Ifira Trust) should be conducted in the normal way for such meetings. No doubt that means that, in the first place, the Paramount Chief should call the meeting and set the agenda (after such consultation as he chooses). The evidence suggests a resolution is carried if it is supported by a majority of those eligible to vote. There is no evidence to suggest a vote is not carried unless it has unanimous support of every community member who are at the meeting.

Conclusions and the Future

70. The result of the above reasons is that the appeal is allowed and the orders of the primary judge are set aside.

71. That does not represent a “win” for some and a “loss” for others. It reflects the outcome based upon the analysis of the relationships of the shareholders of ITL to the Ifira community. That relationship is much as the primary judge found it to be, with some refinement in the relevant expressions which has followed from the careful attention to that issue in the course of the appeal. It also reflects the more precise application of the Memorandum and Articles of Association to the operations of the business of ITL as a company incorporated under, and governed by, the Companies Act that the Court of Appeal had the opportunity to consider.

72. For the future, these reasons for judgment show that the Ifira community does have the power to meet to require the shareholders of ITL (other than the Paramount Chief) to transfer their respective shares to persons nominated by that community. At present there are only two such shareholders, but that will not necessarily be so in the future. The issued shares in ITL may increase, in accordance with its Articles of Association, so there may be more persons who become shareholders. By the control of who are the



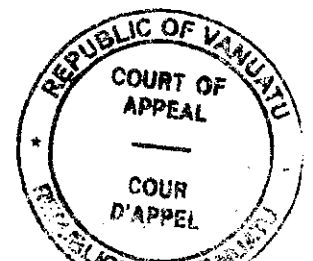
shareholders of ITL, exercised responsibly, the board of directors of ITL may in turn be changed. The directors retain the primary responsibility for the oversight and direction of the affairs of ITL, and the fulfillment of the obligations imposed on directors under the Companies Act.

73. There was some suggestion in the course of submissions that there are competing almost intransigent factions within the Ifira community. If so, that is most unfortunate. The establishment of the Ifira Trust, and the creation of ITL as its trustee, in 1978 were visionary. ITL, on behalf of the Ifira community as beneficiaries of the trust is now a large commercial enterprise. From the outsiders' perspective, it would be senseless for factional issues (if they exist) to put that to risk. In that light, it should be said that the Ifira community should not act rashly or with too much speed. It should bear in mind that it is beneficial to maintain corporate memory by sensible progressive changes to the directors (and shareholders), and to the extent appropriate to the focus of its operations.
74. The Ifira community may be aware that a board of directors of 31 is rare, simply because experience shows that such a large number of directors do not produce the best commercial decision, even in the largest of international companies. It might choose to focus more on restructuring the issued share capital to have more extensive direct input into the selection of directors by increasing the member of members. It must remember that the directors' duties are to the company ITL to ensure it properly fulfils its role as Trustee of the Ifira Trust, and not for any other purpose.
75. All those things are for the Ifira community to consider as it moves forward, hopefully to preserve and enhance long term the successful operations of ITL for the benefit of all the Ifira community, both now and in the future. We endorse the observations of the primary judge on the interim judgment at [7] – [12] on that respect.
76. Having regard to the outcome of the appeal, there will be no order for costs of the appeal or of the Supreme Court proceeding.

ORDERS

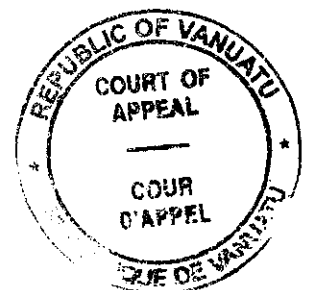
77. There is an obvious problem about the running of ITL in the immediate future. At present there are three shareholders, and at least in a practical sense 31 directors. In our view the sensible thing is to allow things to stand as they are for 4 weeks, while the Paramount Chief if he decides to can call a meeting of the Ifira community to decide whether to nominate others to replace the shareholders who can appoint directors.

We will allow the appeal to the extent of setting aside the orders and declarations of the primary judge relating to the holding of a meeting to consider and to pass certain resolutions. Those orders operate immediately. As we have said, we well understand



why the primary judge made those orders. The outcomes he had in mind can ultimately be achieved by the Ifira community meeting to change its nominated shareholders, if it wishes to do so. If existing nominees refuse to accept the will of the Ifira community, the Court may direct them to do so or if it is necessary direct the amendment to the share register.

78. We also will set aside the orders and declarations of the primary judge relating to amending share register so as to remove Mr K Kalsakau and Mr Sope as shareholders. Because of the practical problems then of who is to run ITL, we will suspend the operation of that order until 19 December 2013, so that if by that date there has been no resolutions of the Ifira community changing its shareholder nominees, the three registered shareholders will be in a position to take steps to appoint new directors in accordance with the Articles of Association. They, and the new directors (if any) in their respective roles will then be responsible for running ITL after that date. They will remain as the shareholders unless and until the Ifira community decides to replace them (other than the Paramount Chief).
79. Until 19 December 2013, at least, those persons who are according to the Last Annual Return listed as directors of ITL (unless there has been a change since that return) will continue to act as directors of ITL, subject of course to them properly fulfilling their functions. Thereafter, the composition of the directors will be subject to the shareholders, in accordance with the Articles of Association.
80. Finally, we set aside or refine the declaration of the primary judge about the relationship of the shareholders of ITL to the beneficiaries of the Ifira Trust, and we substitute a declaration that the shareholders of ITL from time to time (other than the share held by the Paramount Chief) hold their respective share or shares as nominees of the Ifira Trust, and must transfer the share or shares held by them or any of them in accordance with a resolution of the beneficiaries of the Ifira Trust passed at a meeting of these beneficiaries duly convened in accordance with the practice of the Ifira community. That declaration also operates immediately.
81. As noted, there is no order for the costs of this appeal and the order of the primary judge in the Supreme Court is set aside and there is substituted an order that all parties in the Supreme Court proceedings bear their own costs.
82. The Court records its appreciation for the helpful written and oral submissions of counsel for the parties.
83. The discussion of the issues in this case, and their importance to the parties, shows why in all the circumstances it is appropriate to order that leave be granted to the appellants to extend time for the filing of this appeal to 28 October 2013. That covers both the nature




of appeal, and the grounds of appeal. The period of delay was relatively short, and the delay it at least partly explained by the complexity of the matter in the Supreme Court. The prejudice to all parties by not addressing the issues before the Court of Appeal is self evident.

84. Accordingly, the Court also orders that the time for appealing from the orders made in the Supreme Court be extended to 28 October 2013.

Dated at Port Vila this 22nd day of November, 2013

ON BEHALF OF THE COURT



Chief Justice Vincent Lunabek

