

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

**Civil Appeal**  
**Case No. 20/3605 CoA/CIVA**

**BETWEEN: FAINA PAKOA & FAMILY**  
*First Appellant*

**ERICK SIALAS & FAMILY**  
*Second Appellant*

**RAMU MISSAK & FAMILY**  
*Third Appellant*

**MARK SIALAS & Family**  
*Fourth Appellant*

**RAYMOND MISSAK & FAMILY**  
*Fifth Appellant*

**FATIMA FARATEA & FAMILY**  
*Sixth Appellant*

**JOE NIKO & FAMILY**  
*Seventh Appellant*

**KAPEL PAKOA & FAMILY**  
*Eighth Appellant*

**DUK MISSAK & FAMILY**  
*Ninth Appellant*

**AND: GUAN KAI**  
*First Respondent*

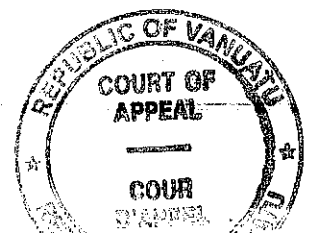
**WAISUNU BAKOKOTO, BAKAULU  
BAKOKOTO, ANDAS BAKOKOTO**  
*Second Respondent*

**Coram:** *Hon Chief Justice V Lunabek*  
*Hon Justice R Asher*  
*Hon Justice D Aru*  
*Hon Justice O Saksak*  
*Hon Justice GA Andrée Wiltens*  
*Hon Justice R White*

**Counsel:** *Mr M Fleming for the Appellants*  
*Mr G Blake for the First Respondent*  
*Mr S Kalsakau for the Second Respondent*

**Date of hearing:** 7 May 2021

**Date of Decision:** 14 May 2021



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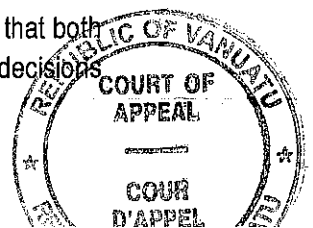
## JUDGMENT

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1. By s 17(g) of the *Land Leases Act* (the LL Act), the proprietor of a registered lease holds the lease subject to "the rights of a person in actual occupation of land save where enquiry is made of such a person and the rights are not disclosed".
2. The first respondent to this appeal, Guan Kai, is the registered proprietor of Leasehold Title No. 12/0633/1387 (the Lease) which relates to land in the Tebakor area of Port Vila (the Land). The nine appellants are families who occupy (or who have occupied) parts of the Land. In the proceedings at first instance, there had been 11 such families but, as a result of agreements, two had withdrawn by the time of the trial.
3. The principal question on the appeal is whether, by reason of s 17(g) of the LL Act, Mr Kai holds the Lease subject to the interests of the appellants. There are other issues but these will be identified later.
4. The principal issue arose in the proceedings at first instance because the appellants disputed that Mr Kai was entitled to orders for their eviction from the Land.
5. Following a complex trial which extended over five days, the primary Judge made the eviction orders sought by Mr Kai, as well as other orders: *Kai v Tom* [2020] VUSC 279. The appellants seek on appeal an order quashing the orders of the primary Judge, a declaration that they have an interest protected by s 17(g) of the LL Act, an order that Mr Kai grant them subleases, and consequential orders.
6. For the reasons which follow, we consider that the appeal should be allowed and the matter remitted to the primary Judge for further consideration of particular issues. We also consider that, subject to any further order of the Judge, the remitted issues should be determined on the evidence already received, although the Judge may wish to receive further submissions concerning the remitted issues.

### Background circumstances

7. The lessors of the Lease are three brothers: Waisunu, Bakaulu and Andas Bakokoto. The primary Judge referred to them as "Messrs Bakokoto" and we will do likewise. Messrs Bakokoto were collectively the 12<sup>th</sup> defendant at trial and are the second respondent on the appeal.
8. There was a fourth Bakokoto brother, Jacky. Before Jacky's death on 18 November 2014, the four Bakokoto brothers had been the custom owners of the Land. They had become the custom owners in 1992 on the death of their father, Edward Bakokoto. Since Jacky's death, Messrs Bakokoto have been the custom owners. The Judge accepted the evidence of Messrs Bakokoto that both before and after the death of Jacky, it was (and is) the custom of the brothers to make decisions



in concert, with the effect that one brother could not deal with the Land without the agreement of all the others.

9. The history of lease transactions concerning the Land is as follows:

- on 26 March 2012, Leasehold Title No. 12/0633/112 between Messrs Bakokoto as lessors and Jacky Bakokoto as lessee was registered;
- on 10 September 2013, the surrender of Leasehold Title No. 12/0633/112 was registered;
- on 12 December 2013, Leasehold Title No. 12/0633/1387 between Messrs Bakokoto as lessors and Jacky Bakokoto as lessee was registered; and
- on 12 December 2013, the transfer of Leasehold Title No. 12/0633/1387 from Jacky Bakokoto, as transferor, to Mr Kai, as transferee, was registered.

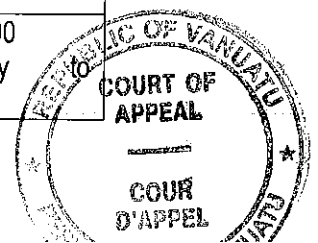
10. The Court was told that the surrender of Leasehold Title No. 12/0633/112 on 10 September 2013 occurred so that a misdescription in the Lease, in particular a misdescription of its boundaries, could be corrected. That may well have been prompted by Jacky Bakokoto's entry into a contract bearing the date 4 September 2013 to sell the Lease to Mr Kai.

11. The appellants occupy houses on the Land and in some instances, have done so, for many years. They asserted that they have built and operated stores and bars and have planted trees, gardens and crops. In all but one case, they asserted that their occupation was pursuant to oral agreements made with Jacky Bakokoto. The exception is Faina Pakoa who said that she had made an agreement with Edward and Jacky Bakokoto.

12. The appellants' case at trial, and on appeal, was that they had contractual licences to occupy and use a portion of the Land and that those licences, together with their carrying out of improvements in the expectation of being able to occupy the Land indefinitely, had given rise to an equitable interest.

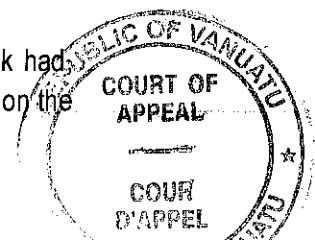
13. The primary Judge summarised the evidence of the appellants as to their agreements in a Table (taken from the appellants' Schedule of Particulars of their claim):

Name of witness (party)	Agreement with who & when	Date started residing	Dwellings built	Initial payment amount & to who	Rental amount, when and who paid to
Faina Pakoa (Second Defendant)	With Edward Bakokoto & Jacky Bakokoto in 1988	1988	1 house, kava bar and rent rooms	VT10,000 (kava bar) and VT15,000 (business) to Jacky Bakokoto	VT14,500 monthly to Jacky Bakokoto
Erick Silas (Third Defendant)	With Jacky Bakokoto in 2001	2001	1 house, 1 rent house		VT2,000 monthly



			and 1 toilet		Jacky Bakokoto
Ramou Missak (Fourth Defendant)	With Jacky Bakokoto in 2010	2002	1 house		VT2,000 to Jacky Bakokoto
Priscilla Margaret Pakoa (Fifth Defendant)	With Jacky Bakokoto in 1996	1996	1 house (4 rooms - 3 rooms for rent)		VT7,500 to monthly Jacky Bakokoto
Raymond Missak (Sixth Defendant)	With Jacky Bakokoto in 2013	1987	1 house		
Fatima Faratea (Eighth Defendant)	With Jacky Bakokoto in 2011	2011	1 house, store and 1 kava bar	VT15,000 (kava bar), VT10,000 (house) and VT5,000 (store) to Jacky Bakokoto	VT13,000 to monthly Jacky Bakokoto
Joe Niko (Ninth Defendant)	With Jacky Bakokoto in 2004	2003	1 house (4 rooms) and 1 toilet	VT15,000 and custom ceremony (head of kava, local chicken, yam and 2 bags of local food) to Jacky Bakokoto	VT2,000 to monthly Jacky Bakokoto
Kapel Pakoa (Tenth Defendant)	With Jacky Bakokoto in 2003	1988	1 house, 1 rent house, kava bar and car wash		VT2,500 to monthly Jacky Bakokoto
Leisale Maki Missak (Eleventh Defendant)	With Jacky Bakokoto in 2013	2008	1 house and 1 toilet	VT5,000 to Jacky Bakokoto	VT1,000 to monthly Jacky Bakokoto

14. The Judge accepted that the appellants had dealt with Jacky Bakokoto alone (and in Faina Pakoa's case, also with Edward Bakokoto) and accepted that the appellants had paid monies to Jacky Bakokoto (we infer the amounts stated in the Table). However, the Judge regarded as hearsay the evidence which the appellants had given about their agreements with Jacky Bakokoto, and said that she could not make findings as to the agreements, if any, which they had reached with him.
15. In his submissions on the appeal, counsel for the appellants said that Raymond Missak had, following the agreement with Jacky Bakokoto in 2013, expended VT 2 million on a house on the



Land. That is not consistent with the Schedule of Particulars on which the Judge relied. Nor is there any apparent reference to it in the Judge's notes of evidence. In these circumstances, we consider it appropriate to proceed on the basis that the Table in the Judge's reasons, based as it is on the appellants' own Schedule of Particulars, is correct.

16. On 3 June 2013, Jacky Bakokoto and Messrs Bakokoto served notices on the appellants requiring them to vacate the Land by 15 September 2013. The notice said that they were required to vacate "in order for future commercial development".
17. Although it seems that some occupiers may have vacated the Land in response to that notice, the appellants did not. On 20 January 2015, Messrs Bakokoto served a further notice to vacate on the appellants, telling them that their "investor wants to develop this land". They served another notice to vacate two days later (22 January 2015) and their solicitor served notices to vacate on the appellants on 29 August 2016.
18. It is apparent that there have been some attempts made by Mr Kai to assist in the relocation of the appellants but arrangements which they consider satisfactory have not yet been reached.

#### **Statutory provisions**

19. Sections 14 and 15 of the LL Act identify the rights of the proprietor of a registered lease. They provide:

**14. Interest conferred by registration**

*Subject to the provisions of this Act, the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease together with all implied and expressed rights belonging thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.*

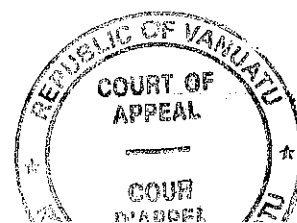
**15. Rights of proprietor**

*The rights of a proprietor of a registered interest, whether acquired on first registration or subsequently for valuable consideration or by an order of the Court shall be rights not liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all rights, privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject*

- (a) *to the encumbrances and to the conditions and restrictions shown in the register;*
- (b) *unless the contrary is expressed in the register, to such of the liabilities, rights and interests as are declared by this Act not to require registration and are subsisting:*

*Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as trustee.*

20. Section 17, to which reference was made earlier, provides:



17. Unless the contrary is expressed in the register, the proprietor of a registered lease shall hold such lease subject to such of the following overriding liabilities, rights and interests as may, for the time being, subsist and affect the same, without their being noted on the register –

...

(g) the rights of a person in actual occupation of land save where enquiry is made of such person and the rights are not disclosed; and

...

Provided that the Director may direct registration of any of the liabilities rights and interests herein before defined in such manner as he may think fit.

21. Section 72, concerning licences, provides:

**72. Licences**

(1) Without prejudice to section 93 a licence shall not be capable of registration.

(2) A licence relating to the use or enjoyment of the land comprised in a registered lease is ineffective against a bona fide purchaser for valuable consideration unless the licensee has protected his interest by a lodging a caution under section 93.

22. Section 93 of the LL Act permits a person claiming, amongst other things, a licence affecting a registered interest to lodge with the Director a caution in the prescribed form forbidding the registration of any person as transferee of, or any instrument affecting, that interest, either absolutely or conditionally.

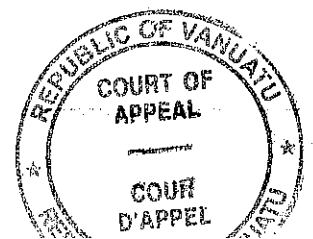
23. It was not suggested that any of the appellants had lodged such a caution.

24. As the Court of Appeal noted in *William v William* [2004] VUCA 16, s 17 is one of the provisions in Part 4 in the LL Act establishing and giving effect to the indefeasibility of registered titles. The rights of an occupier pursuant to s 17(g) which subsist "for the time being" without being noted on the register are an exception to that indefeasibility. The Court in *William v William* continued by saying:

[I]f the person "***in actual occupation of land***" is there pursuant to an equitable proprietary interest, the protection will subsist *as long as the equitable interest continues*. In such a case, the nature *and duration* of the equity will have to be determined. Where the interest is one acquired through or under a previous proprietor of a registered lease, the interest may continue for as long as the term of the lease.

...

[Section] 17(g) operates in respect of "***rights***", that is rights recognized by the law of Vanuatu. A person in actual occupation who is a trespasser will have no "rights" which are protected by the provision. A right may arise under custom law, or it might be a



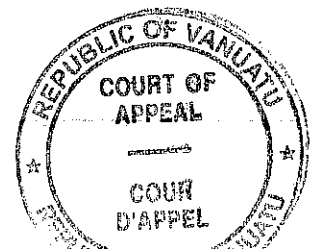
right that derives from and through the proprietor of a registered lease or the predecessor in title of that lease.

(Bold emphasis in the original and italicised emphasis added)

### The reasons of the primary Judge

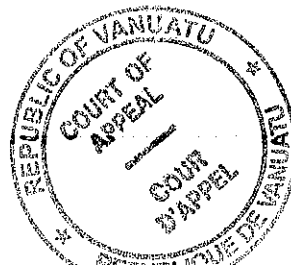
25. The Judge made the following findings:

- (a) Mr Kai is the registered proprietor of the Lease;
- (b) although there has been no declaration of custom ownership, Edward Bakokoto had been a custom owner of the Land and, on his death, the four brothers had become the custom owners. Following Jacky's death, it is Messrs Kakokoto who are the custom owners;
- (c) the appellants did not have a right under s 17(g) of the LL Act because:
  - (i) by reason of none of Edward Bakokoto, Jacky Bakokoto or Messrs Bakokoto having a declaration of custom ownership in their favour, the appellants did not have the express consent of custom owners for their occupation;
  - (ii) Messrs Bakokoto had not in any event consented to the appellants occupying the Land;
  - (iii) one Bakokoto brother could not deal with the Land unless all brothers agreed and Messrs Bakokoto had not authorised Jacky to act for all four brothers in his dealing with the occupiers. This meant that Jacky's dealings with the occupiers could not bind all brothers;
  - (iv) the appellants had accordingly failed to prove on the balance of probabilities that their occupation of the Land has been with the express and implied consent of all the custom owners and lessors;
  - (v) even if that finding be wrong, the evidence of the appellants concerning their oral agreements with Edward Bakokoto and Jacky Bakokoto was hearsay and inadmissible;
  - (vi) the notice to vacate served by the four Bakokoto brothers on 3 June 2013 had brought to an end the appellants' rights to occupy the land;
  - (vii) any claim by the appellants to an equitable interest in the land arising from their agreements with Jacky Bakokoto which was said not to have been brought to an end by the 3 June 2013 notice to vacate would have to be pursued in a separate action against Jacky Bakokoto's estate or against Messrs Bakokoto. It could not be pursued in the claim brought by Mr Kai. This meant that, in the action before the Court, the appellants plea that Messrs Bakokoto were estopped from denying that consent had been given for their occupation was misconceived.
- (d) the appellants did not have standing to bring a claim under s 100 of the LL Act seeking the rectification of the register on the basis that the registration of the transfer of the Lease to Mr Kai had been obtained by fraud;
- (e) Mr Kai did not owe a duty to the appellants to relocate them; and
- (f) Mr Kai was entitled to the orders which he sought.



**Ground 1 – the absence of a declaration of custom ownership**

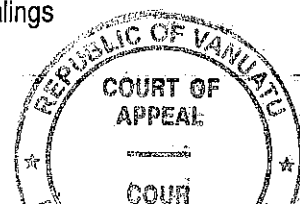
26. The appellants submitted that the Judge had been wrong to find that a consent to occupation could be given for the purposes of s 17(g) only by a *declared* custom owner.
27. Counsel for Mr Kai did not seek to support this finding of the Judge. However, counsel for Messrs Bakokoto submitted that persons claiming a s 17(g) right must establish that they are either the *declared* custom owner or secondary rights holder with rights of use and occupation or have obtained permission from the *declared* custom owner. Counsel sought to support this submission by submitting that Article 73 of the *Vanuatu Constitution* should be understood as to “custom owners who have been determined by a court of competent jurisdiction and not persons who claim or assert to be custom owners”.
28. Articles 73 and 74 of the Constitution provide:
- 73 Land belongs to custom owners**  
*All land in the Republic of Vanuatu belong to the indigenous custom owners and their descendants.*
- 74. Basis of ownership and use**  
*The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu.*
29. As is apparent, neither Article 73 nor Article 74 stipulate that it is only *declared* custom owners who own land in Vanuatu. Accordingly, those Articles provide no support for the counsel’s submission. Moreover, the Constitution recognises that issues about custom ownership may arise and provides means by which those issues may be resolved: see Articles 52 and 76. It contains no indication that, until those disputes are resolved, no one may be a custom owner.
30. It is established that, in the absence of agreement, the only bodies which have lawful jurisdiction and power to make a determination concerning custom ownership which will bind everyone are the courts, in the first instance Land Tribunals (formerly Island Courts) and, if there is an appeal, the Supreme Court: *Valele Family v Touru* [2002] VUCA 3. But it does not follow from this circumstance that it is only custom owners recognised by a declaration who may give consent to the use of custom land. As this Court held in *Kolou v Trinh* [2017] VUCA 30 at [16], it is only when there is a dispute about custom ownership that there must be a decision by a competent authority established with the authority to finally resolve that dispute. In the present case, there has been no dispute as to the custom ownership and, accordingly, it was possible for Edward Bakokoto and later his sons to consent to the occupation of the Land by the appellants.
31. This means that the first ground of appeal must be upheld.





**Ground 2 – did Messrs Bakokoto consent to the appellants' occupation of the Land?**

32. The appellants' pleaded case at trial was that they occupied the Land with the *express* consent of the custom owners. However, as the Judge noted at [47] of her reasons, the appellants had also submitted that their occupation of the Land had been with the *implied* consent of the custom owners.
33. The Judge regarded Messrs Bakokoto as witnesses of truth and found that they had not consented to the appellants' occupying the Land nor authorised their brother Jacky to act for all four brothers in his dealings with the appellants. As one brother could not deal with the Land without the agreement of the others, the Judge reasoned that this meant that Jacky's dealings with the appellants did not bind Messrs Bakokoto.
34. On the appeal, counsel for the appellants did not challenge the Judge's findings that Messrs Bakokoto had not consented to the appellants' occupation and had not authorised Jacky to act for all brothers in his dealings with the appellants, insofar as this was finding about *express* consent or *express* authority. He submitted, however, that the Judge should have found that the occupiers were entitled to regard Jacky as having the apparent or ostensible authority of his brothers to enter into dealings concerning the Land with them. Although counsel did not make this submission expressly, we understood him also to contend that Faina Pakoa had been entitled to consider that Jacky Bakokoto had the apparent or ostensible authority of Edward Bakokoto to enter into the dealings with her.
35. The doctrine of ostensible authority is the means by which a principal who has, by words or actions, conferred 'apparent' or 'ostensible' authority on a person may be bound by contracts entered into by that person on its behalf even though the person lacked actual authority to do so: Dal Pont, *Law of Agency*, Pont, 4<sup>th</sup> Edition, LexisNexis 2020 at [20.1].
36. There is a good deal of material which suggests that, from the perspective of the appellants, Jacky appeared to have the authority of all his brothers in relation to his dealings with them concerning the Land. The occupation of the appellants of the Land seems to have been obvious, as was the fact that they had erected houses and undertaken other improvements on it. Messrs Bakokoto must have known of the appellants' presence on the Land and of their activities on it. Bakaulu Bakokoto said that he had known that Jacky had been collecting money from the appellants and had had a disagreement with Jacky as to the sharing of those monies. Waisunu Bakokoto acknowledged that the appellants had had Jacky's consent to occupy the Land. Despite knowing these matters and knowing that Jacky was having dealings with the appellants in relation to the Land, there was no suggestion that Messrs Bakokoto had taken any action to object to the arrangements which Jacky had made with the appellants or to inform them that Jacky was doing so without their authority. Instead, they seem to have allowed Jacky to engage in all the dealings as though he did have their authority to do so.
37. It is understandable that the trial Judge did not make a finding about this form of authority as it does not seem to have been articulated in those terms in the submissions before her. However, it was a matter which had to be considered in relation to the appellants' claim that Jacky's dealings with them in relation to the Land were authorised by Messrs Bakokoto.



38. Given the other issues which are to be remitted, we consider it inappropriate for this Court to substitute its own decision concerning the presence of ostensible authority. Instead, it will be the first of the matters to be addressed on the remittal to the primary Judge.
39. Before leaving this ground, we refer to the submission of counsel for Mr Kai that, irrespective of the custom which existed between the four Bakokoto brothers, the appellants had been required as a matter of law to obtain the consent of *all* customary owners. Counsel relied for this submission on *Kanegai v Republic of Vanuatu* [2020] VUCA 2 in which it was said at [9] that "it is well established that to obtain rights of occupancy the appellant required the consent of all customary owners". However, we do not regard the principle stated in *Kanegai* as being decisive of this appeal. That case establishes that, when there is a dispute as to custom ownership, a person claiming consent will need to prove the consent of all of the competing custom owners. But *Kanegai* is silent about how such consent may be proved in other circumstances. In a case like the present, in which the custom owners are brothers, that consent may be proved by evidence of the consent given by one custom owner coupled with proof that that custom owner had the authority of the others, whether express, implied or ostensible, to give that consent. Accordingly, we reject this defence to the appeal.

#### **Grounds 3 and 4 – the hearsay ruling**

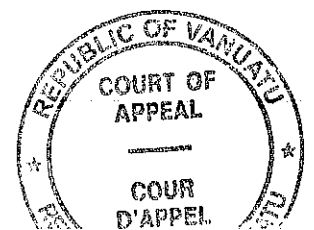
40. The primary Judge ruled that the evidence which the appellants had given of their agreements with Edward and Jacky Bakokoto was hearsay and accordingly inadmissible. On that understanding, the Judge excluded this evidence from her consideration of the issues at trial.

41. The Judge gave the following reasons for this conclusion:

[53] *The occupiers' evidence as to any agreement with Edward or Jacky Bakokoto was not objected to on the ground of hearsay. Nevertheless that evidence is hearsay as it was given in order to prove the truth of the existence of the alleged agreements. Edward and Jacky Bakokoto, both being deceased, cannot give evidence to confirm or disprove the occupiers' evidence. I rule that the Second-Twelfth Defendants' evidence as to their alleged agreements with Edward and Jacky Bakokoto is hearsay and inadmissible.*

[54] *I do find and accept that the occupiers dealt with Jacky Bakokoto alone and, in one instance, with Edward Bakokoto in relation to their occupation of the land. Given the hearsay evidence from the occupiers, I am unable to conclude what agreements, if any, were reached.*

42. The appellants raised two grounds of appeal with respect to the hearsay finding: first, that the Judge had been wrong in regarding the excluded evidence as inadmissible and, secondly, that she had been wrong to make the ruling without notice to them especially given that no objection had been taken at trial to the admissibility of the evidence.



43. The hearsay rule was stated by the Privy Council in *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 at 970 in the following terms:

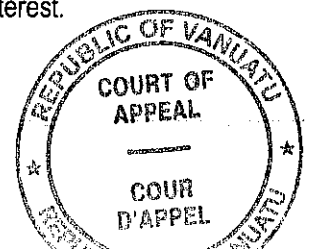
*Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.*

Thus the effect of the hearsay rule is to exclude evidence by A of what was said by B only when that evidence is led to prove the truth of a fact asserted by B.

44. In the present case, the appellants did not lead the evidence of their discussions with Edward and Jacky Bakokoto in order to prove the *truth* of the matters spoken by each. Their purpose instead was to lead evidence of discussions *in which they themselves had been the participants* in order to prove the words actually spoken so that the Court could determine, on the basis of the words found to have been spoken, whether there had been agreements and, if so, the terms of the agreements. In the case of agreements which are wholly oral, that is the only way by which the agreements can be proved. Had Edward and Jacky been alive, they could have given answering evidence and the Court would have resolved any conflicts. The circumstance that Edward and Jacky Bakokoto had died, and so could not give answering evidence, did not mean that evidence which would not have been hearsay if they were alive then becomes hearsay.
45. It is understandable that the Judge wished to have evidence in primary form (the words actually spoken) and not evidence in conclusionary form (for example, "we reached an agreement"). But providing that the evidence was of a primary form, it was both relevant and admissible and, as noted, was the only way by which the appellants could prove the terms of the consent they alleged to their occupation of the Land.
46. Accordingly, with respect to the Judge, we uphold Grounds 3 and 4.

#### **Grounds 5 and 6 – the effect of the Notice to Vacate on 3 June 2013**

47. As already noted, the primary Judge found that the service of 3 June 2013 Notice to Vacate on the appellants brought to an end their right to occupy the Land and, accordingly, the right protected by s 17(g) of the LL Act.
48. On the appeal, the appellants contended that these conclusions had been wrong because:
- (a) they had an equitable interest in the Land which still subsisted at the time of the first registration of a lease on 26 March 2012 and which could not be terminated by the issuing of a Notice to Vacate; and
  - (b) Messrs Bakokoto were estopped from denying the existence of that equitable interest.



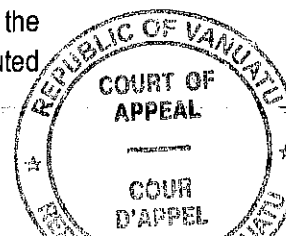
49. In relation to the asserted equitable interest, the appellants relied on the decision of the Chief Justice in *Bakokoto v Obed* [1999] VUSC 44 in which, in relation to circumstances analogous to those of the present case, the Chief Justice said:

*The Court's approach in cases of this kind is first to enquire what is the equity due to the licencees and then to consider how best to satisfy it.*

*It is quite plain from the evidence in this case, that if the Plaintiff allows the Defendants to build houses and live on his land, it amounts to expending money on the land under [the] expectation created or encouraged by the Plaintiff that the Defendants will be able to remain there. That raises an equity in the licencees [Defendants] which entitles the Defendants to stay of the Plaintiff's land. The Court will not allow an expectation to be defeated where it would be inequitable to do so. The present Plaintiff is bound by this equity which is recognised by law to arise from the expenditure of money by the Defendants in actual occupation of the land when they are led to believe by the Plaintiff/custom land owner that, as a result of that expenditure they will be allowed to live on the land*

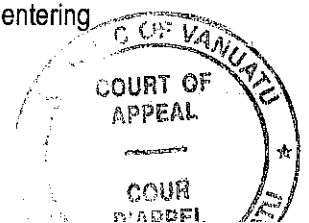
*In my judgment, the Defendants have an equitable right and/or interest in the Plaintiff's land. The conduct of the Plaintiff as established by the evidence, constitutes a breach of the Defendants' equitable rights and/or interests.*

50. We respectfully agree with this statement of principle. It means that the existence or otherwise of the equitable interest claimed by the appellants had to be determined in this case.
51. The decision in *Bakokoto v Obed* is important in another way. The Chief Justice found that the rights and obligations of the parties had to be determined *by reference to their agreement*. In that case, the parties had been in dispute about the terms and conditions of their agreement, in particular the period during which occupation was permitted. Ultimately, the Chief Justice rejected the plaintiff's contention that the parties had agreed upon a periodic tenancy of five years and accepted that he had agreed that the defendants could enter onto the land, erect houses, and live on it as long as they wished.
52. As it was accepted that the present appellants occupied the Land under contractual licences, it was necessary for the Judge to make findings about the terms and conditions of those licences and, in particular, about what, if anything, had been agreed as to the duration of those licences. That is because the equities claimed by the appellants could not extend beyond the period of occupation which the parties had agreed upon.
53. In the present case, the Judge did not, for the reasons given earlier, make findings about the terms of the agreements of the appellants with Jacky Bakokoto. Until those findings had been made, and findings as to the duration of the entitlement to occupy made, the efficacy of the Notices to Vacate to bring the occupations to an end could not be determined.
54. Counsel for the appellants submitted that the evidence disclosed that Jacky had agreed with the appellants that they could occupy the Land for as long as they wished. Counsel for Mr Kai disputed



that that was so and referred to passages in the Judge's notes which seemed to record acknowledgement by at least some of the appellants that they had known that they could occupy the Land only for as long as Jacky permitted them to do so. Thus, the parties' submissions raised two principal alternatives: agreements permitting the appellants to occupy the Land as long as they pleased, on the one hand, or agreements for occupation for an indefinite period but terminable by notice, presumably reasonable notice, on the other. We have reviewed the Judge's evidence notes with a view to seeing whether it is possible for this Court to make findings concerning these or any other alternatives. However, we are satisfied that it is not practical to do so.

55. Instead, we will remit the matter to the primary Judge to make findings about these matters. In doing so, the Judge will no doubt keep in mind that it is the appellants who have the relevant onus of proof. Much will depend upon the Judge's assessment of the evidence, if any, which the appellants gave on the topic of the duration of their respective agreements. Although the Judge will not have answering evidence from Edward or Jacky Bakokoto, it will be appropriate for her to make an assessment of the plausibility of the respective contentions. On the appellants' side, there will be the fact that they did enter into occupation of the Land and erect houses and carry out other improvements. That may, as it did in *Bakokoto v Obed*, support an inference that some form of long term agreement was reached. On the other side, it may not be plausible to think that Jacky Bakokoto would have agreed positively that the appellants could occupy the Land for as long as they pleased, thereby inhibiting altogether for a period of possible unlimited duration his ability to make some other use of the Land.
56. We emphasise, however, that, contrary to the submission of counsel for the appellants, it does not follow from the mere fact that the appellants had a right to occupy, that that was a right to continue occupation in perpetuity or until they chose to cease occupation. It will be the terms of their agreements with Jacky Bakokoto which will determine whether that was so. If those agreements permitted occupation only until termination on reasonable notice, then the equity which they assert in the Land would subsist only for such a period. We note again that s 17(g) protects only rights and interests as may "for the time being" subsist.
57. If the primary Judge finds, on the remittal, that the appellants' rights to occupation were terminable on reasonable notice, the Judge may well conclude that the Notices to Vacate served on 3 June 2013 had the effect of bringing the appellants' rights to occupation to an end. However, in order for the Judge to consider this further in the light of her findings concerning the claimed underlying equity, we will uphold these grounds of appeal. We emphasise, however, that the primary Judge may on the remittal and subject to the further findings, make the same finding as to the effect of the Notices to Vacate.
58. Before leaving this ground of appeal it is appropriate to refer to another submission of counsel for Mr Kai. This was to the effect that, because the appellants claimed a contractual licence but had not lodged any caution pursuant to s 93 of the LL Act, the claimed licences could not be effective against Mr Kai, given that he was a *bona fide* purchaser of the Land for valuable consideration.
59. This submission cannot be accepted. The appellants did not claim to be only contractual licencees. Their claim was that the contractual licences together with their subsequent conduct in entering



the Land and making significant improvements to it gave them an equity in the Land. Section 17(g) will protect such an equity if established.

### **Ground 7 – standing for the purposes of s 100 of the LL Act**

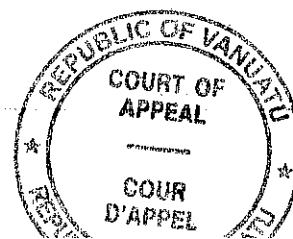
60. Section 100 of the LL Act provides that, subject to subs (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if, amongst other things, the Court is satisfied that the registration was obtained by fraud. It is not necessary for present purposes to note the terms of subs (2).
61. By their reply to the defence and counterclaim of Messrs Bakokoto, the appellants alleged that the registration of the transfer of the Lease from Jacky to Mr Kai had been obtained by fraud because the copy of the Lease submitted for stamp duty purposes showed the consideration for the transfer at VT 10 million whereas Mr Kai had acknowledged that the true consideration was VT 25 million. As to whether this may constitute a fraud for the purposes of s 100, see *Chen Jinqiu v Ly Nu Loung* [2020] VUCA 10 at [132]-[134].
62. The primary Judge found that the appellants did not have standing to make the application for rectification. In doing so, the primary Judge applied *Naflak Teufi Ltd v Calsakau* [2005] VUCA 15 in which this Court said:

We are satisfied on a consideration of the object and purpose of [section 100] that, at the very least, a person seeking to invoke section 100 must include a person who has an interest in the register entry sought to be rectified and which it is claimed was registered through a mistake or fraud ...

63. As the Judge had found that the appellants lacked a requisite interest in the Lease, she found that they lacked standing to bring an application for rectification of the register. That conclusion was undoubtedly correct but should be reconsidered after the Judge has determined, on the remittal, whether the appellants do in fact have any interest in the Land.
64. Accordingly, this issue too should be remitted to the Judge.

### **Ground 8 – the award of general damages**

65. Having found that Mr Kai was entitled to recover possession of the Land by the eviction orders, the Judge found that he was entitled to general damages for "the loss of enjoyment of his property [resulting] from the occupiers' occupation of the property". The Judge rejected Mr Kai's claim for VT 1 million for special damages noting that he had not proven any special damages. However, the Judge ordered the appellants to pay general damages of VT 500,000.
66. On the appeal, the appellants contended that this award was inappropriate as Mr Kai had not demonstrated that he had suffered any loss of enjoyment of the Land.



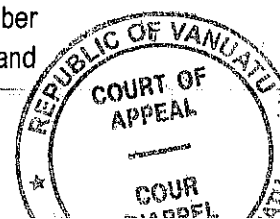
67. The normal measure of damages in the case of wrongful occupation or use is the market rental value of the property for the period of that wrongful occupation or use: *McGregor on Damages*, 20<sup>th</sup> Edition, Sweet & Maxwell, at [39-046]; *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713. However, Mr Kai did not make a claim for damages of this kind.
68. Mr Kai did not establish any loss warranting an assessment on some alternative basis. In saying this we are not overlooking the evidence to which counsel for Mr Kai referred to the effect that he had bought two parcels of land to which the appellants could relocate and had offered them financial assistance of VT 600,000. Counsel's submissions did not indicate how expenditure of this kind could be recovered as damages for wrongful occupation.
69. In the circumstances, we consider it appropriate to uphold this ground of appeal and set aside the award of VT 500,000. It is not necessary for this claim to be remitted to the primary Judge for further consideration.

#### **Ground 9 – the period in which to vacate**

70. The Judge ordered that the appellants vacate the Land within 28 days from the service on them of a copy of her decision. The appellants contend that the period of 28 days was unreasonable and instead, the Judge should have allowed three months.
71. No doubt, in fixing the period of 28 days, the Judge took into account all the time which the appellants have had since being served with the Notice to Vacate on 3 June 2013. Nevertheless, it is understandable that the appellants have wished to remain in occupation pending the determination of these proceedings. In our view, a period of only 28 days from the Court's determination is a relatively short time in which the appellants are to make the arrangements for their vacation and the relocation of their houses. On the reconsideration, if the Judge makes again the eviction orders, she may consider it appropriate to allow the appellants the three months they have sought.

#### **Grounds 10 and 11 – the substitution of Messrs Bakokoto as the 12<sup>th</sup> defendants**

72. When Mr Kai first commenced the proceedings, he named Mr Kereto Bakokoto as the 12<sup>th</sup> defendant. He did so on the basis that Mr Kereto Bakokoto was the legal personal representative of Jacky Bakokoto.
73. The appellants objected to Mr Kereto Bakokoto's involvement in the proceedings claiming that he was not in truth the legal personal representative of the estate of Jacky Bakokoto. They also contended that he should not have been included because Mr Kai did not claim any relief against Mr Kereto Bakokoto or against the estate.
74. It is not necessary to consider the merit or otherwise of that submission because, on 30 September 2020, the primary Judge made an order removing Mr Kereto Bakokoto as a defendant and

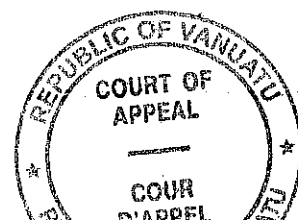


substituting Messrs Bakokoto as the 12<sup>th</sup> defendant in his place. The appellants contended that the substitution of Messrs Bakokoto was inappropriate.

75. The basis upon which the appellants opposed the inclusion of Messrs Bakokoto as parties in the proceedings was not made clear. It is plain that they had an interest in the proceedings arising, at the least, from the pleading in one of the replies of the appellants that "the custom owners" were estopped from denying that they occupied the Land with their consent. By itself, that made Messrs Bakokoto, as the custom owners, proper parties to the proceedings.
76. The appellants' submissions did not indicate any practical adverse effect in the trial which the involvement of Messrs Bakokoto had had. We note in this respect that even if they had not been parties, it is almost inevitable that they would have given evidence in the trial.
77. This ground of appeal is dismissed.

### **Conclusion**

78. For the reasons given above, the appeal is allowed and the orders made by the primary Judge are set aside. We are concerned that the parties have already participated in a substantial and complex trial. We think it undesirable that they not be put to the expense of another complete trial, especially as the nature of the issues which remain for determination is such that the primary Judge can appropriately make those determinations.
79. Accordingly, the matter is remitted to the Judge for further consideration, in the light of these reasons, of the following issues:
  - (a) the question of whether Jacky Bakokoto had the ostensible authority of his father in relation to his dealings with Faina Pakoa and of Messrs Bakokoto in relation to his dealings with the other appellants and, if so, whether Jacky's dealings with the appellants were authorised by the custom owners;
  - (b) the terms and conditions agreed upon between Edward and Jacky Bakokoto and Faina Pakoa and between Jacky and the appellants with respect to occupation of the Land and whether those terms and conditions, together with the subsequent conduct of the appellants in relation to the Land, gave rise to an equity existing at the commencement of the Lease which is protected by s 17(g) of the LL Act and, if so, the duration of that equity;
  - (c) whether the Notices to Vacate served on 3 June 2013 or any of the later Notices to Vacate, were effective to terminate any rights of occupation held by the appellants; and
  - (d) whether the appellants have standing pursuant to s 100 of the LL Act to seek rectification of the register.

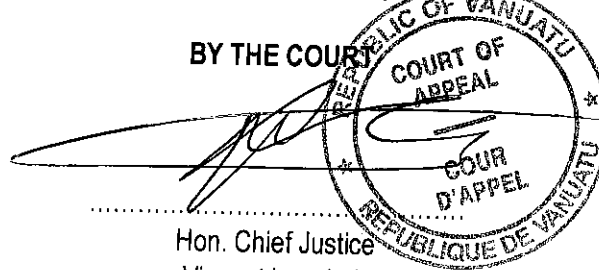




80. We consider that the further consideration by the Judge should be on the basis of the evidence received in the trial. Accordingly, subject to any further order of the Judge, the further consideration by the Judge is to be undertaken on the basis of the evidence already received, but the Judge may wish to invite further submissions from the parties concerning the remitted issues and may, as a result of those submissions, allow further evidence.
81. We also order the Registrar of the Court to refer to the Attorney-General the evidence received in this case to the effect that the consideration for the transfer of the Lease shown on the documents submitted for stamp duty assessment was VT 10 million whereas Mr Kai's evidence at trial was that the true consideration was VT 25 million.
82. Mr Kai is to pay the appellants' costs of the appeal to be taxed in default of agreement. Messrs Bakokoto are to bear their own costs of the appeal. The costs of the trial before the Judge and of the further hearing are reserved to the Judge for her consideration and determination.

DATED at Port Vila this 14<sup>th</sup> day of May 2021

BY THE COURT



Hon. Chief Justice  
Vincent Lunabek