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CIVIL CASE NO. 6 OF 1995

(Land Jurisdiction)

IN THE MATTER OF : An Application for
An Injunction.

**BETWEEN: PHILIP MALAS AND LOKEN
MALAS of P. O. BOX 968, Port Vila,
VANUATU.**

Plaintiffs

**AND: TRETHAM CONSTRUCTIONS
LIMITED AND TREVOR HANNAM
of P. O. BOX 190, Port Vila,
VANUATU.**

First Defendant

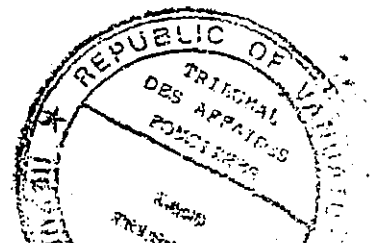
**AND: Claude Mitride of P. O. BOX 557,
Port Vila, VANUATU.**

Second Defendant

REASONS FOR JUDGMENT

This is an application of the above named Plaintiffs, Philip Malas and Loken Malas, both of Mele Village seeking for an injunction against the First and Second above named Defendants, Tretham Constructions Limited and Trevor Hannam and, Claude Mitride both of Port Vila, Vanuatu.

The grounds for the application are set out in the sworn affidavit of the Plaintiffs filed at the Efate Island Court on 16th day of November 1995 at 8. 55am o' clock.



The nature of the injunction sought by the Plaintiffs against the First and Second Defendants is not specifically mentioned in the Plaintiffs' Affidavit whether it is a perpetual, interlocutory or an interim injunction which is sought against the two Defendants. It is noted that all parties in these proceedings are lay persons. It can be understood from the Plaintiffs' Affidavit that this application is for an interlocutory injunction as the Plaintiffs stated at the end of their Affidavit that:

"Mifala i askem long Island Court blong stopem development long graon ia until Efate Island Court i declarem who nao i stret custom owner".

Thus, this seems to mean that the injunction sought will last until the Efate Island Court determines the custom owner(s) of the disputed land which the Plaintiffs referred to as "PONATOKA" Land and as they said in Court, the declared custom owner(s) will then negotiate with any potential investor(s) as to any lease agreement on the land concerned. It is clear that the injunction sought is not a perpetual injunction for it has to be specifically pleaded.

The Plaintiffs submitted with their Affidavit the original receipt No. 745045 of Vatu 30, 000 being for their payment of the customary land claim fees dated 19th August 1993 before the Efate Island Court. [See Island Courts (Civil Procedure) Rules, 1984 (subsidiary) Appendix B, Fees O. 3. r2 CAP 167].

They submitted also a copy of a Public Notice issued by the Clerk of the Efate Island Court to the Public in General and to any interested claimant(s) in particular on the disputed land concerned [Order 6 rule 8, Island Courts (Subsidiary) Act CAP 167.]

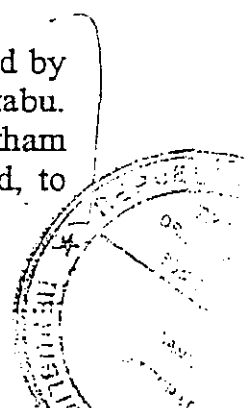
It transpires from the Efate Island Court File No. 6 of 1993 that there are now six (6) parties who claim their customary interests on the said land. Thus, the claims on the said land are now pending before the Efate Island Court for hearing in order to determine the true custom owner(s) (the map and boundaries of the said land are attached with the Plaintiffs' Affidavit "B2".)

The Plaintiffs say in their Affidavit that sometimes this year 1995, the First named Defendant, Tretham Constructions Limited and Trevor Hannam obtain a Certificate of Registered Negotiator on the land called "VATUGISU" Title NO. 112 G which is within the boundary of the whole land they claimed and that the above named First Defendant obtain a formal lease agreement to subdivide the said land Title 112 G without their consent.

They attach a letter "C" dated 2nd September 1995 addressed to Mr Rod Edges of Mele Land Trust Limited, Interim Committee C/o. Moores Stephens of Port Vila, Vanuatu.

This letter was signed by three members of Malas Family and was endorsed by Mele Village Chief, Peter Pöilapa and his Assistant Chief Timothy Malestabu. The letter was copied to Mr Trevor Hannam as the agent of Tretham Constructions Limited, the interim Committee of Mele Land Trust Limited, to Land & Survey Departments.

(Chief was advised)



Mr Trevor Hannam, on behalf of the above First Defendant filed an Affidavit at the Efate Island Court on the 21st November 1995 and says, inter alia, that: " he believes that the leasehold Titles on the Land mentioned by the Plaintiffs in their Affidavits is not correct but the leasehold Title on the land "VATUGISU" is Title NO. 12/ O821/ 062. He submitted a copy of " Advice of Registration of a dealing affecting Registered Land in Annex "A" of his Affidavit, dated 26th October 1995, showing that the Registered Proprietors are Trevor Ernest George Hannam and Judith Vivienne Hannam; the titles affected are 12/ O821/ 061 and 12/ O821/ 062 and that it is a Rural Agricultural Lease dated 18th September 1995 made between the Mele Trustees Limited and Trevor Ernest George Hannam and Judith Vivienne Hannam and finally that the lease is for 75 years each.

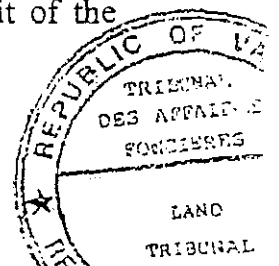
He said that he believes the lease on the land "VATUGISU" was registered under the land leases Act on 26th October 1995 to be expired on the year 2070.

He contented that Efate Island Court has no jurisdiction to hear the disputes as to the Registered Leases, the appropriate Court to hear such disputes is the Supreme Court of Vanuatu on the basis of Sections 1 and 100 of the Land Leases Act CAP 163.

He stated further that pursuant to Sections 1, 14 and 15 of the Land Leases Act the lessee of a registered Lease has a "*raet we no kat wan bakeken i save ko entap mo long hem*" on the leasehold property, so that the Plaintiffs have no right to try to control the deals between lessor and the lessee.

Finally, he submitted a letter dated 29th September 1995 addressed to Mr George Kerby, Lands Officer of the Land Department confirming that Mele Trustees Limited represents the custom owners of this land and that there is no objection to the registration of the Leases between Mele Trustees Limited and that this development will benefit the whole of Mele Village and that the village has given its approval to the project. This letter was signed by Mele Chief Peter Poilapa and his assistant, Chief timothy Malastabu. The First Defendant attached also a copy of a letter of 6th November 1995 advising that a meeting of Mele Village authorising Mele trustees Limited to act on behalf of the village, in all land matters relating to Mele Land, including all Land which is the subject of any dispute between different individual Mele families.

This letter was also signed by Mele chief Peter Poilapa and his assistant, Chief Timothy Malastabu. He submitted to Court a Copy of the Certificate of Registered Negotiator of 23rd August 1995 delivered by the Honourable Minister for Natural Resources, Paul B. Telukluk. It shows Mr and Mrs Trevor Hannam is the registered negotiator for the land known as the Title NO. Part Title 112 G. It is agricultural Lease. The Custom owner is Mele Trustees Limited. It is valid for twelve (12) months only. He submitted also an affidavit of Peter Poilapa, chief of Mele village and an Affidavit of Philip Wayne rundle a partner of Moore Stephens Vanuatu acted as Director and Secretary for Mele Trustees Limited; the two affidavits referred to supported the affidavit of the First Defendant to the same effects.



Mrs Caroline Mitride, on behalf of Claude Mitride the Second Defendant filed also an Affidavit on the 21st day of November 1995. In her affidavit she says Claude Mitride is the Lessee on " BUKURA" Land Titles 12/ O823/ 001 and 12/ O822/ 011 which are not the Title number referred to by the Plaintiffs. She submitted a Copy of Lease on BUKURA' land registered under the land leases Act.

She further disputed the jurisdiction of the Island Court as not being the appropriate Court to determine disputes of registered leases but only the Vanuatu Supreme Court has. She also refers this Court to sections 1, 14, and 15 of the Land Leases Act as the first Defendant did.

On point 7 of her Affidavit she says:

"Nakamal blong Chief long Mele Village hemi approvum subdivision blong graon ia, BUKURA, finis, ... mo tu Nakamal blong Chief i talem se Mele Trustees Ltd i kat raet blong act long bihalf blong Mele village long every matter long saed blong kraon blong Mele (luk long Annex "C")."

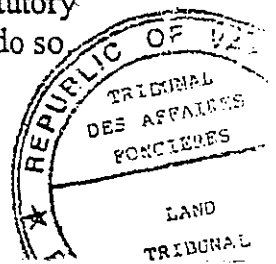
Furthermore, she says in point 8 of her affidavit:

" Rural Residential Lease Selection Committee we i stap long Lands Department hemi report se hemi no gat any samting akensem subdivision ia, mo hemi biliv se project ia bae hemi wan long term benefit long investor, long ni- Vanuatu mo long Government from bae hemi help blong mekem problem blong ova population i ko daon (luk Annex "D" we hemi ripot blong Rural Residential Lease Selection Committee)."

She finally says that the Lands Survey Department approved the development project and approved plans to be enclosed with the Leases and submitted them to Mele Trustees Limited.

It is worth mentioning that the application for an interlocutory injunction is not a trial on the merits. There is usually no oral evidence and no opportunity for cross-examination. The decision of the House of Lords in American Cyanamide Co. v. Ethicon Ltd [1975] AC 396 clarified the approach of the Courts to interlocutory applications inter partes for prohibitory injunctions. The guidelines laid down by Lord Diplock are regarded as the leading source of Law on the subject, although, as the Court of Appeal pointed out in Cayne v. Global Natural Resources plc [1984] 1 All ER 225, they are based on the proposition that there will be a trial on the merits at a later stage when the rights of the parties will be determined.

It is important to bear in mind that the American Cyanamide case contains no principle of universal application. The only such principle is the statutory power of the Courts to grant injunctions when it is just and convenient to do so



The American Cyanamide case provides an authoritative and most helpful approach to cases where the function of the Court in relation to the Grant or refusal of interlocutory injunctions is to hold the balance as justly as possible in situations where the substantial issues between the parties can only be resolved by a trial.

This Court will follow the guidelines set out by Lord Diplock in the American Cyanamide case in this way by answering the following question:

Is there a serious question to be tried in this case?

The Plaintiff does not need to show a prima facie case, in the sense of convincing the Court that on the evidence before it he is more likely than not to obtain a perpetual injunction at trial. The evidence available to the Court at the Hearing of the Application for an Interlocutory Injunction is incomplete. It is given on Affidavit and has not been tested by oral cross-examination... The Court no doubt must be satisfied that... there is a serious question to be tried.

Putting it another way the Plaintiff will fail if he cannot show that he has "*any real prospect of succeeding in his claim for a permanent Injunction at the trial*".

In the present case, the two Plaintiffs filed a claim on the land concerned. They did it on the basis of Sections 73, 74, 75, 76, 77 and 78 of the Constitution as pretended custom owners of the lands on which the First and Second Defendants intended to subdivide them. Their claim is pending hearing before the Efate Island Court. The Plaintiffs disputed the formal lease Agreement obtained by the First and Second Defendant on the basis that they are the pretended customs owners who should give their consent to the formal lease agreement in order to subdivide the said land properties.

There is no doubt that the Plaintiffs have a substantive claim to support their application for an injunction. They strongly apply to this Court to issue an injunction against the First and Second Defendants because as they say in Court if this Court refuses to grant injunction this refusal may result in substantial hardship to them as they need the land and sea Coast for their future generation (descendants) to have access to Coasts for fishing. The two Plaintiffs in this case stated they do not dispute the Agricultural Lease obtained by the First and Second Defendants but they disputed the subdivisions both Defendants intended and started to do on the disputed land.

The respective land titles obtained by the Defendants are within the boundaries of the customary land which is subject to claims before the Efate Island Court.

The First and Second Defendants disputed the Jurisdiction of the Island Court on the basis that the Efate Island Court has no jurisdiction to hear disputes concerning Leases and pursuant to sections 1 and 100 of the Land Leases Act CAP 163 the Vanuatu Supreme Court only has jurisdiction to hear such disputes.



It has to be clarified that this is not a dispute between Lessor(s) and Lessee(s) to which the Supreme Court has the absolute jurisdiction as provided by Sections 1 and 100 of the land Leases Act as contented by the First and Second Defendants.

This is an application lodged by the Plaintiffs who are custom claimants on a disputed land for an injunction to refrain from interfering with the land during the hearing of the case. [See section 1 (1) (c) of the Island Courts (Powers of Magistrates) Order No. 1 of 1990]. See also Section 13 (d) (e) of the Island Courts Act CAP 167. This situation could be extended also to cases pending before the Courts for hearing. It should be noted that Section 29 of the Courts Act CAP 122 seems to give inherent powers to all Courts including the Island Courts in these terms:

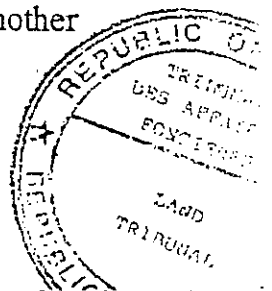
- Section 29 (1) *" Subject to the Constitution, any written Law and the limits of its jurisdiction a Court shall have such inherent powers as shall be necessary for it to carry out its functions. "*
- (2) *" For the purpose of facilitating the application of any written Law or custom any provision may be construed or used with such alterations and adaptations as may be necessary and every Court shall have inherent and incidental powers as may be reasonably to apply such written Law or custom. "*

On the basis of this section 29, the Island Court as a " Court of Law " have inherent powers to grant or refuse injunctions. This is a necessary power for this Court to carry out its functions within, of course, the limits of its equitable jurisdiction.

Therefore, in the case before us, this Court has jurisdiction to hear this application.

The First and Second Defendants submitted also that the Chief of Mele Village, Chief Peter Poilapa and his Assistant have confirmed that Mele Trustees Limited represents the custom owners of the disputed land and it will act on behalf of the Mele village in all land matters relating to Mele Land.

It has to be understood that the Mele Chief is not a pretended custom owner on the land concerned. He could not substitute himself to the custom owners and give right to a body such as the Trustees to act on behalf of the custom owners. The Mele Land Trustees is supposed to represent all custom Land owners at Mele village. However, this representation is made on the basis that all custom owners consented to that effect. If a custom owner refuses to be represented by the Mele Land Trustees Limited, the Mele Chief and his assistant could not give any authorisation to the Trustees to act on the custom owner's behalf without his final consent. The Chief has no authority to do that in the eyes of the Law. The authority of the Chiefs (if there is any) on his people and community is one thing and the rights of custom owner on the land is another thing. It is important to distinguish one from another.



Furthermore, the respective land titles obtained by the First and Second defendants are Agricultural Leases. They need to get new leases agreement in relation to the subdivisions. None of the First and Second Defendants got now Leases Agreement with the consent of the plaintiffs to subdivide the disputed land Titles.

Finally, the Second Defendant submitted a report on site visit to lotissement Bukura Efate, which is a summary of the Rural Residential Leases Selection Committee. I get an opportunity to go through the said report. It is a proposed project. It is not a final project. The following recommendations are made:

1. The Rural Residential Leases Selection Committee to meet again to review advices, make additions and make sound recommendations/advices.
2. ...
3. ...
4. Investor must obtain planning permission from Shefa Province for:
 - (1) Subdivision purpose
 - (2) Change of use from Agriculture to Residential on lots proposed for Residential Purposes.

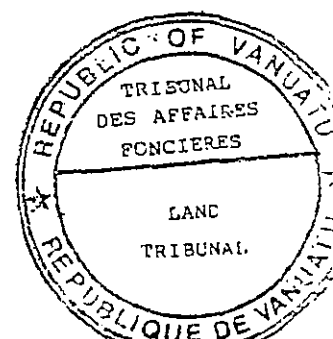
I scrutinise the documents filed by the First and Second Defendants. Both Defendants have agricultural Leases on their respective Land Titles referred to in their affidavits. I do not find any planning permission from Shefa Province for (1) subdivision purpose and (2) change of use from Agriculture to Residential on lots proposed for residential purposes.

In this case, the First and Second Defendants have not raised any arguable defence, there is not a serious question to be tried, and an interlocutory injunction should be granted without considering the adequacy of damages or the balance of convenience

(see Official Custodian for Charities -V- Mackey (1985) ch. 168).

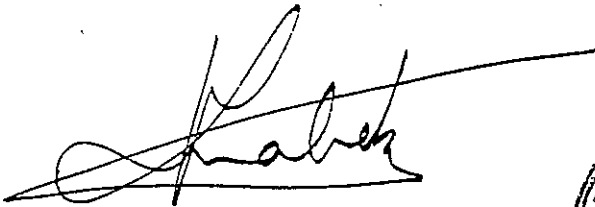
Thus, this Court will grant the injunction sought by the Plaintiffs and make the following orders:

1. It is ordered and directed that the First above named Defendant Tretham Constructions Limited and Trevor Hannam and the Second Defendant, Claude Mitride be restrained and an injunction is hereby granted restraining;



- a) The First Defendant, Tretham Constructions Limited and Trevor Hannam, his agent, servant or assistant from subdividing Leasehold Titles 12/ O821/ 061 and 12/ O821/ 062 which is located within the boundaries of the disputed land called "PONATOKA" until the Efate Island Court determines the true custom owner(s).
 - b) The Second Defendant, Claude Mitride, his Agent, servant or assistant from subdividing leasehold Titles 12/ O823/ 001 and 12/ O822/ 011 which is within the boundaries of "PONATOKA" land until the Efate Island Court determines the true custom owner(s).
2. This Order does not affect any Agricultural development made by the First and Second Defendant on the basis of their respective Agricultural Leases.
 3. Liberty to apply by both parties.
 4. The costs be reserved.
 5. Appeal within 30 days as from today 1st December 1995.

DATED AT PORT VILA THIS 1st Day of December 1995.



LUNABEK VINCENT.
Senior Magistrate.

