

**IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU
(CIVIL JURISDICTION)**

JUDICIAL REVIEW CASE No. 02 OF 2013

BETWEEN GREEN PEAK LIMITED

First Claimant

AND COSTA BLANCA DEL MAR LIMITED

Second Claimant

AND REPUBLIC OF VANUATU

Defendant

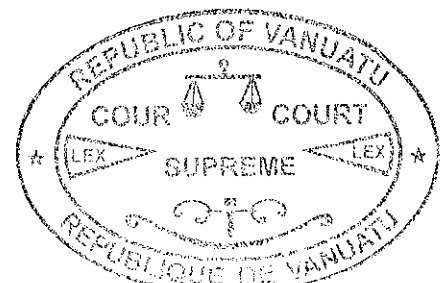
Coram: Justice Mary Sey

Counsel: George Boar for the Claimant
Frederick Gilu for the Defendant

Date of Judgment: 17th December 2014

JUDGMENT

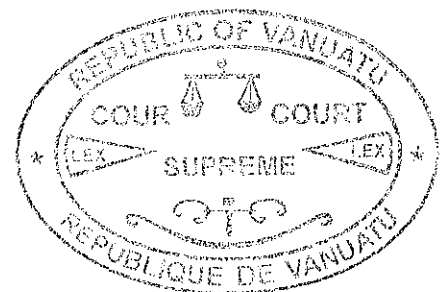
1. This is a claim for Judicial Review, filed on 18 March 2013, in which the Claimants seek the following reliefs:
 - (a) A quashing order in respect of the decision of the Defendant to delay, withhold and refuse the registration of the Lease Agreement contained in the Lease Instrument title 12/0411/008 and 12/0413/095.
 - (b) A mandatory order directing the Defendant to register the First and Second Claimants' Lease Title No. 12/0411/008 and 12/0413/095 according to law.
2. The basis of the Defence filed on 2 July 2013 was that there was non-compliance with Section 6 of the Land Reform Act. Furthermore, the Defendants say that the Claimants were not given any negotiator's



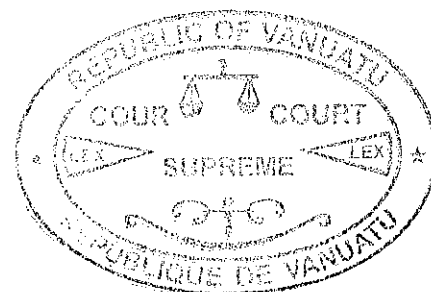
certificate to negotiate with the custom owners of the land known as Takara Airport and that the negotiator certificate approved by the Minister on 10 October 2006 was issued to Mr. Edmond Jonas and Mr. Yoan Mariasua in their personal capacity and not as beneficiaries of their Companies i.e. the First and Second Claimants named herein.

Background

4. On 10 October 2006, the then Minister of Lands issued a negotiator certificate to Mr. Edmond Jonas and Mr. Yoan Mariasua to negotiate for the land known as Takara land, Old Airport, North Efate.
5. On 11 May 2007, registration fees were paid by Teouma Holdings Limited and the lease documents were prepared by the Lands Department.
6. On 29 June 2007, the Minister of Lands signed the two leases namely lease title 12/0413/095 between Karaf Family, Family Manapangamanua, Ameara N' taen Kanas as lessors and Green Peak Limited as the lessee and lease title 12/041/008 between Karaf Family, Family Manapangamanua, Ameara N' taen Kanas as lessors and Costa Blanc del Mar Limited as the lessee.
7. On 7 August 2007, the two leases were lodged with the Director of Lands for registration.
8. By a letter dated 21 January 2008, the Director of Lands, Survey & Records informed Mr. Edmond Jones and Mr. Yoan Mariasua about the reasons why he had refused to proceed with the registration of the First and Second Claimants' leases. The Director provided 4 grounds for his refusal as follows:



1. The negotiator's certificate was issued to Messrs Yoan Mariasua and Edmond Jonas and bears their names as the registered negotiators and not that of the Claimants Costa Blanca Del Mar Limited and Green Peak Limited.
 2. There was no evidence provided as to whether these Companies existed and were actually registered and that Messrs Yoan Mariasua and Edmond Jonas were the beneficial owners.
 3. The third ground for refusing the lease was that some of the declared custom owners have approached the Department of Lands demanding that the two leases must not be registered purporting that no proper consultation was undertaken to have the two leases created.
 4. One of the custom landowners who had signed the lease as representative of Family Ameara had withdrawn his signature.
9. On 9 November 2012, Mr. Edmond Jonas and Mr. Yoan Mariasua wrote a letter to the Department of Lands to cancel the two leases and to reimburse all monies paid in respect of the fees of the two leases.
10. On 22 November 2012, the Department of Lands received a letter requesting the reimbursement of fees to be paid to Teouma Holdings Limited.
11. On 3 December 2012, the Department of lands reimbursed Teouma Holdings Limited the sum of VT1, 083,750 paid in respect of the two leases.
12. By letter dated 1 August 2013, Mr. Edmond Jonas and Mr. Yoan Mariasua wrote to the Department of Lands stating that they had revoked the letter of 9 November 2012. Then on 30 August 2013 they paid the registration fees of VT1,083,750 for the First and Second



Claimants' lease titles being 12/0411/008 and 12/0413/095. This was the amount previously refunded to Teouma Holdings Limited.

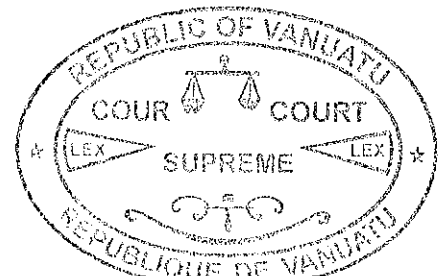
Preliminary Matter

13. It is timely to mention that in the Defendant's closing submissions it is submitted that this proceeding was not commenced subsequent to the requisite notice having been given under section 6 of the State Proceedings Act No. 9 of 2007 [as amended by the Government Proceedings (Amendment) Act No. 4 of 2010].

Section 6 prohibits the commencement of a proceeding against the State unless detailed notice of the intention to commence the proceeding is given to the State at least 14 days and not more than 6 months before the proceeding is commenced.

"6 Notification of intention to institute proceedings

- (1) *No proceeding against the [State], other than an urgent proceeding, [or a Constitutional Proceeding, may] be instituted under section 3 unless the party intending to do so first gives written notice to the State Law Office of such intention.*
- (2) *The notice [under (1)] must:*
- (a) include reasonable particulars of the factual circumstances upon which the proposed proceedings will be based; and*
- (b) be given not less than 14 days and no more than 6 months prior to the institution of proceedings."*
14. The Defendant submits that such notice is essential for the State to enquire as to the nature of the claim and to correspond with the claimants if necessary for clarification and or resolution of the matter prior to any litigation proceedings. The Defendant further submits that this was never done by the Claimants in this proceeding.

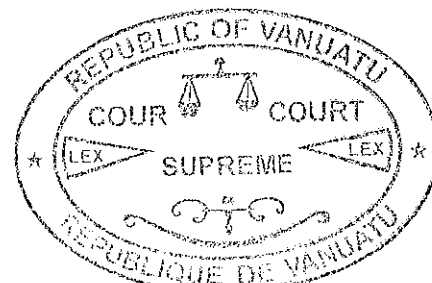


15. Suffice it to say that this was not an issue raised at the commencement of the proceeding and during the trial. Accordingly, I do not consider that it should be a factor to be taken into account in respect of the matters in issue.
16. Nonetheless, as the Court of Appeal observed in **Republic v Kwang Sing 1** (Civil Appeal Case No. 21 of 2013), "it does appear that the failure to give such notice will operate as a complete prohibition to the commencement of a proceeding against the State. Those contemplating commencing proceedings against the State need to appreciate the likely consequences of proceeding without the giving of notice under s. 6."
17. The **Issues** posed for determination in this application for judicial review are:
- (a) Whether or not the First and Second Claimants have complied with all the procedural requirements for registering their leases?
 - (b) Whether the decision of the Director of Lands on 21 January 2008 is *ultra vires* the provisions of the Land Leases Act [CAP 163] and/or the Land Reform Act [CAP 123]?
18. For ease of reference, the body of the letter written to Messrs Yoan Mariasua & Edmond Jonas is reproduced hereunder. It reads:

"Dear Sirs,

**COSTA BLANCA DEL MAR LTD & GREEN PEAK LIMITED LEASES – TAKARA,
NORTH EFATE**

I write in reference to the above matter and the continuous attack on me by the Honourable Minister of Lands regarding the above two leases.



I wish to inform you both that after a careful examination of the two leases, it was evident that the two leases were invalid, improper and have been obtained contrary to the appropriate Land Laws. Even the Honourable Minister of Lands had not realized the mistake he had made by approving your leases.

Firstly, I understand that you were issued a negotiator certificate which has your names as the registered negotiators for the land known as Takara Old Airport. When the leases were prepared, they carry the names of the above mentioned Companies, namely, Costa Blanca Del Mar Limited and Green Peak Limited. You are strongly advised that this is clearly wrong in law. Why, because you were granted a negotiator certificate, not the two Companies. What has been done here falls short of the legal requirements of section 6 of the Land Reform Act CAP. 123.

Secondly, there is no evidence provided as to whether the Companies do exist or not as per Section 6 of the Land Leases Act Subsidiary Legislation. The section talks about Evidence of Incorporation. Now you can see clearly for yourselves that my action not to proceed with your leases, is totally based on the Land Laws of this country.

There are other issues which need your attention and serious consideration. The Department of Lands has been approached by some of the elders and family members of the declared custom owners that there has not been a proper consultation at the level of the Takara Community. Besides, the Department has in its possession a letter dated 27 August 2007 written by one of the representatives of the custom owners who had signed the leases as lessor withdrawing his signature from the lease.

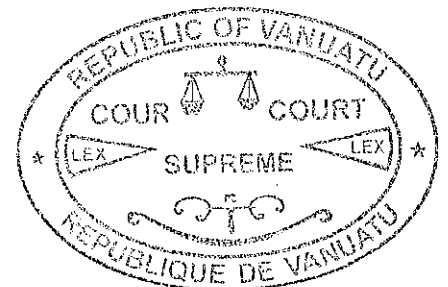
The above happened following a meeting held at Takara on 25 August 2007 and a resolution passed for Mr. Kaltalua Bill Ameara (who had signed the leases as representative of Family Ameara) to withdraw his signature. There is also a rumour that the leases cover the gardening lands for the entire Community of Takara. These are some of the issues that you both should consider very seriously. I wish to advise that leases should not be used as a weapon to get rid of a community for the sake of the so call development. Proper consultations are required so that those to be affected are well informed.

I wish to reiterate that at the beginning, your leases were invalid and were/are still not registrable documents because they fall short of the legal requirements of the Land Laws. How the Minister of Lands is accusing me of being an obstacle to the current Government policy is absolutely baseless. My action is protected under the Land Laws. On the other hand if you both think what I have done is contrary to law, feel free to challenge my decision in Court.

Please contact the undersigned should you have any queries regarding this letter.

Yours faithfully,

Jean-Marc PIERRE
Director, Lands, Survey & Records"



Relevant Law

19. **Section 6 of the Land Reform Act [CAP 123]** provides:

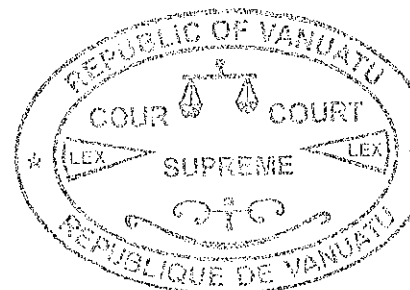
6. Certificate of registered negotiator

- (1) *No alienator or other person may enter into negotiations with any custom owners concerning land unless he applies to the Minister and receives a certificate from the Minister that he is a registered negotiator.*
- (2) *A certificate issued in accordance with subsection (1) shall –*
 - (a) *state the names of the applicant and of the custom owners;*
 - (b) *give brief details of the land in respect of which negotiations are registered; and*
 - (b) *state the object of the negotiations.*
- (3) *If negotiations are completed without compliance with subsection (1) the Minister may refuse to approve the agreement between the custom owners and the unregistered negotiator and if he is an alienator may declare the land unsettled land.*

20. **Section 8 of the Land Leases Act [Cap 163]** provides:

8. General Powers of Director

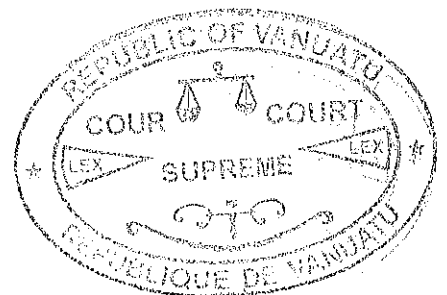
The Director may exercise the following powers in addition to any other powers conferred on him by this Act -



- (a) *he may require any person to produce any instrument or other document or plan relating to the registered interest and that person shall produce the same;*
- (b) *he may summon any person to appear and give any information or explanation respecting a registered interest, and such person shall appear and give such information or explanation;*
- (c) *he may refuse to proceed with any registration if any instrument, or other document, or plan, information or explanation required to be produced or given is withheld or any act required to be performed under this Act is not performed;*
- (d) *he may administer oaths or take a declaration in lieu thereof, and may require that any proceeding, information or explanation affecting registration shall be verified on oath or by declaration;*
- (e) *he may order that the costs, charges and expenses incurred by him or by any person in connection with any investigation or hearing held by him for the purposes of this Act shall be borne and paid by such persons and in such proportions as he may think fit;*
- (f) *he may, at his discretion, dispense, with the production of any signature, or the supply of any information or any advertisement or notice required by this Act; and*
- (g) *he may state any case or reserve any question for consideration by the Court.*

21. **Subsection 30(5) of the Land Leases Act [CAP 163] provides:**

- (5) *An application for registration of an instrument whereby a corporation acquires a registered interest shall be accompanied by such evidence of incorporation or such other evidence as the Director may require.*



22. **Subsection 4(2) of Land Registration General Rules No. 9 of 1986 provides that:**

4. Lodgment for registration

...

(2) *It shall be lawful for the Director to refuse to accept any application for registration of any matter –*

(a) when the fee assessed by the Director to be payable in accordance with these Rules in respect thereof has not been paid;

(b) if the relevant instrument and documents do not accompany the application, unless such instruments, or documents are proved to the Director's satisfaction to be already in the Land Records Office;

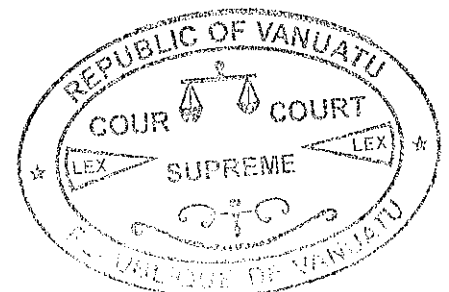
(c) if the application, instrument or document contains any apparent material defect or omission;

The Evidence

23. The Claimants rely on the following sworn statements:

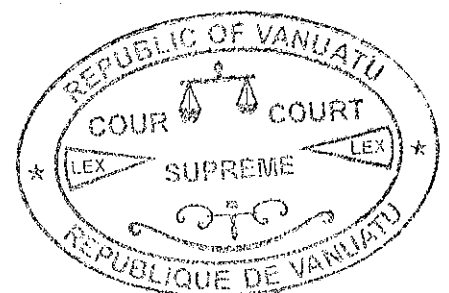
- a) Yoan Mariasua dated 7 May 2013 ("Exhibit C1");
- b) Edmond Jonas dated 7 May 2013 ("Exhibit C2");
- c) Edmond Jonas dated 4 September 2013 ("Exhibit C3"); and
- d) Edmond Jonas dated 7 April 2014 ("Exhibit C4");

24. The Defendant relies on the sworn statement of Paul Gambetta dated 2 July 2013 in support of the Defence ("Exhibit D1").



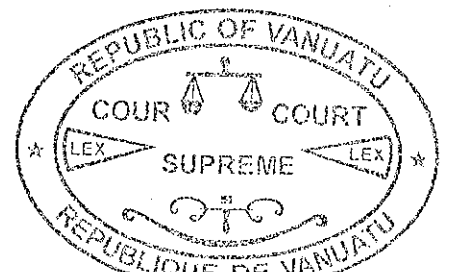
Submissions

25. The First and Second Claimants submit that they had done everything that they were required to do to obtain registration of the leases including obtaining all the necessary approval certificates and consents and paying the stamp duties and necessary fees. They contend, however, that in breach of the Land Leases Act and the regulations (as amended), the Defendant refused to register the lease document within a reasonable time on the basis of non-compliance with section 6 of the Land Reform Act [Cap 123].
26. The Claimants further contend that Yoan Mariasua is the beneficial owner of Costa Blanca Del Mar Limited whilst Edmond Jonas is the beneficial owner of Green Peak Limited and, therefore, under section 6 of the Land Reform Act [Cap 123] the Claimants' leases were registrable and, as a matter of law, they are entitled to have their leases registered through their companies namely the First and Second Claimants herein.
27. The Claimants' counsel further submits that the Defendant is estopped from denying the validity of the leases because by granting the negotiator certificate to the proprietors of the First and Second Claimants, preparing the First and Second Claimants' Lease Agreements and the Minister executing the Lease Agreements with the First and Second Claimants – meant that the Claimants' leases were in order and registrable.
28. Counsel cited the case of **Roger Japheth v Jean Marc Pierre and Ors** (Civil Case No. 187 of 2007) where His Lordship Fatiaki J. said, inter alia, that "*whilst one can sympathise with the Director's position and concerns in his desire to ensure as far as possible that instruments that are registered under the Land Leases Act [cap 163] are as "dispute-free"*



as possible, unfortunately that is not part of his functions nor is the refusal power given him under section 8 (c) intended for that purpose."

29. Let me pause here to say that I am totally in agreement with His Lordship's statement above and I consider it applicable in this present application to portions of the matters referred to by the Director in his decision of 21 January 2008. In particular, I find that the "other issues" he referred to in paragraphs 5 & 6 thereof do not fall under the General Powers of Director pursuant to section 8 of the Land Leases Act nor is the refusal power given him under section 8 (c) intended for that purpose.
30. I shall now proceed to consider the other two reasons given by the Director in his decision on 21 January 2008 for his refusal to register the leases. One was that there was non-compliance with section 6 of the Land Reform Act [CAP 123] and the other was that there was no proof that the Companies existed at the time the leases were lodged for registration.
31. The defendant submits that section 6 of the Land Reform Act permits someone to negotiate to obtain a lease over customary land that is disputed in order that the Minister may exercise its authority under section 8 of the Land Reform Act. The Defendant further submits that it is mandatory upon an applicant to state precisely who is intended to obtain a lease so as to ensure that the Minister may exercise its powers under section 8 of the Land Reform Act. Detailed and precise information will allow the Minister to make an informed decision relating to the land in question.
32. The Defendant further submits that the Claimants failed to comply with the requirements provided under section 6 of the Land Reform Act and

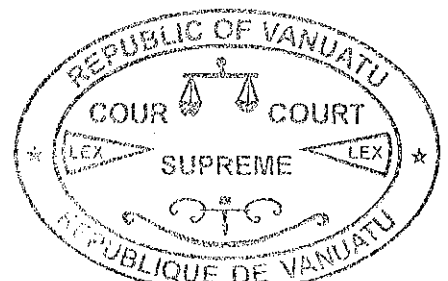


that the information regarding the persons who negotiated the negotiator certificate does not tally with the identification of those who have actually been granted approval for the lease.

33. It is further submitted by the Defendant that the evidence adduced by Mr. Edmond Jones established that the Claimants, as companies, were incorporated on 25 May 2007 and that the negotiator certificate was issued on 10 October 2006. As such it is the Defendant's submission that at the time when Mr. Yoan Mariasua and Mr. Jones were issued with the negotiator's certificate they were issued with the said certificate in their personal capacity and not as beneficiaries of the two companies because at the time of the issuance of the certificate the two companies were not yet incorporated.

Discussion

34. In this present application for judicial review, it appears to me that the Claimants' contention is that the Director exceeded his jurisdiction in his letter of 21 January 2008. The Claimants submit that when the Minister signed the Lease Agreement on 29 June 2007, he was satisfied that since Mr. Edmond Jonas and Mr. Yoan Mariasua are the beneficial owners of the Claimants and they had been issued certificate of negotiators over the same land in question, the lease was in order and proper.
35. The Claimants further submit that, under Section 8 of the Land Leases Act, the law obligated the Director to request additional information from the Claimants if he so wished as regards any matters contained in the Lease Instrument. They further submit that if the Director considered that there was still another avenue other than compliance with Section 8 of the Land Leases Act, then the Director could have applied under Section



8 (g) by stating a case or reserving any question for consideration by the Supreme Court. Furthermore, the Claimants contend that the Director could not simply write a letter which he did on 21 January 2008 refusing the Instrument or simply delay and refuse to register same.

36. The Claimants' position was clearly stated by their solicitor in a letter dated 20 February 2013 and attached to the sworn statement of Mr. Yoan Mariasua as "YM2." It reads:

"Dear Director,

RE: REGISTRATION OF LEASE TITLE NO. 12/0413/095 AND 12/0411/008

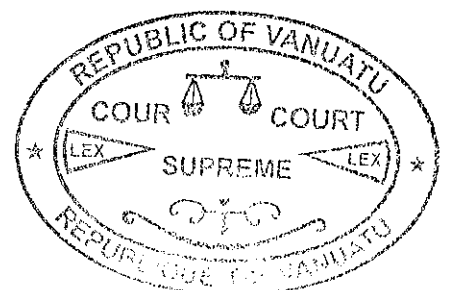
We refer to the above and advise we act for Green Peak Ltd and Costa Blanca del Mar Ltd.

On 29 June, 2007 the Minister of Lands executed the lease instruments contained in Lease Titles 12/0413/095 and 12/0411/008. The original lease instruments were submitted to your department for registration after our clients paid for stamp duties and registration fees. These lease instruments remain unregistered for the past 4 years 8 months. We would like to bring your attention to the decision of Roger Japheth -v- Director of Lands dated 22 March 2010 which is the authority that says the Director has no power to delay, to withhold or to refuse registration of the Lease. The Director must only be satisfied that the lease has been duly executed, stamp duties and registration fees paid.

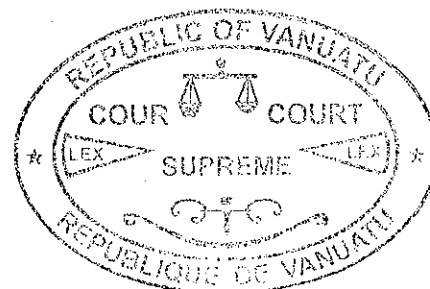
We request that our client's lease instruments be registered within the next 7 days, and if need be, do contact us if you need further assistance and or information.

*Yours faithfully,
BOARLAW*

George Boar
Principal"



37. In their oral evidence before Court, both Mr. Edmond Jonas and Mr. Yoan Mariasua said this was the first time they had seen the Director's letter dated 21 January 2008. They went on to say that they had met him several times but he had never raised any issues about registration of companies. In answer to questions put to him under cross examination, Mr. Jonas said: "First I have never seen that letter and secondly the Director had never informed me about any reasons for his refusal. He kept on holding on to our lease without giving me a valid reason why he could not register our lease."
38. During cross examination of Mr. Yoan Mariasua, defence counsel put it to him that he had never provided any proof of the incorporation of the companies to the Director even after his letter of 21 January 2008. His answer was: "We provided proof to him of the registration of the companies with our application for registration. We provided two copies - one for Green Peak and the other for Costa Blanca. These were provided when we lodged our application." When it was further put to him that it is not reflected on "PG3" Mr. Yoan Mariasua maintained that they had attached it with their application.
39. The Director Jean-Marc Pierre gave evidence for the Defendant and he stated that he had refused to register the two leases because the negotiator certificate had the names of two individuals and when the application was lodged it contained the names of two companies which were not incorporated at the time.
40. The witness went on to say that he recalled meeting with Mr. Edmond Jonas and Mr. Yoan Mariasua to discuss his difficulties with the registration. He said it was not true that they had submitted the



incorporation documents otherwise he would not have asked for the documents.

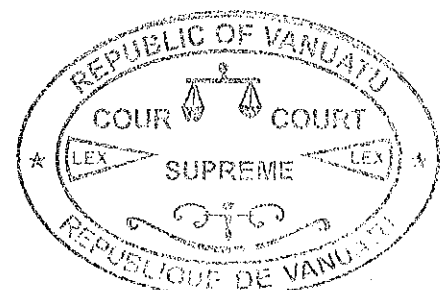
41. It is incumbent upon any person to obtain a negotiator certificate from the Minister of Lands pursuant to section 6 of the Land Reform Act [CAP 123] if he or she intends to obtain a lease over rural land. Section 6 of the Land Reform Act reads:

"No alienator or other person may enter into negotiations with any custom owners concerning land unless he applies to the Minister and receives a certificate from the Minister that he is a registered negotiator."

42. In **Takau v Carlot** [2001] VUSC 134 Civil Case 87 of 1998 the Court stated:

"Section 6 is the requirement in law for the respondents to comply with as they were issued with Certificate of Registered Negotiator to negotiate with custom owners and the answers to those questions will help the Minister to exercise his power under Section 8 of the said Act."

43. The Court went on to state that the issuing of such certificate was an order to the respondents to give the required information he wants in the said Form A to him. Even if the Minister is not satisfied with such information in Form A he can require the applicant to appear before him for interview or to provide additional information and that is a process taken by decision makers to be satisfied before making decisions.
44. It is in evidence that on 10 October 2006, the then Minister of Lands had issued a negotiator certificate to Mr. Edmond Jonas and Mr. Yoan Mariasua to negotiate for the land known as Takara Airport. They then



decided to transfer the negotiator certificate to their companies Green Park Limited and Costa Blanca Del Mar Limited.

45. As mentioned previously, one of the reasons advanced by the Director of Lands for his refusal to register the Claimants' lease at the time when it was lodged was because there was no proof that the two companies were incorporated.

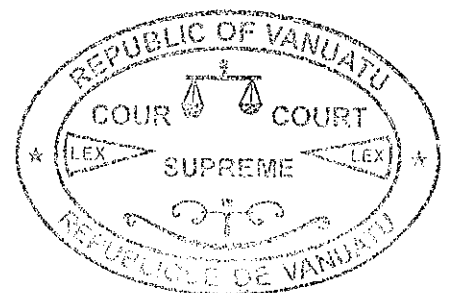
46. Subsection 30 (5) of the Land Leases Act [CAP 163] provides that:

"An application for registration of an instrument whereby a corporation acquires a registered interest shall be accompanied by such evidence of incorporation or such other evidence as the Director may require."

47. Of equal significance is the notation in paragraph 5 under the heading "NOTES" in annexure "PG3." It reads:

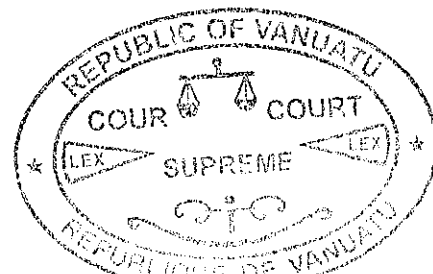
"on the first occasion application is made by or on behalf of a company or other incorporated body for it to be registered as proprietor of an interest, a copy of the memorandum and articles of association and the certificate of incorporation certified by the Registrar of Companies or other evidence of incorporation satisfactory to the Director of Land Records must be produced."

48. The evidence adduced by the Defendant established that at the time when the two leases were lodged for registration, there was never any proof that the Claimants were incorporated. It is clear from annexure "PG3" (LR Form 1 - Application For Registration), which is attached to the sworn statement of Mr. Paul Gambetta, that at the time when the leases were lodged for registration only the lease registration forms, their



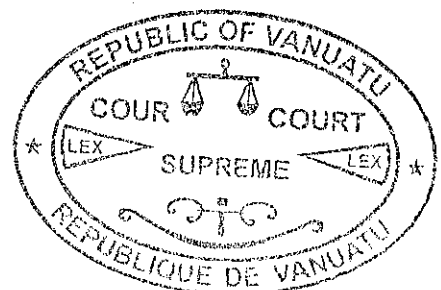
schedules and their survey plans were recorded in SECTION 4 as Instruments and other Documents Enclosed.

49. I note from the further sworn statement of Mr. Edmond Jonas filed on 7 April 2014, that he has provided documents to confirm that Green Peak Limited and Costa Blanca Del Mar Limited were incorporated at the Vanuatu Financial Service Commission on 25 May 2007 and 11 May 2007 respectively. At paragraph 3 of his sworn statement, Mr. Edmond Jonas confirmed that he and Mr. Yoan Noel Mariasua remain as directors and beneficial owners of Green Peak Limited and Costa Blanca Del Mar Limited since 2007 and he annexed "EJ5" and "EJ6" which are true copies of the Annual Return for the year 2014.
50. Be that as it may, however, I am inclined to accept the Defendant's submission that although such evidence is adduced to this Court in 2014, it was never a matter that was brought to the attention of the Director at the time when the leases were lodged for registration. There is also no evidence to suggest that after the letter of the Director on 21 January 2008, the Claimants purported to furnish the Director with the documentation required to establish the incorporation of the two companies.
51. Pursuant to subsection 4 (2) (b) of the *Land Registration General Rules* No. 9 of 1986, it shall be lawful for the Director to refuse to accept any application for registration of any matter if the relevant instrument and documents do not accompany the application, unless such instruments, or documents are proved to the Director's satisfaction to be already in the Land Records Office.
52. Judging from all the evidence adduced, I find that at the time that the Claimants lodged annexure "PG3", which is their application for



registration of their leases, they did not produce a copy of the memorandum and articles of association and the certificate of incorporation certified by the Registrar of Companies or other evidence of incorporation satisfactory to the Director of Land Records as envisaged by subsection 30 (5) of the *Land Leases Act* [CAP 136]. Furthermore, section 8(c) of the *Land Leases Act* also specifies that the Director of Lands may refuse to proceed with any registration if any instrument, or other documents or plan, information or explanation required to be produced or given is withheld or any act required to be performed under this Act is not performed.

53. In his testimony, the Director said it was not true that the Claimants had submitted the incorporation documents otherwise he would not have asked for the documents. I find this piece of evidence credible and I accept it as true and satisfactory.
54. It is timely to state that I have had the opportunity of seeing and hearing all the witnesses as well as observing their demeanour during the trial and in my considered view Mr. Yoan Mariasua appeared to be very evasive and he did not come across as a credible witness.
55. In the final analysis, it is my considered view that it was lawful for the Director to refuse to register the leases lodged in favour of the Claimants. In the circumstances, the Claimants' Judicial Review Claim fails and it is hereby dismissed with costs to the Defendant on the standard basis to be taxed if not agreed.



DATED at Port Vila, this 17th day of December, 2014

BY THE COURT



M.M.SEY
Judge

