IN THE SUPREME COURT OF

THE REPUBLIC OF VANUATU

(Civil Jurisdiction) **Civil Case No. 163 of 2011**

BETWEEN: JIMMY KAS KOLOU and JONAH KALENGOR
First Claimants

AND: STEPHEN DORRICK FELIX
JIMMY GEORGE LANGROS
MELES KALSILIK
SIAL KALSIIK
SONG KALSIKIK
GEORGE KALSIKIK
KALSEI KALOWI MASFIR
KALOPA KALSILIK
Second Claimants

AND: GILBERT TRINH
First Defendant

AND: REPUBLIC OF VANUATU
Second Defendant

AND: IRREPARABILE LIMITED
Third Defendant

AND: THE PROPRIETORS – Strata Plan No. 00085
Fourth Defendant

AND: ARABELLA LTD
Fifth Defendant

AND: TRAN NAM TRUNG
Sixth Defendant

AND: NATIONAL BANK OF VANUATU
Seventh Defendant

Hearing:	***16 April 2014***
Reserved Judgment:	***29 April 2014***
By:	***Justice Stephen Harrop***
Distribution:	***Robin Tom Kapapa for the Claimants***
	No appearance for the First Defendant (Christina Thyna)
	Viran Molisa Trief (SLO) for the Second Defendant
	Felix Laumae for the Third Defendant
	No steps yet taken for the Fourth Defendant
	Garry Blake for the Fifth Defendant
	James Tari for the Sixth Defendant
	Abel Kalmet for Seventh Defendant

RESERVED JUDGMENT AS TO APPLICATIONS FOR SECURITY FOR COSTS

Introduction

1. The first, second and third defendants have applied under rule 15.18 of the Civil Procedure Rules for an order that the claimants give security for their costs. Further, although not expressly sought in the written applications apart from that of the first defendant, these defendants seek a consequential order staying the claim until the security for costs is provided by way of payment to the Supreme Court's Trust Account.

2. The applications are opposed and a defended interlocutory hearing took place on 16 April. There was no appearance by Ms Thyna on behalf of the first defendant despite the hearing date having been clearly noted in paragraph 6 of my Minute of 3 March 2014 (in respect of a conference which she also failed to attend). It is apparent from Court records that my Minute was collected by or on behalf of Ms Thyna on 13 March 2014. No explanation has been provided for her non-attendance at the hearing. Accordingly at the outset of the hearing I struck out the first defendant's application for want of prosecution.

3. In the end, that is unlikely to make any difference because if security for the costs of the second and third defendants is ordered, no doubt applications may then be made by one or more of the other defendants, including the first defendant. I refrain from awarding costs against the first defendant but only because of the presence of the other two applications ; the claimant has not been put to any more than nominal additional cost in dealing with the first defendant's application.

What this case is about

4. The claimants are members of the community associated with the village of Eton in East Efate. They say they are the custom owners of the relevant land, which is that contained in leasehold title 12/1024/001. In August 2009, the then Minister of Lands purported to exercise his power under section 8 of the Land Reform Act [Cap. 123] to grant a lease of that land to the first defendant. In the present context that power could be exercised only where there was a dispute as to custom ownership. The claimants say there never has been such a dispute.

5. The first defendant promptly transferred the title to the third defendant. The Minister of Lands provided the lessor's consent to that transfer.

6. The third defendant as lessee then proceeded to subdivide the land into 20 strata titles. That involved the surrendering of the 001 lease and the issue of 20 new strata titles. The Minister of Lands is noted as the lessor in respect of each of those titles. Subsequently, three of the titles have been sold to the fifth defendant and one to the sixth defendant.

7. The claimants, in their latest amended claim filed on 3 March 2014, claim that the relevant registrations have been procured by fraud or alternatively mistake on behalf of the applicable defendants. They allege that none of them are purchasers who acted in good faith and without notice of the fraud or mistake. They seek rectification of the register under section 100 (1) of the Land Leases Act [Cap.163].

8. Despite an order that defences by filed by 31 March 2014, only the third defendant has filed a defence to the latest amended claim. However it is clear from previous pleadings and from submissions that all defendants say they were bona fide purchasers for value and without knowledge of any fraud or mistake. They do not however expressly plead section 100 (2) of the Land Leases Act, perhaps because they were not in possession at the critical time namely when the issue of fraud or mistake was first asserted against the registration. That this is a critical point was confirmed by the Court of Appeal in Turquoise v. Kalsuak [2008] VUCA 22 at page 8. In this case, at the very latest, the issue of fraud or mistake was raised when, on 18 August 2011, the claimants filed their claim.

The course of this proceeding

9. Justice Spear had responsibility for this file until his departure from Vanuatu at the end of 2013. He convened numerous conferences during 2012 and 2013, and a substantive trial.

10. Unfortunately, after hearing 8 days of evidence at the trial in January and February 2013, a complication arose. Because four of the strata titles had been sold it was realised that the respective purchasers, the fifth and sixth defendants, as well as the proprietors of the strata plan itself, the fourth defendant, ought to have been joined as parties to the proceeding.

11. After further conferences in an effort to see whether the Court could properly give judgment, it was concluded by Justice Spear on 28 October 2013, with great regret, that he had no alternative but to declare a mistrial. In paragraph 12 of his Lordship's Minute of that date, he stated: "*Costs remain the course (sic) in respect of this conference and earlier conferences following the conclusion of that hearing. Costs in respect of the mistrial remain also costs in the course (sic) but with the qualification that the mistrial has come about principally because*

the claimant did not join all those with an interest in the land in the proceeding in the first place. That will need to be the guiding principle when the issue of costs comes to be determined."

The jurisdiction to order security for costs

Rules 15.18 to 15.20 of the Civil Procedure Rules provide:

"Security for costs

15.18 *(1) On application by a defendant, the Court may order the claimant to give the security the court considers appropriate for the defendant's costs of the proceeding.*

(2) The application must be made orally, unless the complexity of the case requires a written application.

When court may order security for costs

15.19 *The court may order a claimant to give security for costs only if the court is satisfied that:*

(a) the claimant is a body corporate and there is reason to believe it will not be able to pay the defendant's costs if ordered to pay them; or
(b) the claimant's address is not stated in the claim, or is not stated correctly, unless there is reason to believe this was done without intention to deceive; or
(c) the claimant has changed address since the proceeding started and there is reason to believe this was done to avoid the consequences of the proceeding; or
(d) the claimant is ordinarily resident outside Vanuatu; or
(e) the claimant is about to depart Vanuatu and there is reason to believe the claimant has insufficient fixed property in Vanuatu available for enforcement to pay the defendant's costs if ordered to pay them; or
(f) the justice of the case requires the making of the order.

What court must consider

15.20 *In deciding whether to make an order, the court may have regard to any of the following matters:*

(a) the prospects of success of the proceeding;
(b) whether the proceeding is genuine;
(c) for rule 15.19 (a), the corporation's finances;
(d) whether the claimant's lack of means is because of the defendant's conduct;
(e) whether the order would be oppressive or would stifle the proceeding;

(f) whether the proceeding involves a matter of public importance;
(g) whether the claimant's delay in starting the proceeding has prejudiced the defendant;
(h) the costs of the proceeding."

The applications by the second and third defendants

12. Mrs Trief, relying on rule 15.20 (h) notes the extensive costs which have been incurred by the second defendant in defending the claim to date and in preparing for and running the aborted trial. A draft itemised bill of costs was attached to the application showing a total of Vt 1,615,664.

13. Mrs Trief cited rule 15.19 (f); *"The justice of the case requires the making of the order" as* the appropriate basis for an order in this case.

14. For the third defendant Mr Laumae also relied on 15.19 (f) but also drew attention to rules 1.2, 1.4 and 1.5 namely the overriding objective of the rules and the responsibilities of the Court and the parties in relation to the obligation to deal with cases justly. Mr Montgolfier, a director of the third defendant, filed a sworn statement indicating that the third defendant had incurred about Vt 5 million in legal fees to date in defending its "*indefeasible interest*". He makes the point that even when the third defendant disclosed the names of the purchasers of strata titles, there was no application by the claimants to include them as parties. He also emphasises the commercial consequences which the continuation of the case have had and will continue to have for the third defendant and for all those involved in the strata title subdivision.

15. Mr Montgolfier expresses his *"understanding"* that it would not be possible for the claimants to pay the third defendant's costs if their claim is unsuccessful. He says that apart from the claimant Stephen Felix , who is the Chief Magistrate, the others do not have employment or operate businesses.

16. The claimants' written response to the applications, filed by Mr Kapapa on 14 April 2014, submits that the present situation, with no clear indication that the claimants would be unable

to pay costs if they are unsuccessful, does not come within rule 15.19. He submits the claimants have good prospects of success and a genuine claim. He points out that even after the claim was filed, the defendants continued to undertake fresh land dealings in the period between November 2011 and February 2012. The defendants knew about the onsales to the fourth, fifth and sixth defendants and were in the best position to inform the Court that they ought to be parties.

17. At the hearing, Mr Kapapa explained that he had drafted a statement for Mr Felix to swear but due to his absence in Fiji it had not been possible to finalise this prior to the hearing. I permitted him to file such a statement by 22 April and gave counsel for the defendants the opportunity to file a memorandum commenting on Mr Felix's evidence, if they wished to do so, by 25 April 2014.

18. Mr Felix's sworn statement was filed on 23 April and Mr Laumae, alone among defence counsel, took the opportunity to make further written submissions, on 24 April. These went well beyond commenting on Mr Felix's statement which was the basis on which leave was given to file them. The first eight pages of Mr Laumae's submission could have been made at or before the hearing and were not, so I put them to one side, with the exception of a brief comment in paragraphs 31 and 32 below.

19. Mr Felix does not say anything about the ability of himself or the other claimants to pay costs. Instead he focuses on the merits of the claim and explains that there are good reasons why the fourth, fifth and sixth defendants were not included initially. There can be no dispute about that, but they ought to have been joined as soon as the claimants did become aware of them, and they were not. Mr Felix also contends that because it was only the interests of the new defendants which caused the mistrial, rather than the interests of the first three defendants, the current applications , designed to protect their interests, should not succeed. I do not accept that what led to the mistrial deprives the second and third defendants of their right to make, and potentially to succeed on, these applications. They are applying because of their concern about the level of costs which have arguably been wasted and about the inevitably substantial costs to come before a judgment is issued.

Discussion and Decision

20. This is an unusual application for security for costs because it is not primarily founded on the claimants' inability to pay costs. Although Mr Montgolfier has referred to his understanding *"that the claimants may not be able to pay costs if their claim is unsuccessful,"* his assertion is brief and uncorroborated. The primary reason for these applications is the extent of the costs to which the defendants have been put already and which to quite an extent are, in their view, wasted costs because the trial will need to start afresh. There was no application for security for costs at any earlier stage of this proceeding which has been on foot since August 2011. The ability of the claimants to meet costs has not previously been a concern and there is no evidence of a change in that ability.

21. Essentially it seems to me that the defendants blame the claimants for the mistrial and it appears Justice Spear was inclined to a similar view when he reserved costs as costs in the cause following the mistrial. With respect, while a claimant is primarily responsible for including all potential parties as defendants, there are situations where the defendants know more about other potential defendants than the claimants do. I accept there was evidence provided by the third defendant detailing the transactions with the fourth, fifth and sixth defendants and that the claimants ought on learning of that promptly to have joined them as defendants. But the first, second and third defendants themselves were in just as good a position to raise this issue with the Court as one that needed to be addressed before trial. These are not defendants who were unknown to the existing defendants; on the contrary they had had commercial dealings with them and they were fully aware of their relevance to the case long before the claimants were aware of it. I note that under Rule 3.2 (3) (a) it is not merely a claimant who may apply for a new party to be joined but any party may do so.

22. Even however if one takes the view that the claimants were primarily responsible for the mistrial, the appropriate award of costs against the claimants and in favour of the defendants can and will be made at the end of the proceeding once the outcome is known. If the claim succeeds then the claimants may receive a lower award of costs than would otherwise have been appropriate; if the defendants succeed they may be entitled to a greater award of costs than would otherwise have been the case without the mistrial.

23. Seen in this light, the applications for security for costs appear to be an attempt to obtain an appropriate pre-emptive *"pound of flesh"* from the claimants prior to determination of the merits of the case. The applicants may be seen as seeking to have now (albeit paid into Court) an award of costs of the mistrial which Justice Spear reserved until the end of the case. While I see some force in Mrs Trief's submission that the Court can and should look at the overall costs position and take into account not merely the costs relating to the mistrial but *also* those which inevitably will be incurred from this point forward, care needs to be taken before any order for security for costs is made on that account.

24. Rule 15.19 (f) is an unusual *"catchall"* provision since, unlike the other paragraphs in rule 15.19, it does not appear to be dependent or at least not necessarily so, on concern about a claimant's inability to pay costs if the claim is unsuccessful.

25. On the face of it rule 15.19 (f) is sufficiently broadly worded that it may provide a basis for an order being made where there is no concern at all about the claimant's ability to pay. I note that in Awa v. Colmar [2009] VUCA 37, the Court of Appeal at page 3 of its judgment appeared to endorse the exercise of the discretion by the primary judge to order security for costs as a condition of granting an adjournment.

26. Accordingly,although there is a respectable argument that rule 15.19 (f) ought to be read more restrictively in the context of the *"flavour"* of rule 15.19 as is apparent from the other paragraphs, I will proceed on the basis that the broad wording permits an order to be made in circumstances where is is no clear evidence of an inability to pay costs.

27. I note though that the discretion to order security for costs under rule 15.19 (f) may only be exercised if the Court is satisfied that "the justice of the case *requires* the making of the order" (emphasis added). Accordingly it is not enough for the justice of the case to support the making of an order or to tend to suggest that the making of an order is appropriate. The Court must be driven to the conclusion that injustice would follow if the order is not made.

28. Guidance is provided to the Court in rule 15.20 as to some of the considerations to which regard may be had.

29. At the hearing there was considerable debate about the first of these, the prospects of success. However this debate simply reinforced in my mind that there are strongly held beliefs and legitimate arguments on both sides. The fact that this matter has not been resolved either before or as the result of hearing eight days of evidence, and in the face of the costs consequences, only serves to reinforce the point.

30. The first key issue in this case appears to me to be whether there was any dispute as to custom ownership at any relevant stage on which the Minister could properly rely in exercising the power he purported to exercise under section 8 of the Land Reform Act.

31. Mr Laumae in his 24 April submissions contends, with reference to case authority, that the Court may not accept a mere assertion as to custom ownership. Only an Island Court of Land Tribunal decision will do. However this begs the question of there being a dispute as to custom ownership in the first place. The claimants say there has never been one so there has been no contest requiring resolution by a Court of Tribunal, under the applicable law.

32. The defendants deny in their pleadings that there has been no dispute but to use Mr Laumae's words this is equally a "mere assertion" without any identification of the disputing party or parties or how the Minister and claimants came to know of the dispute: this is an issue on which further particulars ought to be required of the defendant.

33. A subsidiary issue is that, even if the Minister had evidence that custom ownership was disputed, did he exercise his power in a way which involved acting *"in the interests of and on behalf of the custom owners"*? That is a threshold requirement set out in section 8 (2)(b). I note that this provision was the subject of extensive and authoritative discussion by the Court of Appeal in Turquoise v. Kalsuak [2008] VUCA 22. Accordingly, even if there was here a dispute as to who the custom owners were, the claimants must in any event have a strong argument that they ought to have been consulted before the lease to the first defendant was granted by the Minister. That is because the Minister surely knew they *claimed* to be the custom owners.

34. The other main issue relates to the application of section 100 (1) to this situation. As I have noted the defendants do not appear to be relying on section 100 (2) which would otherwise

potentially restrain the Court from rectifying the register. The issue here then, regardless of the knowledge and bona fides of the defendants and unrestricted by the bar in s 100(2) , would appear to simply whether the claimants can satisfy the Court that the relevant registrations were procured by fraud or mistake as the claimants allege. The timing of the relevant transactions on its own appears highly suspicious and to provide at least some foundation for the claimant's allegations.

35. An assessment of the prospects of success of the claimants on these issues is difficult for me to essay given that I am not, by contrast of Justice Spear, fully familiar with the evidence given at the aborted trial. However I am certainly not prepared to conclude that the claimants do not have reasonable prospects of success. Beyond that it is not currently possible to go.

36. As to rule 15.20 (b) there is every indication this proceeding is genuine. As I understand it, it is taken by families who regard themselves as unchallenged custom owners in the Eton area and who have lived on or otherwise occupied the land for generations. Challenging the transactions in the way they have is most unlikely to have been done without careful consideration and a genuine belief in the prospects of success on their part.

37. Rule 15.20 (c) has no application here because the claimant is not a corporation.

38. Rule 15.20 (d) has no direct application because the defendant's application is not based on an ability to meet costs. However rule 15.20 (e) does tend to point against the making of an order. If Mr Montgolfier is right as to the likely financial position of the claimants, there is a danger that ordering security for costs may deprive them of such ability as they currently have (impaired as it is likely to be by the burden of the costs of the mistrial) to pay their own legal costs. That may result in a denial of access to justice and a determination by this Court of what appears to be a significant and genuinely-advanced claim.

39. As to rule 15.20 (f) , although this case is of interest primarily to those directly involved, there are a good many people contained within the claimants' families and the generations to come. There are also significant actual and potential commercial consequences for a range of people associated with the defendants. It is in everybody's interests that the merits of this strongly-

contested case are determined fully and fairly by a trial with a judgment of the Court published in the usual manner. To the extent that an order for security for costs might impede or prevent that, these applications ought to be declined. Against that, if the defendants succeed, they will be entitled to costs. While there is always some risk if costs not being paid, I reiterate these applications are not primarily founded on that risk.

40. Rule 15.20 (g) relating to the claimant's delay in starting a proceeding causing prejudice to a defendant has no application here.

41. Rule 15.20 (h), the costs of the proceeding, is clearly a relevant consideration and one emphasized by Mrs Trief. She made the submission that the stakes are very high in this case and the substantial costs which have already been incurred, when added to those which will inevitably soon be incurred, support the making of an order. In short , she submitted that the claimants ought to have their minds focused by how significant a case this is for the defendants by the making or an order.

42. In my view, while the costs are substantial, that is true for everyone involved and it would be wrong to make an order for security for costs in recognition of that where , as here, the majority of the other criteria point against the making of an order.

43. In the end the Court has a discretion whether to make an order for security for costs even if a qualifying criterion, or more than one, is met. I am not satisfied that the justice of this case *requires* the making of an order for security for costs. All parties will have their right to apply for costs at the end of the case in light of the outcome and that includes costs relating to the mistrial which have been reserved as costs in the cause. There is a risk that if substantial orders for security for costs (such as have been sought) were made, the claimants who appear to have a genuinely-held belief in the merits of their claim, and a solid evidential foundation for advancing it, may be deprived of access to justice.

44. The error which led to the mistrial is regrettable, but as I have noted, the defendants themselves have a responsibility to ensure that the Court is in the best position to determine

the merits of the case. Indeed, to use Mr Laumae's submissions against him, rule 1.5 requires all parties (not just the claimants) to help the Court to achieve the overriding objective of dealing with cases justly. Here therefore the defendants had just as much an obligation as the claimants did to ensure that the fourth, fifth and sixth defendants were joined and they knew better than the claimants, and before the claimants, that they ought to be involved.

45. For these reasons the applications for security for costs by the second and third defendants are dismissed. The claimants are entitled to costs on this application but I consider they ought to also to be reserved as costs in the cause so that they, along with all the other substantial costs which all the other parties are incurring, can be assessed in the light of the substantive outcome.

46. What matters now is that the case should be put on track for a fresh hearing as soon as possible. Although the mistrial was greatly disappointing to everyone involved, it may be that the new trial will be more focused and efficiently-run by counsel as a result of the experience of the previous trial. In that sense, it may not be quite the disaster it currently seems.

Further directions

47. It is essential that all of the defendants file their defences to the amended claim as soon as possible (with the exception of the third defendant which is the only one to have done so). The Court has already made an order that that be done by 31 March 2014. Now that that date has long passed, each of the defendants other than the third defendant is ordered to file their defence **by Friday 16 May 2014**. The fourth, fifth and sixth defendants should also be preparing any sworn statements they wish to file. These are to be filed and served **by Friday 30 May 2014**. There will be a pre-trial conference on **Thursday 5 June 2014 at 9 am**. I will allocate one hour then to ensure that all necessary orders relating to the new trial are made. A full attendance of counsel is required. Should that date and time be inconvenient to any counsel they are *immediately* to contact my Associate so that an alternative date can be allocated well in advance.

BY THE COURT