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

CIVIL APPEAL NO. 03 OF 2014

BETWEEN: **BARAK TAME SOPE**
First Appellant

AND: **KALPOKOR KALSAKAU**
Second Appellant

AND: **IFIRA TRUSTEE LIMITED**
First Respondent

AND: **TERIKI PAUNIMANU MANTOI KALSAKAU III, MASING LAURU, KALPOVI MANGAWAI, BUTUA BAKOKOTO, CHARLEY AIONG, TAWARA KALONIKARA and MANREA KALORIB**
Second Respondents

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Dudley Aru
Hon. Justice Stephen Harrop

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

Date of Hearing: Tuesday 25 March, 2014

Date of Judgment: Friday 4 April, 2014

JUDGMENT

---

1. This is an appeal brought with leave from a Judge of the Supreme Court against an interim injunction made on an urgent application by Justice Sey on 18 December 2013. The injunction was granted to hold a situation which had arisen following the delivery of the judgment of the Court of Appeal in Sope & Ors. v. Teriki Paunimanu Mantoi

Kalsakau III and Ors. and the Ifira Trustees Ltd CAC 35 of 2013. That judgment was delivered on 22 November 2013, and is to be read with these reasons for judgment.

2. At paragraph 77 of the judgment, the Court of Appeal said:-

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

3. At paragraph 79 the Court of Appeal ordered that until 19 December 2013 (4 weeks later) at least those persons who are recorded in the last Annual Return as directors of ITL would continue to act as directors of ITL, subject to them properly fulfilling their functions. Thereafter, the composition of the directors was to be subject to the shareholders, in accordance with the Articles of Association.

4. At paragraph 80, the Court of Appeal made a declaration:-

> *" ..... that the shareholders of ITL from time to time (other than the share held by the Paramount Chief) hold their respective share or shares as nominees of the Ifira Trust, and must transfer the share or shares held by them or any of them in accordance with a resolution of the beneficiaries of the Ifira Trust passed at a meeting of these beneficiaries duly convened in accordance with the practice of the Ifira community. That declaration also operates immediately."*

5. Under the Articles of Association of ITL the shareholders for the time being are empowered to appoint the directors of ITL.

6. The Paramount Chief of Ifira Tenuku called a meeting of the beneficiaries of Ifira Trust, by notice dated 9 December 2013. Pursuant to the notice, the meeting was held at Warwick Le Lagon Resort and Spa on Friday 13 December 2013. Resolutions were passed unanimously or by an overwhelming majority of the beneficiaries present at the meeting, including resolutions requiring a transfer of the nominee shares of Barak Tame Sope and Kalpokor Kalsakau (the present appellants) held in Ifira Trustees Ltd.

7. When requested to do so the nominee shareholders, Messers Sope and Kalsakau, refused to execute transfers of their respective shares as directed by the resolutions passed at the meeting on 13 December 2013.

8. Thereupon the respondents to this appeal sought an urgent injunction from a Judge of the Supreme Court fearing that unless a restraining order was made against the present appellants, they would be (or consider themselves to be) free to purportedly implement

decisions as shareholders of ITL to the detriment of the resolutions passed by the beneficiaries at the meeting on 13 December 2013, and to the detriment of ITL.

9. The application was heard on 18 December 2013 and the interim order now under appeal was made, namely:-

> *"1. That pending further Order of the Court, those 31 persons acting as Directors will continue to act as Directors.*
> *2. The Claimants are to file their Supreme Court Claim within 28 days from the date of this Order.*
> *3. Both Civil Case No. 291 and Civil Case No. 295 will be listed together.*
> *4. ....."*

10. Civil Case 295 was that anticipated in paragraph 2 of the Order in which the present respondents seek declarations as to the validity of the resolutions passed at the meeting on 13 December 2013. Civil Case 291 of 2013 had already been instituted by the present appellants against the present respondents seeking declarations that the resolutions had no effect on the present appellants as shareholders, and restraining the present respondents from taking any steps or action to prevent the present appellants from exercising their rights and powers as shareholders.

11. The evident intent of the interim injunction was to hold the position that had hitherto existed concerning the management of ITL until the issues raised in the two civil actions, in particular the validity of the resolutions, was determined, and to expedite the trial of those cases.

12. To complete the picture of events since the delivery of the Court of Appeal judgment, on 20 December 2013 the present appellants as shareholders purported to replace the 31 persons previously acting as directors with 6 new directors. The present respondents contend that the action taken by the present appellants is in contravention of paragraph 1 of the injunction and is invalid as it is contrary to the resolutions passed at the meeting of the beneficiaries.

13. The validity or otherwise of the steps taken by the present appellants on 20 December 2013 will also turn essentially on the validity of the resolutions passed at the meeting of beneficiaries held on 13 December 2013.

14. The appellants contend that the interim injunction was wrongly made because the conditions for the making of such an order set out in rule 7.5 (3) of the Civil Procedure Rules No. 49 of 2002 were not made out, and, further, that as the Court of Appeal had found that the 31 persons listed as directors were not lawfully appointed, the Supreme Court had no power to order that they remain in the position of directors.

15. Rule 7.5 (3) provides that on an application for an interlocutory order:-

"The court may make the order if it is satisfied that:

(a) The applicant has a serious question to be tried and, if the evidence brought by the applicant remains as it is, the applicant is likely to succeed; and

(b) The applicant would be seriously disadvantaged if the order is not made."

16. Plainly there is a serious question to be tried, namely the validity of the resolutions passed at the meeting on 13 December 2013, and the legal consequences that flow from those resolutions if they are valid. So much is now conceded by the appellants.

17. Counsel for the appellants argued vigorously before this Court that the evidence which the present respondents placed before the Supreme Court in support of the application, if it remained as it was, would not be likely to result in a finding that the resolutions were valid. The main point emphasized in the argument was that the meeting of beneficiaries was not *"duly convened in accordance with the practice of the Ifira community"* (those being the words appearing in paragraph 80 of the Court of Appeal judgment of 22 November 2013).

18. The evidence placed before the Supreme Court by the present respondents in support of the application for the injunction, when read in its entirety, offered explanation why the meeting was convened in the manner it was, and why it was held where it was. They set out in detail the procedures which were followed leading up to the passing of the resolutions. If that remained as the evidence at trial we consider there is a likelihood, within the meaning of rule 7.5 (3), that the present respondents' claim would succeed. Rule 7.5 (3) does not require the Court to evaluate whether one side or the other would probably succeed in litigation. A likelihood of success for the purposes of the rule means only that the evidence (here of the respondents), if it remains as it was without further challenge, would be sufficient to make out the case being advanced.

19. Such a ruling says nothing at all about what the outcome of the trial on the merits of the claim will be. The ultimate outcome will depend on a full evaluation of all the evidence put forward by each of the parties to the litigation. The totality of the evidence might be quite different from the portion of evidence placed before the Judge on the application for the injunction. All that is determined by the making of an injunction of the kind now under challenge is that there was enough material advanced by the applicant seeking the injunction to warrant holding a particular situation until the merits of the dispute are resolved on a consideration of all the available evidence which the parties then have the opportunity to put before the Court at trial.

20. It is not helpful for a Court on an interlocutory application to go deeply into the evidence or to evaluate merits as all the available evidence may not then be known. For this reason it is not appropriate that this Court now undertakes the exercise which

counsel for the appellants urged on us, namely to evaluate at this stage the probable merits of the claims concerning the validity of the resolutions. It is necessary only that we conclude that the relevant requirements of rule 7.5 (3) were made out. In this case the requirements were plainly made out.

21. We are satisfied that the material placed before the Supreme Court by the present respondents in support of the application for the injunction justified a conclusion by the Supreme Court that they, or rather the beneficiaries of the Ifira Trust who they represented, were likely to be seriously disadvantaged (rule 7.5 (3) (b)) if the injunction was not granted. Failing the injunction, there was a real prospect that events could occur that would alter the management of ITL before the validity of the resolutions passed on 13 December 2013 was determined. If this occurred, and the validity of the resolutions was thereafter upheld, there would be yet another alteration of management of ITL. Successive changes of management, particularly where the changed management would pursue different philosophies, carries with it a risk of serious disadvantage to the beneficiaries. We consider it was clearly open to the Supreme Court to take the view that a change in management of ITL that could then be again changed by the outcome of litigation would seriously disadvantage the beneficiaries of ITL.

22. The argument that the Court had no power to make an order that had the effect of restraining the present appellants as shareholders from exercising their rights as shareholders to appoint directors is without substance. The Court of Appeal by holding the situation for 4 weeks after delivery of judgment exercised such a power. By 18 December 2013 there was a resolution passed by the meeting of beneficiaries directed to the nominee shareholders to transfer their shares. If the resolutions were valid, the rights of the nominee shareholders were strictly confined by those resolutions and the Court undoubtedly had power to make an order designed to protect the integrity of the Court processes which would decide the legal rights and duties of the parties, and in particular the rights of nominee shareholders.

23. In our opinion there is no merit in the challenge to the interim injunction, and the appeal must be dismissed. At the conclusion of the argument we announced this outcome, and said we would publish our reasons later. We now do so.

24. During argument all parties agreed that the issues in dispute need to be resolved quickly, and if this can only be done by a trial, the trial should occur as soon as possible. To this end, Justice Sey who is seized of the matters in the Supreme Court has set three days for the trial to commence on 9 am on Monday 19 May 2014, running through to Wednesday 21 May 2014. The trial is to occur on those dates, and it is for the parties to ensure that they have taken all steps to marshall together their evidence, and to put the pleadings in order to enable this to happen. Last minute adjournments to rectify procedural or other deficiencies will not be granted.

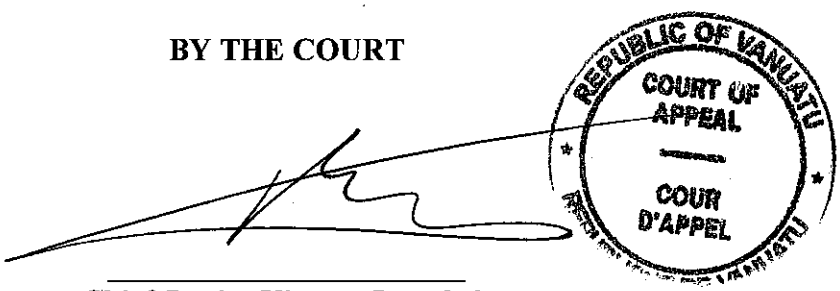
25. Justice Sey has also set a time for the next conference of the parties, namely at 8 am on 14 April 2014. By that time the parties must ensure that they have identified all amendments or additions necessary to the pleadings, including those necessary to place before the Court all questions concerning the actions of the present appellants on 20 December 2013.

26. Whilst the Court has made these administrative arrangements to expedite the trial of the outstanding civil cases, it remains open to the parties to resolve their differences in the meantime by agreement. The Court encourages them to explore ways of doing so. As we said at the conclusion of argument on the appeal, if the parties are able to reach agreement between themselves, the solutions they reach are likely to have a much higher prospect of satisfying the beneficiaries than an outcome imposed on the parties by an order of the Court.

27. This appeal is accordingly dismissed. The appellants must pay the respondents' costs on the standard basis.

Dated at Port Vila this 4th day of April, 2014

BY THE COURT



Chief Justice Vincent Lunabek