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

Civil Appeal
Case No. 22/683 CoA/CIVA

BETWEEN: **Faina Pakoa & Family, Erick Silas & Family, Ramu Misak & Family, Mark Silas & Family, Raymond Missak & Family, Fatima Faratea & Family, Joe Niko & Family, Kapel Pakoa & Family, Duk Misak & Family**

Appellants

AND: **Guan Kai**

First Respondent

AND: **Waisinu Bakokoto, Bakaulu Bakokoto & Andas Bakokoto**

Second Respondents

Coram:	***Hon. Chief Justice Lunabek, V*** ***Hon. Justice Mansfield, J*** ***Hon. Justice O'Regan, M*** ***Hon. Justice Saksak, O*** ***Hon. Justice Aru, D*** ***Hon. Justice Goldsbrough, EP***
Counsel:	*Fleming, M for the Appellant* *Blake, G for the First Respondent* *Kalsakau, S for the Second Respondent* *Taiva, J for the Interested Party*
Dates of Hearing:	*Tuesday 16 August 2022 and* *Wednesday 17 August 2022*
Date of Judgment:	*19 August 2022*

JUDGMENT OF THE COURT

1. In the pre-Independence New Hebrides, Rosina Iapatu Missack and Yaputu Missack along with their son Jupeter Iapatu began living on Tebakor Land Area going towards Malapoa College as it now is, when they worked for one Madame Lucien Houdie. This happened in 1976. Madame Lucien Houdie until Independence owned the land and lived in the Colonial House where the Mok Store now is. The area of which she was regarded as owner was known as the Tebakor Houdie Plantation.

2. From that initial settlor came others, mainly close and then extended family. The family saw the birth of a grandchild in 1987 and he is Raymond Missak who is named as representing Maxim Lawawa and family as the sixth defendant in this matter, now the fifth appellant.

3. Independence and the birth of Vanuatu saw ownership of the plantation, in 1989, transferred to the Family Bakokoto then headed by Edward who was the father of four sons, Jacky, Waisunu, Bakaulu and Andas. The agreement for Family Missak to remain on the land was confirmed with Edward during his lifetime whereas the agreement for Raymond Missak, born in 1987, to establish his own home was made with Jacky Bakokoto.

4. This is the brief story of but one family invited onto this land many years ago. Each family has its own story to tell of their occupation of this land. Many of them are originally from the island of Tanna.

5. Family Bakokoto, in 2012, took out a lease in their own favour over the area of land which eventually became known as lease title number 12/0633/1387. It was a practice well recognised in Vanuatu when customary land was to be converted into registered land prior to sale by the original customary owners. So, the first lease of the land was in the name of one of them, Jacky Bakokoto, who held for himself and his brothers equally. Jacky is now deceased and his three brothers, Waisunu, Bakaulu and Andas are now the 12th respondents. The trial judge called them Messrs Bakokoto, and we will do the same.

6. Then the same land was sold and agreement to transfer the lease to Guan Kai took place in 2013. With the new purchaser keen to take the land without sitting tenants, steps were taken by the family Bakokoto to ensure the land would be free of tenants for the benefit of Guan Kai. This process did not go as smoothly or as quickly as either Messrs Bakokoto or Guan Kai had hoped. Messrs Bakokoto gave notice to the families living on their land on 3 June 2013. That notice is in evidence attached to the sworn statement of Kereto Bakokoto at Tab 17 of the original Appeal Book B.

The history of these proceedings

7. In an amended claim filed 29 May 2020, the present First Respondent, Guan Kai sought the eviction of eleven families from land within property title number 12/0633/1387 located at Tebakor Land Area towards Malapoa College within Port Vila. The proceedings were discontinued against the 1st defendant just before trial and thereafter also as against the 7th defendants, the Family Yakar.

8. A defence was filed by ten of the eleven families and the matter proceeded to trial with judgment delivered on 27 November 2020. In that judgment, the trial court found for the claimant and dismissed the counter claim brought by the defendants. Orders *inter alia* to deliver vacant possession of the land were accordingly made.

9. The judgment of 27 November 2020 itself was the subject of an appeal, which appeal was heard and determined in May 2021 reported as *Pakoa v Kai* [2021] VUCA 24. The result of that appeal was to overturn the decision of 27 November 2020 in these terms:-

"Conclusion

78. For the reasons given above, the appeal is allowed, and the orders made by the primary Judge are set aside. We are concerned that the parties have already participated in a substantial and complex trial. We think it undesirable that they not be put to the expense of another complete trial, especially as the nature of the issues which remain for determination is such that the primary Judge can appropriately make those determinations.

79. Accordingly, the matter is remitted to the Judge for further consideration, in the light of these reasons, of the following issues:

(a) the question of whether Jacky Bakokoto had the ostensible authority of his father in relation to his dealings with Faina Pakoa and of Messrs Bakokoto in relation to his dealings with the other appellants and, if so, whether Jacky's dealings with the appellants were authorised by the custom owners;

(b) the terms and conditions agreed upon between Edward and Jacky Bakokoto and Faina Pakoa and between Jacky and the appellants with respect to occupation of the Land and whether those terms and conditions, together with the subsequent conduct of the appellants in relation to the Land, gave rise to an equity existing at the commencement of the Lease which is protected by s 17(g) of the LL Act and, if so, the duration of that equity;

(c) whether the Notices to Vacate served on 3 June 2013 or any of the later Notices to Vacate, were effective to terminate any rights of occupation held by the appellants; and

(d) whether the appellants have standing pursuant to s 100 of the LL Act to seek rectification of the register.

80. We consider that the further consideration by the Judge should be on the basis of the evidence received in the trial. Accordingly, subject to any further order of the Judge, the further consideration by the Judge is to be undertaken on the basis of the evidence already received, but the Judge may wish to invite further submissions from the parties concerning the remitted issues and may, as a result of those submissions, allow further evidence.

..."

10. The matter remitted was heard on 13 July 2021 with a decision delivered on 11 March 2022. It is against that decision that this appeal is brought. The trial judge called for and considered submissions from the parties and did not find it necessary to call for additional evidence having received the submissions from counsel.

11. In her judgment, the trial judge determined the various issues and ordered accordingly. She found that Jacky Bakokoto had the ostensible authority of his brothers in his dealing with the Appellants, that the terms and conditions allowing for the occupation of the land, the building of houses and payment of nominal rent gave rise to an equity existing at the start of the lease protected by s.17(g) of the Land Lease Act which equity was terminable on reasonable notice alone and that the notice given was sufficient to lawfully terminate the appellants' right to occupy.

12. The trial judge continued to determine that the Appellants lacked standing to bring a claim under s100 of the Land Lease Act and that their claim for the costs of their relocation should be dismissed. She continued to find that the Respondent had proved his claim in trespass and ordered the appellants to vacate lease title 12/0633/1387 within three months.

This appeal

13. The notice of appeal seeks to overturn the decisions made in respect of issues b, c, and d as remitted by the Court of Appeal, which the trial judge referred to in her judgment as Issues 2, 3 and 4. There is no appeal against her finding as regards issue (a) as identified and remitted by the Court of Appeal, termed Issue 1 by the trial judge, on the ostensible authority of the late Jacky Bakokoto.

14. The findings in the court below are as follows concerning the appealed issues 2, 3, and 4: -

> *"The terms and conditions agreed upon between Jacky Bakokoto and the Second-Eleventh Defendants with respect to occupation of the land were that the latter could build houses and occupy the land on payment of nominal monthly rent and that their occupation was terminable by reasonable notice. Those terms and conditions, together with the subsequent conduct of the Second-Eleventh Defendants in relation to the land, gave rise to an equity existing at the commencement of the lease which is protected by s. 17(g) of the Act. The duration of that equity was that it was terminable by reasonable notice [Issue 2].*
>
> *The notice to vacate served on 3 June 2013 was effective to terminate the occupiers' rights of occupation but even if it were not, the ensuing failure to pay rent since June 2013 led to the notice to vacate dated 20 January 2015 which put beyond doubt that the occupiers' licence rights were terminated by that notice and they were given reasonable time to vacate by use of the expression, "as soon as possible" [Issue 3].*
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> *The Second-Eleventh Defendants do not have standing to bring a claim under s. 100 of the Act [Issue 4]."*

15. It is against this background that this appeal is to be determined. This Court, however, was made aware at the start of this hearing of the further transfer of the lease over this land between the respondent and another. Guan Kai transferred his interest in this lease on 16 June 2021, registered on 23 July 2021, for VT 40 million. He was thus no longer the leaseholder when the retrial took place or when the decision was given in his favour. That knowledge the respondent

kept to himself. He did not share it with either the trial court or his legal representatives. This information came to light when the appellants, or some of them, were served with a claim for their eviction brought by the new leaseholder in the Magistrates' Court.

16. Counsel appearing on this appeal all sought that the appeal hearing be continued regardless of the absence, as a party, of the present leaseholder. Counsel for the appellants acknowledged that the order sought that Guan Kai transfer that part of land occupied by the appellants by subdivision was no longer a relief that this Court could order but still maintained his submission that the hearing should continue. Counsel representing the new leaseholder appeared briefly at the commencement of the hearing but indicated the new leaseholder did not seek to be represented at the hearing of the appeal.

17. At paragraph 93 of her judgment, the trial judge concluded:-

> *"The Claimant has proved his claim. He is granted the eviction orders sought".*

18. Given that, as we now know, the Respondent was no longer the leaseholder at the time of the retrial, he could not substantiate that part of his claim that he was the holder of a valid lease and thus entitled to seek eviction. In the circumstances, the eviction order made by the trial judge must be set aside. We now turn to the remainder of the appeal.

19. The notice of appeal essentially challenges findings of fact made on the evidence. In that regard, it is incumbent on the appellants to show that those findings were not open to the trial judge on the evidence before the court. It is thus necessary to consider the evidence on which the trial judge based her findings of fact relevant to the decisions on the issues.

20. In addition, the appellants submit that, even if the factual findings in respect of the ability of Messrs Bakokoto, to terminate the appellants' interest in the land on reasonable notice are correct, there remains evidence of promises made giving rise to estoppel which the trial judge did not deal with in her judgment.

21. At this point, it is necessary to consider two different categories of families. There is one group of these appellants who, in evidence given in cross-examination, agreed that their right to occupy the land ran until they were given the notice to leave. Those people were Raymond Missak, Erick Silas, Priscilla Pakoa, Joe Niko and Leisale Maki Missak.

22. Concerning the second group of families, the trial judge found that, although they gave no evidence of this, they too were given a right of occupation subject to reasonable notice being given to quit. This finding is also challenged on this appeal.

23. As regards the first group, we are not persuaded that this finding was not open to the trial judge. We further find that, even though there was no such evidence from those appellants in the second group, such a finding was available to the trial judge based on the evidence as a whole. Neither do we agree that such a finding was wrong.

24. The appellants submit that even the first group were also promised by Jacky Bakokoto, who the court found had the ostensible authority to deal with the land on behalf of all the custom owners, that in the event of a notice to quit being issued, they would be relocated with houses and buildings similar to those they had built.

25. It is further submitted that the evidence supports a finding that Guan Kai knew of this promise, that the promise should lead to estoppel and that Guan Kai, knowing of the promise, is bound by it and took the land subject to it.

26. At the time of trial, Jacky Bakokoto was already deceased. The evidence about the agreements and alleged promises made by Jacky came from the families themselves. There is evidence contained in both the sworn statements filed by the appellants and in cross and re-examination. In many instances, there is evidence from some of the appellants of the promise that, should the appellants be required to vacate the land, alternative arrangements would be put in place to provide for that event.

27. The existence of such a promise in particular can be found in the evidence of Raymond Missak. His evidence is to the effect that he only entered into an agreement with Jacky Bakokoto in 2013 over the building of a house and that agreement when put into effect meant that he built a house costing him VT 2 million. That evidence was not challenged. It goes to suggest that the appellant was sufficiently secure in the promise he received from Jacky Bakokoto that such a development would not be an unwise investment. His evidence was not to the effect that his occupation of the land was recent, only that the most recent investment that he made in the land was.

28. That evidence is sought to be negated by the submission made that it would be foolish of Jacky Bakokoto to make such a promise when preparatory steps had already been taken to sell the land to an investor. Quite how to reconcile those competing interests was a matter to be determined by the trial judge.

29. There is evidence from other appellants of a promise to relocate and/or rehouse. This evidence is not therefore limited to the 5th appellant. Its effect is not dealt with by the trial judge, perhaps not unsurprisingly as it was not specifically raised as a referred issue.

30. After finding that the right to occupy was terminable on notice, the judge also considered the fact that rent payable ceased to be paid following the service of the notice to quit, suggesting that even if the right to occupy was not terminable on notice, a failure to pay rent itself would bring the same right to an end. Whilst in a situation where the payment of rent was a necessary prerequisite of the continued existence of the right this may be considered a repudiation of the terms, but in this instance that is not so clearly established.

Section 17(g) of the Land Leases Act

31. It is important at this point to note the nature of an overriding interest arising under section 17(g) of the Land Leases Act. Section 17 deals with unregistered interests that can defeat the registered title of a leaseholder in that the leaseholder takes the land subject to those interests. Subsection (g) protects the rights of persons in actual occupation save where inquiry is made and rights are not disclosed. There is no question that these appellants were in occupation. There is no evidence, however, as to whether and in what terms these appellants disclosed their rights on inquiry.

32. A section 17(g) interest is not the equivalent of a licence to occupy on terms which can be readily defined and easily terminated. It arises from rights granted, in this case, by the customary owners of the land. Such rights granted give rise to an equitable rather than legal interest. Section 17(g) gives effect to those equitable interests as against others. Thus, in this case, the question arose as to whether the Guan Kai took the land subject to those s.17(g) interests. If he did, how could those s.17(g) interests be extinguished if at all? Could those interests be terminated by the simple giving of notice? If not, how might they be terminated? Were those interests limited in time or in other ways. The position of the appellants, or some of them, is that their s.17(g) rights could be brought to an end only on notice together with payment of the costs of relocation.

33. This factual scenario is different from previous cases where the right to occupy was found as a fact to be a perpetual right to occupy subject only to the equitable right to compensation for improvements made to the land. The decision in the Chief Justice in *Bakokoto v Obed* [1999] VUSC 44 is an example.

34. In such cases, armed with a finding of a perpetual right to occupy the land and in the absence of a specific agreement as to the terms, as will often be the case, the occupier may call on equitable principles to assist. Thus, an occupier may plead that it would be unjust, or inequitable that, on leaving the land he or she is not compensated for the improvements made to the land with the consent and knowledge of the landowner. In this situation an occupier may rely on a s.17(g) right.

35. Here there is a factual finding, based on evidence, that the right to occupy was terminable on reasonable notice. It was coupled with, according to the appellants and supported by some evidence, some arrangement with the customary landowners of a right to a form of assistance in resettlement. What is said to be that arrangement, according to the pleaded counterclaim is not confined to a right to be compensated for improvement but for an alternative piece of land to be identified, bought for them to resettle on, for new buildings to be paid for to replace the building they have constructed and for garden to be made ready for them. That would put them in a better position than they already have as persons entitled to occupy another man's land, in that they would have title to the land to which they move.

36. That is not a situation, again in the absence of defined terms, that equity would step in to protect for it extends much further than could be described as just and equitable. The occupants must

therefore, fall back on demonstrating exactly what was promised to them by the customary landowners and proceed with a claim as against those customary landowners other than in equity but based on those actual promises made to them.

37. We refer once more to the decision in the Chief Justice in *Bakokoto v Obed* which we have previously cited. In particular, we agree with the notion that it necessary for the court first to determine what is the equity and how it can best be satisfied. Thereafter, we agree with the approach again adopted in *Bakokoto v Obed* that the equity had to be established by reference to the agreement between the parties.

38. The agreement between the parties here, as found by the trial judge, was a right to occupy terminable on reasonable notice. Given that we find no error in the trial judge arriving at that conclusion, which finding means that the occupiers did not have the perpetual right to occupy as was found in *Bakokoto v Obed*, there the matter ends. There is no evidence, or no sufficient evidence that the agreement between the parties was such as to provide for the relocation as pleaded and therefore the appellants cannot succeed in pleading as a defence to the claim a s.17(g) right.

Discussion

39. The agreement to transfer the lease as between Guan Kai and Jacky Bakokoto itself also led to an assumption that there was a cost involved in evicting the sitting tenants. Part of that assumed cost may have been expended on the purchase of a piece of land for VT 2 million with a further VT 13 million was withheld, according to the pleadings of Messrs Bakokoto, until the question of vacant possession of the land was resolved. If none of these arrangements was necessary because no promise of resettlement was ever made, how did the need to withhold the VT 15 million agreed to be due over and above the VT 10 million paid on the transfer? From his own evidence, Guan Kai was aware of issues regarding the sitting tenants, and took steps to hasten their removal from the land.

40. The answer given to Issue 2 by the trial judge is that at the time of the commencement of the lease an equity such as to give the appellants a right under s.17(g) existed, and that right was terminable on notice alone. We note the concerns of the appellants that this suggests that the question of the promises made by or on behalf of the Bakokoto family to the appellants have not been taken into account in answering the question raised by Issue 2. With respect, we do not agree.

41. The question of compensation, in this situation, should not be linked inextricably to the s.17 (g) rights. The issue of compensation was, we are satisfied, raised on the evidence and needs to be determined. It does not, however, in our view, form part of the terms and conditions attaching to the s.17(g) right. If the promise to pay compensation was made, it was a promise to do something in the event of the occupation right coming to an end. In this case, the occupation right came to an end when notice was given. At that point the s.17(g) protection ended. We do

not consider the occupation right included a commitment by the grantor of the right not to give notice until after whatever commitments were made about relocation had been met and paid for.

42. We arrive at this conclusion for several reasons, some of which are peculiar to the facts in this case. The evidence of the promises made by or on behalf of the Bakokoto family is expressed in different ways by different families. It cannot be said with any certainty that it amounts to a promise to purchase land for the resettled families to occupy in lieu, to hold as leasehold tenants, to rebuild, or, at the other end of the scale, nothing more than to help with transport when the time to move came. It is thus not possible to quantify the extent of the rights with sufficient certainty capable of being enforced as a right against anyone who takes the land.

Disposition

43. The promises, if found to be made, and that remains to be determined, were, in the main if not entirely, made to the families only by or on behalf of the Bakokoto family. In that regard, the enforcement of those promises is between the Bakokoto family and the respective families and not a successor in title unless it is shown the successor in title was a party to any promise or adopted it.

44. To that extent, we disagree with the trial judge when making the order dismissing the appellants' counterclaim at paragraph 92 of the judgment. The reason given for dismissing the claim is that the appellants no longer have a s.17(g) right. As we consider that the compensation claim is separate to and not part of the s.17(g) right, it still falls to be determined as against Waisunu, Bakaulu and Andas Bakokoto and, subject to the comments contained in the previous paragraph, Guan Kai.

45. This court cannot make that determination on the material available to us and therefore must remit the matter to the Supreme Court for its determination on the evidence already received in this trial and any additional evidence called for after submissions as to the need for further evidence have been received.

46. With Issue 4, given the transfer of the lease from the respondent, the question falls away.

47. Whilst we agree that Issues 2 and 3 were correctly decided by the trial judge in the affirmative, we find that the subsequent decision of the trial judge in dismissing the appellants' counterclaim was wrong. To that extent, this appeal is allowed and the decision to dismiss the counterclaim is set aside. We direct a further hearing on that claim. As set out earlier the eviction order granted to the Respondent when he was no longer the leaseholder is also set aside. As he no longer has any interest in the lease, his claim is formally dismissed.

48. Costs of the Appellants on this appeal are ordered to be paid by the Respondent, to be agreed or taxed. The failure by Guan Kai to disclose the onward sale of this lease led to an order being made that could not be made and rendered some of the relief sought on this appeal impossible.

Messrs Bakokoto shall bear their own costs of this appeal, as the principal matter involving them has been determined against them.

DATED at Port Vila this 19th day of August, 2022

BY THE COURT

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Hon. Chief Justice Vincent Lunabek

REPUBLIC OF VANUATU
COURT OF APPEAL
COUR D'APPEL
REPUBLIQUE DE VANUATU