National Court of Papua New Guinea

Mahuru v Dekena [2013] PGNC 97; N5305 (1 August 2013)

N5305

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

OS (JR) NO 964 OF 2011

DORIGA MAHURU, MAIVA MAHURU, MAHURU DORIGA, MAX DORIGA & KURUKU NAO
Plaintiffs

V

HON LUCAS DEKENA
MINISTER FOR LANDS & PHYSICAL PLANNING
First Defendant

JOHN OFOI, ACTING SECRETARY
DEPARTMENT OF LANDS & PHYSICAL PLANNING
Second Defendant

HENRY WASA, REGISTRAR OF TITLES
Third Defendant

THE INDEPENDENT STATE OF PAPUA NEW GUINEA
Fourth Defendant

AVA MIKA, KILA GABUTU & MICHAEL JOHN MADI
Fifth Defendants

Waigani: Cannings J
2013: 26 April, 1 August

JUDICIAL REVIEW – decision to grant Special Agricultural and Business Lease – whether Minister failed to act in accordance with statutory preconditions for acquisition of customary land by the State and for granting of lease for special agricultural and business purposes: Land Act, Sections 10, 11 and 102 – whether errors of law committed in decision-making process culminating in granting of State Lease – remedies – principle of indefeasibility of title – whether constructive fraud established.

LAND – customary land – acquisition of customary land by the State for lease-leaseback purposes – Land Act, Sections 10 and 11 – whether agreement of all customary landowners necessary – grant of leases for special agricultural and business purposes – Land Act, Section 102.

The Minister for Lands and Physical Planning granted a 99-year Special Agricultural and Business Lease (SABL) to the fifth defendants over a portion of land in the National Capital District that was customary land. The plaintiffs claimed that they were genuine customary owners of the land and that they were not consulted on and did not agree to the lease being granted to the fifth defendants. They applied for judicial review of the decisions regarding the grant of the lease on five grounds relating to alleged breaches by the Minister of Sections 10, 11 and 102 of the *Land Act* 1996. They argued that the circumstances surrounding the granting of the lease to the fifth defendants involved constructive fraud. They sought declarations and orders to quash the decision to grant the lease and a permanent injunction restraining the defendants from dealing with the land. The fifth defendants, supported by other defendants, argued two jurisdictional points: (a) that the plaintiffs were estopped by the doctrine of *res judicata* by two previous judicial decisions from claiming customary ownership of the land and (b) that the National Court had no jurisdiction to determine the judicial review as it involved a dispute over customary land ownership, a matter falling outside the jurisdiction of the Court. As to the merits of the grounds of review the fifth defendants, supported by other defendants, argued that the plaintiffs failed to establish any of the grounds as they were not customary owners of the land and had failed to adduce evidence of any errors of law and not exhausted procedures available under the *National Court Rules* to obtain the evidence necessary to support their case. The defendants further argued that in the event that any ground of review succeeded the plaintiffs should still be denied relief as they had not proven constructive fraud sufficient to defeat the fifth defendants' indefeasible title to the land.

***Held*:**

(1) The doctrine of *res judicata* provided no bar to the relief sought by the plaintiffs as it was not clear from the two previous judicial decisions relied on (a 1959 decision of the Native Land Commission and a 2008 decision of the Local Land Court) that the question of ownership of the land had been determined in favour of the fifth defendants to the exclusion of the plaintiffs.

(2) A distinction must be drawn between two categories of land cases: (a) those in which there is a dispute about whether land is customary land or competing claims to ownership of customary land and (b) those in which the dispute centres on interpretation or application of

previous judicial decisions as to the status of land or its customary ownership. Only in category (a) cases does the National Court lack jurisdiction. The present case falls into category (b) and the National Court has jurisdiction.

(3) The plaintiffs adduced sufficient evidence for the Court to find that they were amongst others genuine customary owners of the land and they were not consulted on and did not agree to the transactions resulting in the grant of the lease to the fifth defendants.

(4) The plaintiffs' evidence had the effect of imposing on the defendants the evidentiary burden of showing that the alleged breaches of Sections 10, 11 and 102 of the *Land Act* did not occur; and that evidentiary burden was not discharged.

(5) The Court found by reasonable inference, based on the plaintiffs' evidence and the defendants' failure to adduce evidence that was reasonably expected, if it existed, to be readily available to them, that the procedures in the *Land Act* were not followed. Four grounds of review were upheld.

(6) Notwithstanding the general principle of indefeasibility of title there is an exception where it is proven that the circumstances in which a person has obtained title are so unsatisfactory, irregular and unlawful as to amount to constructive fraud for the purposes of Section 33(1)(a) of the *Land Registration Act*. Here the errors of law proven by the plaintiffs were so numerous and serious as to amount to constructive fraud.

(7) The number and seriousness of the errors of law and the finding of constructive fraud warranted exercise of the Court's discretion by granting the principal relief sought by the plaintiffs. The decision to grant the lease was quashed and the lease was declared null and void and the court granted consequential relief to reflect those conclusions.

Cases cited

The following cases are cited in the judgment:

Dale Christopher Smith v Minister for Lands (2009) SC973
Elizabeth Kanari v Augustine Wiakar (2009) N3589
Emas Estate Development Pty Ltd v John Mea & Ors [1993] PNGLR 215
Galem Falide v Registrar of Titles (2012) N4775
Hi-Lift Company Pty Ltd v Miri Setae [2000] PNGLR 80
Joe Koroma v Mineral Resources Authority (2009) N3926
Kapiura Trading Ltd v Bullen (2012) N4903
Koitachi Ltd v Walter Schnaubelt (2007) SC870
Lae Bottling Industries Ltd v Lae Rental Homes Ltd (2011) SC1120
Lae Rental Homes Ltd v Viviso Seravo (2003) N2483
Lavu v Thompson & NBPOL (2007) N5018
Louis Medaing v Ramu Nico Management (MCC) Ltd (2011) N4340
Mark Ekepa v William Gaupe (2004) N2694
Mision Asiki v Manasupe Zurenuoc (2005) SC797
Mosoro v Kingswell Ltd (2011) N4450
Mudge v Secretary for Lands [1985] PNGLR 387
Musa Valley Management Company Ltd v Pepi Kimas (2010) N3827
Open Bay Timber Ltd v Minister for Lands and Physical Planning (2013) N5109
PNG Deep Sea Fishing Ltd v Luke Critten (2010) SC1126
Ramu Nickel Ltd v Temu (2007) N3252
Roderick Tovo Bibilo v Gerard Balbagara (2008) N3291
Ronny Wabia v BP Exploration Operating Co Ltd [1998] PNGLR 8

Steamships Trading Company Ltd v Garamut Enterprises Ltd (2000) N1959
The Papua Club Inc v Nusaum Holdings Ltd (No 2) (2004) N2603
The State v Lohia Sisia [1987] PNGLR 102
Thomas Taiya Ambi v Exxon Mobil Ltd (2012) N4844
West New Britain Provincial Government v Kimas (2009) N3834
Yakananda Business Group Inc v Minister for Lands (2001) N2159

JUDICIAL REVIEW

This was a review of decisions resulting in the Minister for Lands and Physical Planning granting a Special Agricultural and Business Lease to the fifth defendants.

Counsel

T Anis, for the plaintiffs
I Mugugia, for the first, second, third and fourth defendants
S Soi, for the fifth defendants

1 August, 2013

1. **CANNINGS J:** The plaintiffs, Doriga Mahuru and four others, apply for judicial review of administrative decisions resulting in the Minister for Lands and Physical Planning granting a Special Agricultural and Business Lease to the fifth defendants, Ava Mika and two others, over an 8.51-hectare block of land at Taurama Valley in the National Capital District.

2. The land is next to Vadavada settlement on the northern side of Taurama Road. It is known traditionally as "Manuaga". The Minister granted the lease to the fifth defendants on 25 June 2010. The plaintiffs say that they are the customary owners of Manuaga. They say they were not consulted on and did not agree to the transactions that culminated in the lease being granted to the fifth defendants. They apply for judicial review on various grounds based on alleged breaches of the procedures in the *Land Act* relating to customary land and the granting of Special Agricultural and Business Leases. They seek various declarations and orders quashing the decision to grant the lease and restraining the defendants from dealing further with the land.

3. The fifth defendants, supported by other defendants, say that they, not the plaintiffs, are the genuine customary landowners. They have raised two jurisdictional points: (a) that the plaintiffs are estopped by the doctrine of *res judicata* from claiming customary ownership of the land and (b) that the National Court has no jurisdiction to determine the judicial review as it involves a dispute over customary land ownership, a matter falling outside the jurisdiction of the Court. As to the merits of the grounds of review the fifth defendants, supported by other defendants, argue that the plaintiffs failed to establish any of the grounds as they were not customary owners of the land and had failed to adduce evidence of any errors of law and not exhausted the procedures available under the *National Court Rules* to obtain the evidence necessary to support their case. The defendants further argue that in the event that any ground of review

succeeded the plaintiffs should still be denied relief as they had not proven constructive fraud sufficient to defeat the fifth defendants' indefeasible title to the land.

FIRST JURISDICTIONAL POINT: RES JUDICATA

4. Mr Soi for the fifth defendants submits that there have been two judicial or quasi-judicial determinations of the question of customary ownership of Manuaga and on both occasions it has been decided that the fifth defendants or their ancestors own the land – not the plaintiffs. The plaintiffs are therefore estopped (prevented) by the doctrine of *res judicata* (the dispute has already been decided) from asserting ownership of the land in these proceedings.

5. The first determination that the fifth defendants rely on is a finding by the pre-Independence Native Lands Commission constituted by Commissioner W G Giles made on 20 January 1959 following an inquiry under the *Native Land Registration Ordinance* 1952. A copy of the finding has been adduced in evidence and its authenticity is not in dispute. The subject of the finding was "Central Claim No 68", an undisputed claim for registration of "native land" by Madi Geita of Kila Kila (also known as Kira Kira) village on behalf of the descendants of Sogo Gomara (deceased) of Badili Idibana Iduhu clan. The claim covered an area of 681.9 acres (276 hectares) and included land in the vicinity of Boroko, Taurama and Vadavada. Commissioner Giles concluded:

By Koitapu [Koita] custom the area was originally owned by Sogo Gomara and all his descendants, and the descendants of Baemu Soka and Borebu Soka have usufructuary rights to the land.

Control of the land by Koitapu custom is vested in the eldest male of the senior patrilineal line who has the right to allot pieces of land to individuals who are descendants of the common ancestor, for their own exclusive use.

At the date of this finding the control is vested in Madi Geita.

6. The second determination is the order of 11 March 2008 of the Waigani Local Land Court constituted by Magistrate H Sareke and Mediators A G Morea and B Mahuta in proceedings under the *Land Disputes Settlement Act* Chapter No 45. Copies of the order and reasons for decision have been adduced in evidence and their authenticity is not in dispute. The subject of the proceedings was "Ownership of Central Claim 68 (Kessi Creek, Ugabega)". The land was not described in more detail than that. The complainant was Mika Madi, Chairman for an on behalf of Madi Geita Land Group Inc. There were five defendants: Patana Goasa, Kiriwina Community Ekalesia, John Kapinato, Vataraman Property Developers Ltd and Rabura Doriga. The Court decided the case in favour of the complainant by ordering:

> **(1) This Court basically takes judicial notice of the decision of Chief Commissioner Mr W B Giles made on 20 January 1959.**
>
> **(2) Where he declared and ordered that by Koita custom and principles the eldest surviving males of senior patrilineal line are vested with rights to be owners and**

controller of land on behalf of its clan members.

(3) That Mika Madi of Badiri Idibana Vamaga Clan as surviving senior patrilineal line of Sogo Gomara and all his descendants and descendants of Baemu Soka and Borebo Soka is vested with authority to deal with customary land namely Central Claim 68 and its surroundings respectively.

(4) That any sale of customary portions of land within Central Claim 68 and its surroundings by first, second, third and fourth defendants or any members acting without authority of the clan leaders of Badiri Idibana Vamaga Clan. That transaction shall be negotiated or declared null and void.

7. The fifth defendants argue that:

- both determinations settle the question of customary ownership of land within the area of Central Claim 68,
- Manuaga falls within that area,
- they have been vested with ownership of Manuaga by a proper authority and in accordance with Koita custom,
- the plaintiffs are prohibited by the doctrine of *res judicata* from re-litigating the question of customary ownership of Manuaga, and therefore
- the entire proceedings should be dismissed.

8. I reject this argument for three reasons. First, though it seems clear (as the parties agree on this) that Manuaga falls within the area of Central Claim 68 and is subject to the 1959 Native Land Commission finding, it is not clear that it falls within the area that was the subject of the dispute determined in 2008 by the Waigani Local Land Court. Plaintiff Mahuru Doriga has given evidence (exhibit P5) that Manuaga was not part of the disputed land, described as "Central Claim 68 (Kessi Creek, Ugabega)". He says that the disputed land in the 2008 case is in Taurama Valley but on the southern side of Taurama Road, opposite Manuaga, next to the PNG Ports housing compound. Faced with conflicting evidence on this point, I doubt the relevance of the 2008 Local Land Court decision.

9. Secondly even if I accept the fifth defendants' assertion that the 2008 decision covers Manuaga I find nothing in that decision or in the 1959 finding that supports the proposition that the fifth defendants, Ava Mika, Kila Gabutu and Michael John Madi, are the legitimate customary owners of Manuaga. Only one of them, Mr Gabutu, gave evidence but his affidavit is short on detail as to how he, Mr Mika and Mr Madi came to be vested by the proper authority, Mika Madi, with exclusive ownership of Manuaga. I refer to Mika Madi (the complainant in the 2008 Local Land Court proceedings) as the proper authority or 'land controller', as in 2010, when the Special Agricultural and Business Lease was granted to the fifth defendants, Mr Madi was the eldest male of the senior patrilineal line, having been a direct descendant of Sogo Gomara (deceased in 1959) and Madi Geita (Mr Gomara's eldest son and recognised by the 1959 finding as the 'land controller'') by reason of his being Mr Geita's eldest son. Interestingly Ava Mika is Mr Madi's son and Kila Gabutu is Mr Madi's nephew (evidence of these relationships in exhibit P5 is uncontested). However it would appear that their close relationship to Mr Madi gives them no special right to any land, at least not Manuaga.

10. I reiterate that the fifth defendants have not provided any evidence to support the proposition that they are the genuine customary landowners of Manuaga That leaves open the question: who has been allotted Manuaga by a proper authority for (using the terminology of the 1959 finding) "their own exclusive use"? Arguably it is the plaintiffs and the Mahuru Madaha Ono family of Badira Vamaga clan, Kira Kira village. There is uncontested evidence (annexed to the affidavit of Mahuru Doriga, exhibit P5) of a letter

from Mika Madi, as Chairman of Madi Geita Land Group and Controller of Central Claim 68, dated 15 January 2010, addressed to the plaintiffs, acknowledging that:

1. **According to family land boundary allocations, your family land boundaries are located east of the area natively known as Vada Vada at the foothills of Manuaga hillside.**
2. **You are to work only within the boundaries of the land already identified and must ensure not to intrude onto the adjoining lands.**
3. **I trust your land group with good faith and as per our Koitabu custom will share the benefits of developmental proceeds you may receive with the rest of our families within Badiri Vamaga Clan and the village as a whole.**

11. This statement by Mr Madi is not conclusive evidence that the plaintiffs own Manuaga. However, it lends support to the view that they at least have usufructuary rights (the right to possess and use the land) and therefore should be regarded for the purposes of the *Land Act* customary landowners. It also throws considerable doubt on the defendants' assertion that the fifth defendants are the only customary owners of Manuaga.

12. The third reason I reject the *res judicata* argument is that there is no commonality in the causes of action at the centre of on the one hand the 1959 and 2008 determinations and on the other hand the present proceedings. *Res judicata* is a common law principle or legal doctrine that has been adopted as part of the underlying law of Papua New Guinea. It is expressly recognised by Schedule 2.8(1)(d) of the *Constitution*. As I pointed out in *Mark Ekepa v William Gaupe* (2004) N2694 it is a defence to a claim when the following conditions apply:

1. the cause of action (ie the basis of the remedies being sought) in one case is the same as that relied on in an earlier case;
2. the earlier case was between the same parties or their "privies";
3. in the earlier case the court made a final determination of the issues between those same parties or their privies.

13. The causes of action in the 1959 and 2008 determinations were claims of customary ownership of land. The Native Land Commission and the Waigani Local Land Court were required to determine the question of customary ownership (it was not disputed in the 1959 proceedings but was disputed in the 2008 proceedings) and who had the power according to custom to allot land. The cause of action in the present proceedings is not a claim of customary ownership but alleged errors of law made by the Minister and others when making administrative decisions leading to granting of the lease to the fifth defendants. The cause of action in the present case is very different to the causes of action in the earlier cases. Condition (1) for operation of *res judicata* is not satisfied. Neither is (2) and (3). Each is an essential precondition. The failure to satisfy one of them is sufficient to make *res judicata* inapplicable.

14. I conclude that the doctrine of *res judicata* provides no bar to the relief sought by the plaintiffs. The first of the defendants' jurisdictional points is rejected.

SECOND JURISDICTIONAL POINT: NATIONAL COURT HAS NO JURISDICTION IN CUSTOMARY LAND DISPUTES

15. Mr Soi submitted that if the plaintiffs insist that they are the customary owners of Manuaga contrary to the rights of the fifth defendants then this is a case of disputed ownership of customary land and they have chosen the wrong forum in which to agitate their dispute. They should take their grievance to the Local Land Court as the National Court has no jurisdiction.

16. Mr Soi is right to suggest that the National Court must tread warily when dealing with customary land. In *The State v Lohia Sisia* [1987] PNGLR 102 the Supreme Court ruled the National Court has no jurisdiction to hear or determine disputes about whether land is customary land or about competing claims to ownership of customary land. That principle has been applied in numerous other cases, eg *Ronny Wabia v BP Exploration Operating Co Ltd* [1998] PNGLR 8, *Lavu v Thompson & NBPOL* (2007) N5018, *Thomas Taiya Ambi v Exxon Mobil Ltd* (2012) N4844. However, as I indicated in *Roderick Tovo Bibilo v Gerard Balbagara* (2008) N3291 and *Galem Falide v Registrar of Titles* (2012) N4775 a distinction must be drawn between two sorts of land cases:

- those in which there is a dispute about whether land is customary land or competing claims to ownership of customary land;
- those in which the dispute centres on interpretation or application of previous court decisions or judicial or quasi-judicial determinations as to the status of land or its customary ownership.

17. Only in the first category does the National Court lack jurisdiction. Cases falling in that category fall within the jurisdiction of the Land Titles Commission or the Local Land Court. The National Court retains jurisdiction if the case falls into the second category. It does not lose jurisdiction simply because the proceedings happen to relate to ownership of customary land (*Joe Koroma v Mineral Resources Authority* (2009) N3926).

18. The present case falls into the second category. Evidence has been presented about who are the legitimate customary owners of Manuaga but I am not determining such questions at first instance or with finality. The central issues in dispute are not about who owns the land; rather the central issues are whether errors of law as alleged by the plaintiffs have been made by the Minister resulting in the grant of a Special Agricultural and Business Lease to the fifth defendants. This is a judicial review proceeding, not a forum for determination of questions of disputed ownership. The National Court has jurisdiction. The second jurisdictional argument is rejected. I will now consider the grounds of review.

GROUNDS OF REVIEW

19. The plaintiffs' Order 16, Rule 3(2)(a) statement sets out the grounds of review in the following terms:

(a) The First, Second, Third and Fourth Defendants erred in law.

Particulars

(i) The Minister, on behalf of the State, did not meet with the Plaintiffs and their clan members to discuss and set terms and conditions prior to the grant of the Special Agricultural and Business Lease (SABL)

over the Plaintiffs' traditional land as required by Section 10(2) of the Act;

(ii) The Minister did not inquire upon the Plaintiffs' customary land prior to the granting of the SABL over the Plaintiffs' customary land as required by Section 10(3) of the Act;

(iii) At all material times, the Plaintiffs and their clan members were occupying and using their land and at all material times, the land was devolving by custom;

(iv) No instrument of lease in the approved form required by Section 11(2) of the Act was executed by or on behalf of the Plaintiffs and their clan members;

(v) The Plaintiffs and their clan members did not appoint a person or land group required by Section 102(2) of the Act before the grant of the SABL.

(b) The First Defendant breached procedures prescribed under the Act.

Particulars

(i) No agreement was signed between the Minister on behalf of the State and the Plaintiffs and their clansmen which breaches Section 10 of the Act;

(ii) If such an agreement exists, the Minister breached Section 10(2) by failing to meet with the Plaintiffs and their clansmen to set the terms and conditions of his intention to grant lease over the Plaintiffs' customary land;

(iii) The Minister breached Section 10(3) of the Act because at the material time the customary land had devolved by custom;

(iv) The Minister breached Section 10(4) of the Act because the land was not vacant and was occupied by the Plaintiffs and their clan members;

(v) The Minister breached Section 102 of the Act by granting the SABL to the Fifth Defendants when the Plaintiffs and their clan members were not involved in or did not appoint the Fifth Defendants to be granted title for the SABL.

(c) The Defendants have committed error of law on the face of the records, breached procedures prescribed by the Act and acted improperly amounting to constructive fraud.

Particulars

(i) The Plaintiffs repeat all the above grounds;

(ii) The 1st, 2nd, 3rd and 4th Defendants do not hold records to explain or justify their action or inactions;

(iii) The Lands file for some reason has gone missing and despite numerous requests, the file could not be located or disclosed to the Plaintiffs;

(iv) The Fourth and Fifth Defendants hold title over the Special Agricultural and Business Lease but there is no explanation as to how it acquired the title following the due process of law as expressly provided for under the Act.

20. The grounds and particulars overlap and to some extent are repetitious or inappropriate. Paragraph (c) raises what might be a significant point about constructive fraud but it is not really a ground of review. It is more a principle of law to be considered in the event that a ground of review has been established. It is a consideration to take into account if and when the Court determines whether the plaintiffs should be granted the relief that they are seeking. As to paragraphs (a) and (b) I have found it more convenient to regard them as asserting five grounds of review:

1. The Minister erred in law by not meeting with the plaintiffs and agreeing on the terms and conditions on which the land would be acquired by the State, contrary to Section 10(2) of the *Land Act* (paras (a)(i), (b)(i), (b)(ii)).
2. The Minister erred in law by not inquiring into and being satisfied of the use of the land, contrary to Section 10(3) of the *Land Act* (paras (a)(ii), (a)(iii), (b)(iii)).
3. The Minister erred in law because the land was occupied by the plaintiffs and their clan members, contrary to Section 10(4) of the *Land Act* (para (b)(iv)).
4. The Minister erred in law by not ensuring that an instrument of lease in the approved form was executed by or on behalf of the customary landowners, contrary to Section 11(2) of the *Land Act* (para (a)(iv)).
5. The Minister erred in law by granting the lease to the fifth defendants, who had not been appointed by the plaintiffs or their clan members, contrary to Section 102(2) of the *Land Act* (para (a)(v), (b)(v)).

GROUND 1: MINISTER ERRED BY NOT MEETING WITH PLAINTIFFS AND AGREEING ON TERMS AND CONDITIONS CONTRARY TO LAND ACT, SECTION 10(2)

21. The plaintiffs argue that before the Minister granted the lease to the fifth defendants, there were a number of procedures to be complied with including the requirement under Section 10(2) of the *Land Act*

for a meeting and agreement with the customary landowners to set the terms and conditions on which the land would be acquired. The plaintiffs say that no such meeting took place, so an essential procedural requirement was ignored, giving rise to an error of law. The defendants do not dispute that such a procedural requirement exists but argue that the plaintiffs have not proven that the procedure was not followed.

22. The competing arguments require a consideration of the procedural and other requirements that must be satisfied for the Minister to lawfully grant a Special Agricultural and Business Lease. The relevant law is Sections 10, 11 and 102 of the *Land Act*.

23. Section 10 (*acquisition of customary land by agreement*) states:

(1) Subject to Section 11, customary land shall be acquired in accordance with this Section and shall be authenticated by such instruments and in such manner as are approved by the Minister.

(2) The Minister, on behalf of the State, may acquire customary land on such terms and conditions as are agreed on between him and the customary landowners.

(3) Subject to Subsection (4), the Minister shall not acquire customary land unless he is satisfied, after reasonable inquiry, that the land is not required or likely to be required by the customary landowners or by persons on whom the land will or may devolve by custom.

(4) Where the Minister is satisfied, after reasonable inquiry, that any customary land is not required or likely to be required for a certain period but is of the opinion that the land may be required after that period, he may lease that land from the customary landowners for the whole or a part of that period.

24. Section 11 (*acquisition of customary land for the grant of special agricultural and business lease*) states:

(1) The Minister may lease customary land for the purpose of granting a special agricultural and business lease of the land.

(2) Where the Minister leases customary land under Subsection (1), an instrument of lease in the approved form, executed by or on behalf of the customary landowners, is conclusive evidence that the State has a good title to the lease and that all customary rights in the land, except those which are specifically reserved in the lease, are suspended for the period of the lease to the State.

(3) No rent or other compensation is payable by the State for a lease of customary land under Subsection (1).

25. Section 102 (*grant of special agricultural and business leases*) states:

(1) The Minister may grant a lease for special agricultural and business purposes of land acquired under Section 11.

(2) A special agricultural and business lease shall be granted—

(a) to a person or persons; or

(b) to a land group, business group or other incorporated body,

to whom the customary landowners have agreed that such a lease should be granted.

(3) A statement in the instrument of lease in the approved form referred to in Section 11(2) concerning the person, land group, business group or other incorporated body to whom a special agricultural or business lease over the land shall be granted, is conclusive evidence of the identity of the person (whether natural or corporate) to whom the customary landowners agreed that the special agricultural and business lease should be granted.

(4) A special agricultural and business lease may be granted for such period, not exceeding 99 years, as to the Minister seems proper.

(5) Rent is not payable for a special agricultural and business lease.

(6) Sections 49, 68 to 76 inclusive, 82, 83, 84 and 122 do not apply to or in relation to a grant of a special agricultural and business lease.

(7) Notwithstanding anything in this Act, a special agricultural and business lease shall be effective from the date on which it is executed by the Minister and shall be deemed to commence on the date on which the land subject to the lease was leased by the customary landowners to the State under Section 11.

26. It is clear from the words of Section 102(1) that before granting a Special Agricultural and Business Lease the Minister must acquire the customary land by lease under Section 11. He must follow the procedures in both Sections 11 and 102. What about Section 10? It has a number of specific requirements about authentication of instruments, agreement on terms and conditions of acquisition and reasonable

inquiry by the Minister, which are not found in Section 11. Do the procedures set out in Section 10 also have to be followed?

27. It is possible to read Section 11 as a standalone provision, allowing the Minister to lease customary land and then lease it back, through a Special Agricultural and Business Lease, to persons whom the customary landowners have agreed should be granted such a lease, without any need to follow the more detailed procedures in Section 10. On this construction of the Act, Section 10 could be read as the provision which sets out how the State acquires freehold title to customary land. If the State proposes instead to lease customary land under Section 11 and lease it back under Section 102, Section 10 does not apply.

28. The alternative approach, which I took in *Musa Valley Management Company Ltd v Pepi Kimas* (2010) N3827, is that Section 11 is not a standalone provision: if the Minister proposes to acquire customary land by lease under Section 11 he must also follow the provisions in Section 10. There was not a lot of argument on this point either in *Musa Valley* or in the present case. Having reflected on the issue, I am not convinced that I should change my view. I can see that there is a literal argument for the standalone approach as Section 10 begins with the words "Subject to Section 11", which suggests that Section 11 is the prevailing, specific provision, so that if the procedure in it is followed, it is not necessary to follow the procedure in Section 10. However, given the ambiguity in the relationship between these two sections the Court must be acutely aware of their purpose, which is to regulate in a fair and just manner the acquisition by the State of customary land with the agreement of customary landowners. That purpose is best achieved by reading the two provisions together – not as standalone provisions – to ensure that there is genuine agreement by genuine customary landowners and that an obligation is cast upon the Minister to make reasonable inquiries with all interested parties.

29. I maintain the approach I took in *Musa Valley*. To lawfully grant a Special Agricultural and Business Lease over customary land the Minister must comply with all of the requirements of Sections 10, 11 and 102, which can be summarised as follows:

> (a) the Minister must first be satisfied "after reasonable inquiry, that the land is not required or likely to be required by the customary landowners or by persons on whom the land will or may devolve by custom" (s 10(3));
>
> (b) the customary land must then be acquired by the Minister by lease under Section 11(1);
>
> (c) the terms and conditions of that lease must be "agreed between him and the customary landowners" (s 10(2));
>
> (d) acquisition of the land must be "authenticated by such instruments and in such manner as are approved by the Minister" (s 10(1));
>
> (e) the purpose of the Minister leasing the land under Section 11(1) must be for granting a Special Agricultural and Business Lease of that land (s 11(1));
>
> (f) there must be an instrument of lease under Section 11(1) in the approved form executed by or on behalf of the customary landowners (s 11(2));
>
> (g) the customary landowners must agree on the Special Agricultural and Business Lease being granted to the lessees (s 102(2));

(h) there must be a statement of agreement for the purposes of Section 11(2) in the instrument of the Special Agricultural and Business Lease (s 102(3)).

30. I now return to the first ground of review: the plaintiffs are arguing that Section 10(2) was breached as the Minister did not meet with them to agree on the terms and conditions on which their land would be acquired, and there was no agreement on terms and conditions on which the land would be acquired. Put another way the plaintiffs are arguing that what I have described as requirement (c) has not been complied with. I have two quibbles with the argument, as it is framed. First, Section 10(2) does not require that there be a meeting. It speaks only of an agreement between the Minister and the customary landowners as to the terms and conditions on which the land would be acquired. Secondly, the five plaintiffs are presuming that they are the customary landowners and I am not satisfied that they have proven that they are the only customary landowners. Those difficulties do not, however, dispose of the first ground of review. It remains arguable that Section 10(2) was breached as there was no agreement between the Minister and the customary landowners as to the terms and conditions on which the Minister would acquire the land, by lease, under Section 11(1).

31. As indicated earlier, Mr Soi's response is not to argue against the existence of the requirement of an agreement under Section 10(2) but to submit that the plaintiffs have not proven that there was no agreement. The defendants say that the plaintiffs are not the customary landowners so they cannot just state they were not consulted and leave it at that. It is their case and they must prove it. The Department of Lands file on this land has not been adduced in evidence. The file would show whether there was an agreement or not. But the file is not before the Court. So there is no evidence to support the plaintiff's case. The plaintiffs have had ample opportunity to summon production of the file and invoke other procedures in the *National Court Rules*, such as issuing a notice of discovery under Order 16, Rule 8 and Division 9.1 or applying for a statement of reasons under Order 16, Rule 13(7)(4), but have not exhausted those processes. To find in their favour would be to reverse the onus of proof.

32. Mr Soi, supported by Ms Mugugia for the Minister and the other defendants, has raised a valid point about the failure of the plaintiffs to exhaust the avenues for getting the Department of Lands file; and the plaintiffs' lawyers deserve some criticism for that. However, that criticism is tempered by three factors. First there is evidence that the plaintiffs' lawyers have for a long time been corresponding with the Department in an effort to get access to the file. The Department has not responded in an effective and efficient manner. The file is being treated as "missing". Secondly I must be equally critical of the first to the fourth defendants' lawyer: why has this critical piece of evidence not been adduced? Where is the file? Is it good enough to say that the file is "missing" and to submit that that is of no consequence as it is up to the plaintiffs to prove their case? Thirdly I must also be critical of the fifth defendants' lawyers: the plaintiffs are complaining about the absence of an agreement so wouldn't the easiest and most helpful response be to produce the agreement? Or at least get one of the fifth defendants to give evidence that there was indeed an agreement?

33. I don't think it is good enough for the defendants to stand mute and just leave it up to the plaintiffs to prove a negative: that there was no agreement. The law of evidence provides a solution. The plaintiffs have in my view adduced sufficient evidence for the Court to find that:

- they were amongst others genuine customary landowners or at least they had a genuine belief based on reasonable grounds that they had a legitimate customary interest in the land;
- they were not consulted on and did not agree to the land being acquired by the State for the purposes of being leased back to the fifth defendants;
- specifically, for the purposes of Section 10(2), they did not agree on the terms and conditions on which the land would be acquired;
- they have no knowledge of any agreement entered into for the purposes of Section 10(2).

34. The plaintiffs' evidence has the effect of imposing on the defendants the evidentiary burden of showing that the alleged breaches of Section 10(2) did not occur. This is not a reversal of the legal burden of proof, which remains with the plaintiffs at all times. It is simply a way of being fair in a trial. The Court is saying to the defendants: 'You must surely have this evidence, if it exists. You are in a better position than anyone to provide the evidence. Please provide it, because if you don't, the inference will naturally arise that there is no such evidence'.

35. The evidentiary burden has not been discharged by any of the defendants. In these circumstances the most reasonable inference to draw, based on the plaintiffs' evidence and the defendants' failure to adduce evidence that was reasonably expected, if it existed, to be readily available to them, is that:

- there was no Section 10(2) agreement between the Minister and the customary landowners.

36. I find that if the Minister acquired the land by lease he did so without complying with Section 10(2). This was an error of law. Ground 1 is upheld.

GROUND 2: MINISTER ERRED BY NOT INQUIRING INTO USE OF LAND, CONTRARY TO LAND ACT, SECTION 10(3)

37. I consider that there are actually two requirements imposed by Section 10(3) (in what I have earlier described as requirement (a)):

- the Minister must cause a *reasonable inquiry* to be made of whether the land is required or likely to be required by the customary landowners or by persons on whom the land will or may devolve by custom; and
- before proceeding to lease the land under Section 11(1) the Minister must be *satisfied* that the land is *not* required or likely to be required by the customary landowners or by persons on whom the land will or may devolve by custom.

38. The plaintiffs argue that there was no inquiry. They were not consulted. They never heard of any inquiry or land investigation report being undertaken by Department of Lands officials or any authorised person. The Minister could not have been satisfied of the matters in Section 10(3), which was breached.

39. The defendants' response is the same as it was to ground 1: the plaintiffs have not proven that there was no inquiry and not proven that the Minister was not satisfied of the matters in Section 10(3).

40. My determination of this ground follows a similar process of reasoning to that employed in ground 1. The plaintiffs have in my view adduced sufficient evidence for the Court to find that:

- they were amongst others genuine customary landowners or at least they had a genuine belief based on reasonable grounds that they had a legitimate customary interest in the land;
- they were not consulted for the purposes of any inquiry as to whether the land was required by the customary landowners or by persons on whom the land will or may devolve by custom;
- they have no knowledge of any inquiry being undertaken for the purposes of Section 10(3).

41. The plaintiffs' evidence has the effect of imposing on the defendants the evidentiary burden of showing that the alleged breaches of Section 10(3) did not occur. The evidentiary burden has not been discharged by any of the defendants. Most significantly, it has not been discharged by the first and second defendants, the Minister and the Departmental Head. In these circumstances the most reasonable inference to draw, based on the plaintiffs' evidence and the defendants' failure to adduce evidence that was reasonably expected, if it existed, to be readily available to them, is that:

- there was no Section 10(3) inquiry undertaken; and
- the Minister was not satisfied of the matters of which he was required to be satisfied before he could acquire the land by lease.

42. I find that if the Minister acquired the land by lease he did so without complying with Section 10(3). This was an error of law. Ground 2 is upheld.

GROUND 3: MINISTER ERRED AS LAND WAS OCCUPIED BY PLAINTIFFS, CONTRARY TO LAND ACT, SECTION 10(4)

43. The plaintiffs argue that Section 10(4) requires that the land acquired by the lease be unoccupied. They say that they and their clansmen were using the land in 2010, when the lease was granted to the fifth defendants, so the Minister breached Section 10(4).

44. I see no merit in this argument. Section 10(4) does not impose any prohibition of the sort contended for by the plaintiffs. There is a prohibition on the Minister acquiring customary land by lease which is "required" by the customary landowners, but the prohibition is imposed by Section 10(3), not 10(4).

45. Section 10(4) deals only with the period for which land is acquired. If the Minister is satisfied that land is not required for a certain period but may be required after that period, the Minister may lease the land for the period for which the land is not required. For example the Minister after reasonable inquiry made in 2013 might form the view that a piece of customary land is not presently required by the customary landowners but is likely to be required in, say, 2020. Section 10(4) clarifies that the Minister can lease the land from the landowners for part of the period up to 2020 and then lease it back under Section 102 provided that the leaseback does not extend beyond 2020. Section 10(4) is of no relevance to the present case. Ground 3 is dismissed.

GROUND 4: MINISTER ERRED BY NOT EXECUTING LEASE, CONTRARY TO LAND ACT, SECTION 11(2)

46. While there is some scope for argument about whether the procedural requirements of Section 10 apply to customary land acquired for the purpose of granting a Special Agricultural and Business Lease (an issue I have decided in the affirmative) there is no argument on whether the requirements of Section 11 apply. They do apply. Customary land cannot be the subject of a Special Agricultural and Business Lease unless the land is first acquired by lease under Section 11(1) in accordance with Section 11(2): there must be an instrument of lease in the approved form executed by or on behalf of the customary landowners.

47. In *Musa Valley* I noted that the *Land Act* is silent on how the agreement of the customary landowners required by 11(2) is to be effected and evidenced. I suggested that the minimum requirement would be that a substantial majority of the customary landowners indicate their agreement by signing the lease under which the land is acquired by the State. I maintain that approach, which is relied on by the plaintiffs who argue that there was no instrument of lease in any form executed by or on behalf of the customary landowners. They were not consulted. They never heard of any lease to the State or the Minister being executed by anyone. There was no lease, so both Sections 11(1) and 11(2) were breached.

48. The defendants' response is the same as it was to grounds 1 and 2: the plaintiffs have not proven that there was no instrument of lease, so this ground of review cannot be sustained.

49. My determination of this ground follows a similar process of reasoning to that employed in grounds 1 and 2. The plaintiffs have in my view adduced sufficient evidence for the Court to find that:

- they were amongst others genuine customary landowners or at least they had a genuine belief based on reasonable grounds that they had a legitimate customary interest in the land;
- they were not consulted about execution of any lease with the Minister;
- they have no knowledge of any lease being executed for the purposes of Section 11.

50. The plaintiffs' evidence has the effect of imposing on the defendants the evidentiary burden of showing that the alleged breaches of Sections 11(1) and 11(2) did not occur. The evidentiary burden has not been discharged by any of the defendants. In these circumstances the most reasonable inference to draw, based on the plaintiffs' evidence and the defendants' failure to adduce evidence that was reasonably expected, if it existed, to be readily available to them, is that:

- there was no Section 11(1) lease executed; and
- as there was no lease, Section 11(2) was also breached.

51. I find that the Minister acquired the land without complying with Sections 11(1) and 11(2). This was an error of law. Ground 4 is upheld.

GROUND 5: MINISTER ERRED BY GRANTING LEASE CONTRARY TO LAND ACT, SECTION 102(2)

52. While there is no evidence of the land being leased by the customary landowners to the State for the purposes of Section 11(1) there is evidence of the land being leased by the Minister to the fifth defendants. The lease is a one-page document, which I set out verbatim:

THE INDEPENDENT STATE OF PAPUA NEW GUINEA

SPECIAL AGRICULTURAL AND BUSINESS LEASE

THE MINISTER ON BEHALF OF

THE INDEPENDENT STATE OF PAPUA NEW GUINEA

GRANTS TO THE LESSEE:

Ava Mika, Kila Gabutu and Michael John Madi (as joint tenants)

A Special Agricultural and Business Lease under the Land Act 1996 for a period of 99 years from 05/05/2010 ("Commencement date") to 04/05/2109 for agricultural and business purposes of the land referred to in the Schedule and or as shown coloured yellow on the annexed plan.

This lease is not subject to the payment of rent.

The Reservations, Covenants and Conditions (if any contained in the lease from the customary landowners to the State under Section 11 of the Land Act 1996 (NLD 6629) to which this lease is subject to are:

1. **The lease shall be used bona fide for purposes specified in the schedule.**
2. **The lease shall be for a term specified in the schedule commencing from the date the land was leased from the customary landowners to the State under Section 11.**
3. **The lease shall be rent-free for the duration of the lease.**
4. **Provision of any necessary casements for electricity, water, drainage and sewerage reticulation.**

SCHEDULE

All that piece of land known as Allotment/Portion 2717C Section/Milinch GRANVILLE Town/Fourmil MORESBY in NCD Province containing an area of 8.51 hectares or thereabouts as delineated on the registered survey plan (class: URBAN CLASS ONE (1) catalogued No 49/2790 in the Department, Waigani, NCD.

Dated this 25th day of June 2010.

Signed on behalf of the Independent State of Papua New Guinea by a delegate of the Minister.

53. The plaintiffs' argument about the lease is based on what I described earlier as requirement (g): the customary landowners must agree on the Special Agricultural and Business Lease being granted to the

lessees (s 102(2)). In *Musa Valley* I noted that the *Land Act* is silent on how the agreement of the customary landowners required by 102(2) is to be effected and evidenced. I suggested that the minimum requirement would be that a substantial majority of the customary landowners indicate their agreement by:

- signing the lease under which the land is acquired by the State (if that lease indicates the person to whom the Special Agricultural and Business Lease will be granted); or
- signing a separate document (if the lease does not indicate the person to whom the Special Agricultural and Business Lease will be granted).

54. I maintain that approach, which is relied on by the plaintiffs who argue that there was no agreement in any form to a Special Agricultural and Business Lease being granted to the fifth defendants. They were not consulted. They never heard of any proposal to lease the land to anyone. There was no agreement, so Section 102(2) was breached.

55. The defendants' response is the same as it was to grounds 1, 2 and 4: the plaintiffs have not proven that there was no agreement, so this ground of review cannot be sustained.

56. My determination of this ground follows a similar process of reasoning to that employed in grounds 1, 2 and 4. The plaintiffs have in my view adduced sufficient evidence for the Court to find that:

- they were amongst others genuine customary landowners or at least they had a genuine belief based on reasonable grounds that they had a legitimate customary interest in the land;
- they were not consulted for the purposes of reaching agreement that the land would be leased to the fifth defendants;
- they have no knowledge of any such agreement.

57. The plaintiffs' evidence has the effect of imposing on the defendants the evidentiary burden of showing that the alleged breach of Section 102(2) did not occur. The evidentiary burden has not been discharged by any of the defendants. In these circumstances the most reasonable inference to draw, based on the plaintiffs' evidence and the defendants' failure to adduce evidence that was reasonably expected, if it existed, to be readily available to them, is that:

- the customary landowners did not agree that a Special Agricultural and Business Lease be granted to the fifth defendants.

58. I find that the Minister granted the lease to the fifth defendants without complying with Section 102(2). This was an error of law. Ground 5 is upheld.

59. I note in passing that the lease granted to the fifth defendants did not contain a statement concerning the persons whom the customary landowners agreed should be granted the lease, as required by Section 102(3); that being what I described earlier as requirement (h). That apparent breach of the Act was not made the subject of any ground of review.

RECAP OF DETERMINATION OF GROUNDS OF REVIEW

60. I regarded the plaintiffs' Order 16, Rule 3(2)(a) statement as asserting five grounds of review, and I have upheld four of those grounds.

Ground 1 was upheld as there was no Section 10(2) agreement between the Minister and the customary landowners. To the extent that the Minister acquired the land by lease he erred in law by not complying with Section 10(2).

Ground 2 was upheld as there was no Section 10(3) inquiry undertaken into whether the land was required by the customary landowners and the Minister was not satisfied of the matters of which he was required to be satisfied before he could acquire the land by lease. To the extent that the Minister acquired the land by lease he erred in law by not complying with Section 10(3).

Ground 3, concerning an alleged breach of Section 10(4), was dismissed.

Ground 4 was upheld as there was no Section 11(1) lease executed and as there was no lease Section 11(2) was also breached. The Minister erred in law by acquiring the land without complying with Sections 11(1) and 11(2).

Ground 5 was upheld as the customary landowners did not agree that a Special Agricultural and Business Lease be granted to the fifth defendants. The Minister erred in law by granting the lease to the fifth defendants without complying with Section 102(2).

61. In terms of the grounds as they were set out in the Order 16, Rule 3(2)(a) statement:

- grounds (a)(i), (a)(ii), (a)(iii), (a)(iv), (a)(v), (b)(i), (b)(ii), (b)(iii) and (b)(v) have been upheld;
- grounds (b)(iv) and (c)(i), (c)(ii), (c)(iii) and (c)(iv) have been dismissed.

WHAT DECLARATIONS OR ORDERS SHOULD THE COURT MAKE?

62. An application for judicial review proceeds in two stages. First the plaintiff must establish good grounds for judicial review. Secondly if one or more grounds are established the plaintiff must make a case for a remedy, which is a matter of discretion (*Mision Asiki v Manasupe Zurenuoc* (2005) SC797, *Dale Christopher Smith v Minister for Lands* (2009) SC973). Here four grounds of review have been established. Each involves a serious error of law by the Minister which has affected the interests of the plaintiffs. The matter is therefore ripe for consideration of remedies.

63. By a notice of motion filed on 16 January 2012 (constituting the application for judicial review under Order 16, Rule 5 of the *National Court Rules*) the plaintiffs seek the following remedies:

1. **A declaration that the Minister for Lands and Physical Planning shall not acquire customary land for Special Agricultural and Business Lease, unless the Minister and landowners meet and agree on the terms and conditions of the intended lease as required by Section 10(2) of the *Land Act* No 45 of 1996 (the Act).**
2. **A declaration that the Minister for Lands and Physical Planning shall not acquire customary land intended for Special Agricultural and Business Lease unless he is satisfied, after reasonable inquiry, that the land is not required or likely to be required by the customary landowners or by persons on whom the land will or may devolve by custom, as required under Section 10(3) of the Act.**
3. **A declaration that in order for the Fourth Defendant to have good title over a grant of Special Agricultural and Business Lease over customary land, an instrument of lease in the approved form shall be executed by or on behalf of the customary landowners as required under Section 11(2) of the Act.**
4. **A declaration that prior to grant of a valid Special Agricultural and Business Lease, the First, Second, Third and Fourth Defendants must liaise with the landowners of the customary land and compile and produce a Land Investigation Report.**
5. **A declaration that prior to grant of a valid Special Agricultural and Business Lease, the customary landowners of the land intended to be granted a Special Agricultural and Business Lease, shall agree and give their consent as to who shall be registered as the lessee of the intended Special Agricultural and Business Lease, as required under Section 102 of the Act.**
6. **A declaration that the Defendants have by their actions and inactions committed constructive fraud.**
7. **An order in the nature of certiorari to bring into this Honourable Court and quash the decision of the First Defendant made under Section 10(4) of the Act in leasing the customary land under Special Agricultural and Business Lease Portion 2717C Milinch Granville, Town Moresby, National Capital District.**
8. **An order in the nature of certiorari to bring into this Honourable Court and quash the decision of the First, Second, Third and Fourth Defendants to grant the Special Agricultural and Business Lease over the customary land to the Fifth Defendants.**
9. **An order in the nature of certiorari to bring into this Honourable Court and quash the decision of the Second and Third Defendants in accepting and registering the instrument(s) granting the Special Agricultural and Business Lease over the customary land.**
10. **Permanent injunction to restrain the Defendants, their agents or servants and third parties from entering or dealing with the customary land in question.**
11. **The Defendants to pay the Plaintiffs costs.**

64. The declarations sought in paragraphs 1 to 5 amount to not much more than a declaration of the law and the need for the Minister and the State to follow the law. Such declarations are unnecessary and too general to be of any utility. I refuse to make them. The declaration sought in paragraph 6 relates to the present case and raises the important issue of constructive fraud but I also consider a declaration of that nature to be unnecessary and I refuse to make it. I will return to the issue of constructive fraud in a moment. An injunction in the broad terms sought by paragraph 10 would be oppressive. Though I have ruled that there is insufficient evidence that the fifth defendants are the exclusive customary landowners I have not ruled that they have no interest in the land. An injunction in such broad terms is unjustified and I refuse to grant it. That leaves paragraphs 7, 8 and 9 of the motion to be considered, as well as paragraph 11 which relates to costs.

65. Paragraphs 7, 8 and 9 contain the principal relief sought by the plaintiffs: orders that would quash the key decisions that led to the grant of the Special Agricultural and Business Lease to the fifth defendants, which would have the effect of making the lease a nullity. As such orders would remove the title in the land currently held by the fifth defendants, the principle of indefeasibility of title must now be considered.

66. Under Papua New Guinea's Torrens Title system of land registration, the general principle is that once a lease of land from the State to a person is registered, an indefeasible (unforfeitable) title is conferred on the registered proprietors (in this case, the fifth defendants) subject only to the exceptions in Section 33(1) of the *Land Registration Act* (*Mudge v Secretary for Lands* [1985] PNGLR 387). The question arises whether any of those exceptions apply. The only exception that might apply in this case is Section 33(1)(a): in the case of fraud.

67. I have addressed the meaning of "fraud" in a series of cases, including *Elizabeth Kanari v Augustine Wiakar* (2009) N3589, *West New Britain Provincial Government v Kimas* (2009) N3834, *Mosoro v Kingswell Ltd* (2011) N4450, *Kapiura Trading Ltd v Bullen* (2012) N4903 and *Open Bay Timber Ltd v Minister for Lands and Physical Planning* (2013) N5109. There are two schools of judicial thought.

68. On the one hand in *Emas Estate Development Pty Ltd v John Mea & Ors* [1993] PNGLR 215 the Supreme Court (Amet J and Salika J, Brown J dissenting) held that if the circumstances of a grant, forfeiture or transfer of title are so unsatisfactory, irregular or unlawful, it is tantamount to fraud, warranting the setting aside of registration of title. This wide view of "fraud" – it includes irregularities that are tantamount to fraud and constructive fraud – has been followed in the National Court decisions of Sheehan J in *Steamships Trading Company Ltd v Garamut Enterprises Ltd* (2000) N1959, Sevua J in *Hi-Lift Company Pty Ltd v Miri Setae* [2000] PNGLR 80 and Injia DCJ in *Ramu Nickel Ltd v Temu* (2007) N3252. The view that the National Court has an important role in its judicial review jurisdiction of correcting errors of law made in connection with registration of leases is supported by the decisions of Sevua J in *Yakananda Business Group Inc v Minister for Lands* (2001) N2159 and of Kirriwom J in *Lae Rental Homes Ltd v Viviso Seravo* (2003) N2483 and the Supreme Court (Gavara-Nanu J, Davani J, Yagi J) in *Lae Bottling Industries Ltd v Lae Rental Homes Ltd* (2011) SC1120.

69. On the other hand a narrower view was favoured by the Supreme Court (Gavara-Nanu J, Mogish J and Hartshorn J) in *Koitachi Ltd v Walter Schnaubelt* (2007) SC870. The Court held that the *Emas Estate case* was distinguishable on its facts as it concerned a registered proprietor whose State Lease was forfeited and then allocated and registered in the name of a third party. As to the *Garamut case*, that was said to concern a challenge to the issue of a State Lease on the grounds that procedures in the *Land Act* were not complied with. The Court adopted the view of fraud taken in the National Court decision of Gavara-Nanu J in *The Papua Club Inc v Nusaum Holdings Ltd (No 2)* (2004) N2603, where his Honour stated:

The word 'fraud' in Section 33(1)(a) of the Land Registration Act, is not defined anywhere in the Act, but Section 45(1) makes it clear that fraud means more than constructive or equitable fraud. ...

It is implicit from these provisions that "fraud" ... means fraud committed by the registered proprietor or actual fraud. That is the only ground upon which a registered proprietor's title can be rendered invalid.

70. The rationale for adopting the wider view of fraud was recently articulated by the Supreme Court (Kandakasi J and Sawong J, Hartshorn J concurring) in *PNG Deep Sea Fishing Ltd v Luke Critten* (2010) SC1126:

In our view, the principle enunciated in Emas is a necessary safeguard against the abuse of the process prescribed for the proper, fair, transparent and legal allocation of State Leases. In a jurisdiction like PNG where there is ready abuse of legislatively prescribed process particularly over a much sought after resource like land, and other regulatory requirements for safety and welfare of the nation, the decision in Emas becomes very important. The situation in PNG is not the same as in England, Australia or elsewhere, where the state owns most of the land and there is a large supply of land. Also, unlike Australia and England, there is in PNG, a ready resort to abusing legislatively prescribed process particularly in relation to land as much as other important resources. Under Mudge, people who either deliberately or by their own conduct chose not to follow the proper process laid for applying for and being granted State Leases and eventual registration to gain from their own illegal and improper conduct or failures, which cannot be allowed. Hence it makes sense to qualify the application of the decision in Mudge and those following.

71. I consider, as I have concluded in the various cases referred to above, that the wide view should be followed, so the question to be asked is whether the circumstances in which the Special Agricultural and Business Lease over Manuaga was granted and registered in favour of the fifth defendants are so unsatisfactory, dubious and irregular as to be tantamount to fraud. That question must be answered in the affirmative. The elaborate procedures in Sections 10, 11 and 102 of the *Land Act* have been inserted for a reason: to ensure that leases over customary land are granted only after a thorough identification and investigation of the land and the customary landowners and their agreement to what is proposed. In PNG land is a critical natural resource required by National Goal Number 4 to be conserved and used for the benefit of the present generation and for the benefit of future generations. National Goal No 4 (*natural resources and environment*) of the *Constitution* and its accompanying Directive Principles state:

We declare our fourth goal to be for Papua New Guinea's natural resources and environment to be conserved and used for the collective benefit of us all, and be replenished for the benefit of future generations.

WE ACCORDINGLY CALL FOR—

(1) wise use to be made of our natural resources and the environment in and on the land or seabed, in the sea, under the land, and in the air, in the interests of our development and in trust for future generations; and

(2) the conservation and replenishment, for the benefit of ourselves and posterity, of the environment and its sacred, scenic, and historical qualities; and

(3) all necessary steps to be taken to give adequate protection to our valued birds, animals, fish, insects, plants and trees.

72. Under Section 25(2) (*implementation of the National Goals and Directive Principles*) of the *Constitution* all governmental bodies are obliged to apply and give effect to the National Goals and Directive Principles as far as lies within their respective powers. As I pointed out in *Louis Medaing v Ramu Nico Management (MCC) Ltd* (2011) N4340 the National Goals and Directive Principles are in the Preamble to the *Constitution*. They underlie the *Constitution*. They are the proclaimed aims of the

People. They cannot be ignored. They must be taken into account by the Court when interpreting laws and when deciding what relief should be granted to persons such as the plaintiffs who have proven errors of law have been committed by governmental officials and bodies. Section 25(3) of the *Constitution* states:

Where any law, or any power conferred by any law (whether the power be of a legislative, judicial, executive, administrative or other kind), can reasonably be understood, applied, exercised or enforced, without failing to give effect to the intention of the Parliament or to this Constitution, in such a way as to give effect to the National Goals and Directive Principles, or at least not to derogate them, it is to be understood, applied or exercised, and shall be enforced, in that way.

73. Decisions about the transfer of interests in customary land must be made carefully and thoughtfully and in strict accordance with procedures prescribed by law. Those procedures have in this case been flouted. The Department of Lands file is missing and the defendants have been content to defend the case by leaving it up to the plaintiffs to prove their case. Actual fraud has not been proven but I am satisfied that there is constructive fraud.

74. This is therefore a "case of fraud" for the purposes of Section 33(1)(a) of the *Land Registration Act*. It follows that the granting and registration of the Special Agricultural and Business Lease are ineffective at law and should not be allowed to stand. I will exercise the discretion of the Court by making orders substantially in terms of those sought in paragraphs 7, 8 and 9. The Court's orders will require the Register of Titles to be corrected.

75. Costs will follow the event and be on a party-party basis.

ORDER

(1) The application for judicial review is substantially granted.

(2) The relief sought in paragraphs 1 to 6 and 10 of the plaintiffs' notice of motion filed on 16 January 2012 is refused.

(3) The relief sought in paragraphs 7, 8 and 9 of the notice of motion filed on 16 January 2012 is in principle granted and for the avoidance of doubt it is ordered that:

(a) The decision to grant a Special Agricultural and Business Lease over Portion 2717C, Milinch Granville, Fourmil Moresby, National Capital District on or about 25 June 2010 to the fifth defendants is declared null and void and is quashed;
(b) The decision of the Deputy Registrar of Titles to register in the Register of State Leases, Volume 40, Folio 145, a Special Agricultural and Business Lease over Portion 2717C, Milinch Granville, Fourmil Moresby, National Capital District on or about 25 June 2010 to the fifth defendants is declared null and void and is quashed;
(c) The fifth defendants shall within 14 days return their owner's copy of the Special Agricultural and Business Lease over Portion 2717C, Milinch Granville, Fourmil Moresby, National Capital District to the Secretary for Lands and Physical Planning;
(d) The second defendant shall forthwith amend all records of the State under his control to reflect all the orders of the Court;

(e) The third defendant shall forthwith amend the Register of State Leases and all other records of the State under his control to reflect all the orders of the Court.

(4) The relief sought in paragraph 11 of the notice of motion filed on 16 January 2012 is in principle granted and for the avoidance of doubt it is ordered that the defendants shall pay the plaintiffs' costs of the proceedings on a party-party basis which shall if not agreed be taxed.

(5) Time for entry of the order is abridged to the date of settlement by the Registrar which shall take place forthwith.

Judgment accordingly.

Bradshaw Lawyers: *Lawyers for the Plaintiff*
Solicitor-General: *Lawyer for the First, Second, Third, & Fourth Defendants*
Soi & Associates Lawyers: *Lawyers for the Fifth Defendants*
