

N6598

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

WS NO 799 OF 2014

BETWEEN

VAKI VAILALA

Plaintiff

AND

NATIONAL HOUSING CORPORATION

First Defendant

AND

THE HONOURABLE FABIAN POK MP

Second Defendant

AND

**ROMILLY KILA-PAT, SECRETARY,
DEPARTMENT OF LANDS AND PHYSICAL PLANNING**

Third Defendant

AND

THE INDEPENDENT STATE OF PAPUA NEW GUINEA

Fourth Defendant

Waigani: Cannings J
2015: 3, 11 November,
2017: 20 January

LAND – government land – State Leases – indefeasibility of title – meaning of “fraud” in Land Registration Act, Section 33(1)(a) – whether actual fraud must be proven – whether proof of constructive fraud is sufficient.

GOVERNMENTAL BODIES – National Housing Corporation – sale of dwellings – National Housing Corporation Act 1990 – Corporation’s duty to comply with provisions of Act when deciding whether to sell dwelling house and to whom it can be sold.

REMEDIES – appropriate relief re title to residential property in a case of fraud – whether to order that title be declared null and void – whether appropriate to order that property vested in National Housing Corporation be offered for sale to long-term occupier of property .

The plaintiff claimed that a residential property vested in the National Housing Corporation, which he had occupied for 21 years, was sold by the Corporation (the first defendant) to the second defendant in irregular circumstances, contrary to the *National Housing Corporation Act*. He claimed that it was a case of fraud, such that the second defendant's title should be declared null and void and forfeited. He asked that the Corporation be ordered to offer the property for sale to him for the amount at which it had been valued, when the Corporation offered to sell him the property on previous occasions. The defendants argued that the second defendant was the registered proprietor, who had indefeasible title, that there was no fraud, that the Corporation had acted fairly and in accordance with its governing legislation in selling the property to the second defendant who was a bona fide purchaser who had purchased the property in good faith, that the plaintiff was for the bulk of the period of his occupation of the property an illegal and unfaithful tenant and that all relief sought by him should be refused. A trial was conducted to determine whether any relief sought by the plaintiff should be granted.

Held:

- (1) Under Papua New Guinea's Torrens Title system of land registration for alienated government land, registration of a lease vests, subject to limited exceptions, an indefeasible (unforfeitable) title in the registered proprietor subject only to the exceptions in Section 33(1) of the *Land Registration Act*. Most significantly Section 33(1)(a): "in the case of fraud" (*Mudge v Secretary for Lands* [1985] PNGLR 387).
- (2) "Fraud" means actual fraud or constructive fraud. Constructive fraud exists where the circumstances of a transfer of title are so unsatisfactory, irregular or unlawful, it is tantamount to fraud, warranting the setting aside of registration of title.
- (3) The plaintiff proved constructive fraud, as the sale of the property to the second defendant was unlawful (contrary to Division IV.4 (*sale of dwellings etc*) of the *National Housing Corporation Act*), the circumstances of sale were peculiar, irregular and suspicious and the offer to the plaintiff in 2013 was unreasonable.

- (4) It was in the interests of justice that the sale and the transfer of the State Lease from the Corporation to the second defendant be declared null and void and the Corporation be ordered to again offer the property for sale to the plaintiff.

Cases cited:

The following cases are cited in the judgment:

Elizabeth Kanari v Augustine Wiakar (2009) N3589
Emas Estate Development Pty Ltd v John Mea & Ors [1993] PNGLR 215
Helifix Group of Companies Ltd v PNG Land Board (2012) SC1150
Hi-Lift Company Pty Ltd v Miri Setae [2000] PNGLR 80
Kapiura Trading Ltd v Bullen (2012) N4903
Koitachi Ltd v Walter Schnaubelt (2007) SC870
Kol Toki v Moeka Morea (2016) SC1588
Lae Bottling Industries Ltd v Lae Rental Homes Ltd (2011) SC1120
Lae Rental Homes Ltd v Viviso Seravo (2003) N2483
Mamun Investment Ltd v Nixon Koi (2015) SC1409
Mark Lakani v Gabe Ikupu (2015) N6067
Mosoro v Kingswell Ltd (2011) N4450
Mudge v Secretary for Lands [1985] PNGLR 387
NCDIC v Crusoe Pty Ltd [1993] PNGLR 139
Open Bay Timber Ltd v Minister for Lands & Physical Planning (2013) N5109
Ramu Nickel Ltd v Temu (2007) N3252
Rosemary John v James Nomenda (2010) N3851
Steamships Trading Company Ltd v Garamut Enterprises Ltd (2000) N1959
Tau Gumu v PNGBC (2002) N2251
Vitus Kais v Sali Tagau (2016) N6159
West New Britain Provincial Government v Kimas (2009) N3834
Yakananda Business Group Inc v Minister for Lands (2001) N2159

STATEMENT OF CLAIM

This was an application for declarations and orders regarding a State Lease over a residential property.

Counsel:

B Ovia, for the Plaintiff
J L Talopa, for the first Defendant

M Philip, for the second Defendant

20th January, 2017

1. CANNINGS J: This case is about a residential property in the National Capital District, Section 6, Lot 25, Hanu Place, Boroko. The plaintiff, Vaki Vailala, a former public servant, aged in his 60s, and his family, have occupied the property since 1994. The property was until recently managed by the National Housing Corporation (the first defendant), and the plaintiff was required to pay rent to the Corporation. In late 2013-early 2014 the Corporation sold the property, and transferred the State Lease over it, to Hon Fabian Pok MP, the Minister for Defence (the second defendant), who is now the registered proprietor.

2. The plaintiff commenced proceedings in 2014 against those defendants and the Secretary for Lands and Physical Planning (third defendant) and the State (fourth defendant). He claims that the property was sold by the Corporation to the second defendant in irregular circumstances, contrary to the *National Housing Corporation Act*, and that it was a case of fraud. He argues that the second defendant's title should be declared null and void and forfeited and that the Corporation should be ordered to offer the property for sale to him at a reasonable price.

3. The defendants argue that the second defendant is the registered proprietor, that he has indefeasible title, and that there was no fraud as the Corporation acted fairly and in accordance with its governing legislation in selling the property to the second defendant, who was a bona fide purchaser who had purchased the property in good faith. The defendants claim the plaintiff was for the bulk of the period of his occupation of the property an illegal occupier and an unfaithful tenant and all relief he seeks should be refused.

4. A trial has been conducted to determine whether any relief sought by the plaintiff should be granted.

UNDISPUTED FACTS

5. A number of undisputed facts have emerged from the evidence:

- The plaintiff moved into the property in January 1994. He was then an officer of the Department of Lands and Physical Planning. He is a surveyor by profession.
- In 2005 the plaintiff left the Public Service.
- In December 2005 the plaintiff arranged a valuation of the property by the Office of the Valuer-General. It was valued at K70,000.00.
- By a letter dated 28 February 2006, delivered to the plaintiff on 27 July 2006, the Corporation offered to sell the property to the plaintiff for an un-determined price. He accepted the offer, in principle, on 27 July 2006 and said “Please advise next course of action”.
- By a letter dated 18 February 2008 the Corporation again offered to sell the property to the plaintiff, for an un-determined price.
- In July 2009 the plaintiff and the Corporation entered into a written tenancy agreement, for the first time. The rent was K220.00 per fortnight.
- On 18 April 2012 the plaintiff wrote to the Managing Director of the Corporation, pointing out that he had occupied the property since 1994 and accepted two previous offers to sell the property to him but nothing had happened. He again expressed interest in purchasing the property. The Corporation did not respond to the letter.
- On 10 May 2013 the second defendant wrote, under the letterhead “Office of the Minister for Defence”, to the Managing Director of the Corporation expressing his interest in “any property that is available for sale by your organisation”, stating that he has housing allowances and finance and is prepared to pay the market value. He did not mention any particular property that he was interested in purchasing.
- On 30 October 2013 the Managing Director of the Corporation wrote a letter of offer to the plaintiff advising that Section 6, Allotment 25 Boroko is approved for sale under the NHC Outright Cash Scheme for the price of K529,590.60, subject to conditions including that within 14 days the plaintiff accept the offer and pay a 10% deposit.

- The plaintiff's request for an extension of time to consider his position and arrange finance was not acceded to.
- On 18 November 2013 the Managing Director of the Corporation, Mr Dege, wrote to the plaintiff, cancelling the offer of 30 October 2013 due to his failure to comply with the conditions of the offer and notifying him that the property would now be repossessed and sold on the open market.
- On 23 November 2013 Mr Dege wrote a letter of offer to the second defendant advising that Section 6, Allotment 25 Boroko is approved for sale under the NHC Outright Cash Scheme for the price of K525,525.00 (K4,065.60 less than the offer to the plaintiff).
- The second defendant responded in a letter dated 25 November 2013, accepting the Corporation's offer.
- On 28 November 2013 the second defendant paid to the Corporation a deposit of K195,617.00.
- On 28 January 2014 the contract of sale of the property from the Corporation to the second defendant was executed.
- On 26 February 2014 the second defendant paid the Corporation the balance of the purchase price, K277,375.00.
- On 27 February 2014 the Corporation was granted a 99-year State Lease over the property, backdated to commence on 11 February 2014. Prior to that date, the property was owned by the State, not by the Corporation.
- Transfer of the State Lease from the Corporation to the second defendant was registered on 28 February 2014.
- On 11 July 2014 the Corporation gave the plaintiff seven days' notice to vacate the property, through an undated letter signed by its Principal Legal Officer, Mr Gore, served on the plaintiff.
- On 16 July 2014 the plaintiff commenced the present proceedings.
- On 17 July 2014 the Court granted an interim injunction restraining the defendants from evicting the plaintiff pending determination of the proceedings.

ISSUES

6. The main issue is whether the second defendant obtained title to the property in a case of fraud. Under Papua New Guinea's Torrens Title system of land registration for alienated government land, registration of a lease vests an indefeasible (unforfeitable) title in the registered proprietor subject only to the exceptions in Section 33(1) of the *Land Registration Act*. Most significantly Section 33(1)(a): "in the case of fraud" (*Mudge v Secretary for Lands* [1985] PNGLR 387).

7. The plaintiff does not allege actual fraud. His case is based on the proposition that this was a case of constructive fraud. Constructive fraud exists where the circumstances of a transfer of title are so unsatisfactory, irregular or unlawful, it is tantamount to fraud, warranting the setting aside of registration of title.

8. As to whether "fraud" means actual fraud or whether it also includes constructive fraud, the preponderance of judicial opinion is that it can be either. There is now a strong line of Supreme Court authority in support of the constructive fraud approach: *Emas Estate Development Pty Ltd v John Mea* [1993] PNGLR 215, *PNG Deep Sea Fishing Ltd v Luke Critten* (2010) SC1126, *Lae Bottling Industries Ltd v Lae Rental Homes Ltd* (2011) SC1120 and *Kol Toki v Moeka Morea* (2016) SC1588.

9. That line of authority is, in my view, binding on the National Court, more so than cases such as *Koitachi Ltd v Walter Schnaubelt* (2007) SC870 and *Eric Kiso v Bennie Otoa & Ken Wutnalom* (2013) SC1222, in which the Supreme Court has indicated that proof of actual fraud is necessary.

10. The constructive fraud approach has been applied in many National Court cases. For example: *Steamships Trading Company Ltd v Garamut Enterprises Ltd* (2000) N1959, *Hi-Lift Company Pty Ltd v Miri Setae* [2000] PNGLR 80, *Yakananda Business Group Inc v Minister for Lands* (2001) N2159, *Lae Rental Homes Ltd v Viviso Seravo* (2003) N2483, *Ramu Nickel Ltd v Temu* (2007) N3252, *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, *Open Bay Timber Ltd v Minister for Lands & Physical Planning* (2013) N5109, *Vitus Kais v Sali Tagau* (2016) N6159.

11. The constructive fraud approach is what I will apply in this case. The critical issue therefore becomes whether the sale of the property and transfer of the State Lease to the second defendant was a case of constructive fraud. If that is determined in the negative, the plaintiff's case will fail. If it is determined in the affirmative, the question of remedies will arise.

WAS THIS A CASE OF CONSTRUCTIVE FRAUD?

12. This issue will be determined in the following way: first, the competing evidence will be outlined; secondly the evidence will be set out in detail; thirdly, contentious factual issues will be determined; finally a determination will be made of the critical question: was this a case of constructive fraud?

Outline of evidence

13. The plaintiff's case was based on four affidavits, three by the plaintiff and one by Neil Airo, a former officer of the Corporation. The plaintiff also gave oral evidence and was subject to cross-examination.

14. For the defendants, the Corporation's Managing Director and Principal Legal Officer gave oral evidence, as did the second defendant, and their respective affidavits were admitted into evidence.

Evidence for the plaintiff

No	Witness	Description
1	Vaki Vailala	Plaintiff
Evidence		

He and his family have lived in the property since 1994 – he moved in with the permission of his departmental head – it had previously been a house occupied by expatriate contract officers – the NHC offered to sell the property to him twice, in 2006 and 2008 – he accepted the first offer – both offers were subject to valuation, which the NHC did not arrange, so he organised his own valuation, which put the value of the property at K70,000.00 – there have been times when rental arrears built up, but he has paid up when required.

2	Neil Airo	Titles consultant, employee of GLX
		Investments Ltd, former NHC conveyancing officer

Evidence (affidavit only)

Mr Airo stated in his affidavit that normal procedures of the NHC were not followed in selling the property to the second defendant while there was a sitting tenant who was not given sufficient notice that the property he was occupying might be sold to a third party – also he noted that the completion of the purchase price and registration of the transfer at the Internal Revenue Commission and the Department of Lands all took place within 24 hours on 26-27 February 2014.

Evidence for the defendants

No	Witness	Description
1	Dr Fabian Pok MP	Second defendant
Evidence		

As far as he is concerned he simply wrote and asked if the NHC had any properties for sale – they responded six months later and said there was one, so he accepted the offer, then got his finance together and paid the agreed purchase price – it is not correct to say that everything happened within 24 hours – he executed the contract of sale on 28 January 2014, he paid the stamp duty as assessed by the IRC on 31 January 2014, he paid the final instalment of the purchase price on 26 February 2014, then the transfer was registered on 27 February 2014. After he accepted the Corporation’s offer, he did not inspect the property. He did not enquire whether there was a sitting tenant – he expected the Corporation to give him vacant possession.

2	Gabriel Gore	Principal Legal Officer, National Housing Corporation
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Evidence

The plaintiff unlawfully moved into the property in 1994 and no proper arrangements were made for his occupancy until 2005 – this was akin to “fraudulent occupancy” – even though it might have been thought to be an “institutional” property, it was always managed by the Corporation.

The Corporation offered to sell the property to the plaintiff in 2006, then in 2008, but on both occasions the plaintiff let the offer lapse without showing real interest – the Corporation made another offer – the third – to the plaintiff in 2013, but he again showed no interest.

Asked whether the second defendant was aware that there was a sitting tenant, he (the witness) replied that that was not within his office’s responsibility.

3	John Dege	Managing Director, National Housing Corporation
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Evidence

Records of the NHC show that the plaintiff illegally occupied the property in January 1994 and refused to comply with an eviction notice issued against him dated 26 January 1994 – no formal tenancy agreement was executed for many years – the Corporation offered to sell the property to the plaintiff on three occasions, in 2006, 2008 and 2013, but on each occasion he did not accept the offer. The plaintiff was a chronic rent defaulter who had been living in a prime location for very low rent. On 7 October 2013 the Corporation obtained a valuation of the property: K390,000.00.

Findings on contentious factual issues

15. There are three contentious factual issues.

1 Circumstances in which the plaintiff occupied the property in the early years

16. The defendants label the plaintiff as an “illegal occupier” of the property from 1994 to 2005. I reject that as a proper legal or factual description of the circumstances of his occupation.

17. I accept the evidence of Mr Dege that in late January 1994, just after the plaintiff moved in, the then Managing Director of the Corporation, Mr Vaira, issued an “Illegal Occupation” notice to the plaintiff dated 26 January 1994, requiring him to vacate the property. However, I am satisfied that the evidence shows that the plaintiff moved in to the property with the knowledge and consent of his Departmental Head, as the property was regarded in those days as an “institutional” or “reserve” property, for occupation by officers of the Department of Lands and Physical Planning. There is no evidence that after issuing the 26 January 1994 notice the Corporation took any steps to enforce it and the plaintiff was left to occupy the property without hindrance and without any formal arrangement being in place, and without paying rent, until 2005.

18. It was in 2005 that he separated from the Public Service. He then entered into an arrangement with the Corporation to pay rental arrears in a lump sum. There is evidence that on 16 December 2005 the then Managing Director of the Corporation, Mr Kapy, wrote to the plaintiff acknowledging receipt of full payment of the arrears of K6,578.00 and notifying him that a valuation of the property would be arranged with a

view to offering the property to him for sale.

By the end of 2005, therefore, the Corporation was treating the plaintiff as a lawful occupier and legitimate tenant.

2 The plaintiff's rental record

19. By the plaintiff's own evidence, he has not always paid the rent on time. However, there is insufficient evidence before the court, for it to be found as a fact that the plaintiff was a "chronic defaulter". It is not clear whether at the date of trial there were any arrears, and if there were, what the amount was. However, there is evidence that suggests that at least until January 2013 the plaintiff was up to date with his rent. Mr Talopa suggested that the plaintiff paid no rent for the period from 1994 to 2009. This is not correct.

20. I find that:

- from 1994 to 2005 the plaintiff in fact paid no rent;
- in 2005 he paid all arrears to the satisfaction of the Corporation;
- in the period from 2005 to 2013 there were occasions on which arrears accumulated;
- the plaintiff had no arrears owing in January 2013;
- there is no evidence as to the period from January 2013 to the date of trial (November 2015).

3 Circumstances in which offers to sell the property lapsed

21. It is clear that in the period since 1994 the Corporation offered to sell the property to the plaintiff on three occasions: in 2006, 2008 and 2013. I find that the plaintiff accepted, in principle, the 2006 offer. As to the 2008 offer, it was made subject to a valuation, which the Corporation did not arrange. I find that, on both occasions, no sale took place due to a lack of follow-up on the part of the Corporation. I reject the submission of Mr Talopa, for the Corporation, that the plaintiff ought to be blamed for the 2006 and 2008 offers not being acted on. Mr Talopa's criticism of the plaintiff for not showing any financial commitment is misplaced, and it is rejected. As for the 2013 offer, it lapsed due to the plaintiff's failure to accept the offer within 14 days.

Was this a case of constructive fraud?

22. I have concluded, after assessment of the evidence and submissions of counsel, that this issue must be determined in the affirmative for the following reasons.

1 Sale of property to the second defendant was unlawful

I uphold the submission of Mr Ovia, for the plaintiff, that the sale of the property to the second defendant was contrary to Division IV.4 (*sale of dwellings etc*), in particular Section 37 (*sale of dwellings*), of the *National Housing Corporation Act*, which states:

Subject to this Division, the Corporation may sell a dwelling vested in it to—

- (a) an eligible person; or**
- (b) an approved applicant; or**
- (c) a person who exercises the option offered to him under Section 38(1).**

As pointed out by Makail J in *Rosemary John v James Nomenda* (2010) N3851, the Corporation does not have unfettered power to sell dwelling houses that are vested in it, to people of its choosing. It is constrained by the Act. It can only sell a dwelling house to a person who falls within one of the three categories set out in Section 37: (a) eligible persons, (b) approved applicants and (c) Section 38(1) persons.

As to (a), a person becomes an “eligible person” if made the subject of a declaration under Section 3 (*declaration of eligible person*), which states:

The Corporation may declare a person to be a person eligible for assistance under Part IV. by reason of—

- (a) his limited means; or**
- (b) his present unsuitable housing; or**
- (c) any other circumstances considered relevant by the Corporation.**

As to (b), a person becomes an “approved applicant” by virtue of a declaration by the Minister under Section 2 (*declaration of approved applicant*), which states:

The Minister may declare an organization or person to be an approved applicant for the purposes of this Act.

As to (c), the only persons in this category are a tenant of the Corporation who has had a tenancy agreement in force for two years or a person connected to such a tenant – a spouse, widow, widower or next of kin– to whom the Corporation has offered an option to purchase the dwelling, the subject of the tenancy agreement.

23. There is no evidence that the Corporation declared the second defendant to be an eligible person or that the Minister declared him to be an approved applicant. The second defendant was not a person falling within Section 38(1). It follows that the Corporation was not authorised to sell the property to the second defendant. It was clearly unlawful to do so.

2 Circumstances of sale were peculiar, irregular and suspicious

24. The circumstances in which the Corporation selected the second defendant as a person to whom this particular property should be offered for sale were peculiar, irregular and suspicious, as:

- the only thing that the second defendant did to express his interest in purchasing the property was his very general letter of 10 May 2013 to the Corporation, expressing his interest in “any property that is available for sale by your organisation”;
- there is no evidence that any other person was offered this property;
- the sale of the property was not advertised;
- there was no competitive bidding;
- such arrangements smack of favours being done to “big men” such as the second defendant, a member of the Parliament and a Minister.

3 Offer to the plaintiff in 2013 was unreasonable

25. It is true, as pointed out by Mr Talopa for the Corporation, that the

Corporation offered the property for sale to the plaintiff before it made the offer to the second defendant. However I uphold Mr Ovia's submission that the conditions attached to the offer to the plaintiff, made it quite unreasonable, in that:

- the offer came five years after the last offer to sell, and with little notice to the plaintiff;
- the sale price (K529,590.60) had increased significantly from the period in 2005 to 2008, when the Corporation and the plaintiff had been discussing the prospect of his purchasing the property, and a valuation of K70,000.00 was provided;
- the plaintiff was given only 14 days to consider his position and come up with a 10% deposit;
- the Corporation did not consider any extension of the 14-day period, which by itself was unreasonable given that, by that stage the plaintiff had occupied the property for almost 20 years and had been trying to purchase it for the previous eight years (since late 2005);
- there is no evidence that the Corporation adhered to the requirements of Section 38 (*options to purchase*), which states:

(1) After a tenancy agreement has been in force for two years between the Corporation and a tenant, the Corporation may, in its discretion, offer to—

- (a) the tenant; or**
- (b) the spouse, widow or widower of the tenant; or**
- (c) the tenant and his spouse as joint tenants; or**
- (d) the tenant and his next of kin,**

an option to purchase the dwelling the subject of the agreement at a purchase price specified in the option, subject to the conditions imposed by this Division.

(2) Where a tenant, under Division 1, of a dwelling becomes a purchaser under this section, either along or jointly with his spouse, he is entitled—

- (a) as from the date on which his tenancy of the dwelling**

- commenced; or
- (b) if he has been a tenant of the Corporation in more than one dwelling without interruption and the Corporation so approves—from the date of first occupation of an earlier dwelling,

and subject to any terms specified in the option,

to be credited in reduction of the sale price of the dwelling with an amount equal to that part of the economic rent that represents the repayment of the amount of the capital cost included in the amortization allowance in accordance with Section Sch 2.4.

- (3) Where a tenant has not been credited with an amount in accordance with Subsection (2) and his spouse, widow or widower becomes a purchaser under this section, the spouse, widow or widower is entitled to be credited with the same allowance under Subsection (2) as the tenant would have been entitled to if he had purchased the dwelling.

- (4) A contract of sale under this section may provide—

- (a) for the outright purchase; or
- (b) for the payment of the purchase price by instalments; or
- (c) for the payment of the purchase price to be secured

—

- (i) by mortgage, in the prescribed form, over the property in respect of which the advance is made; or

- (ii) by any other security approved by the Corporation.

26. In particular the Corporation appears to have had no regard to any reduction in the purchase price to which the plaintiff would have been entitled under Section 38(2). It also appears to have not considered making an offer to the plaintiff in terms of Section 38(4)(b): providing for payment of the purchase price by instalments.

4 Corporation did not own the property

27. This is a fact that was not highlighted by the parties but it is something that adds to the intrigue surrounding sale of the property to the second defendant. It is clear from the copy of the State Lease annexed to the second defendant's affidavit, and a letter of 19 February 2014 to the second defendant, annexed to the same affidavit, that the Corporation did not "own" the property, in the sense of having title in the form of a State Lease over the property, until 27 February 2014, the day before title was transferred to the second defendant.

28. Mr Talopa and Mr Philip (for the second defendant) submitted that upon commencement of operation of the *National Housing Corporation Act* 1990 all State-owned houses were vested in the Corporation. But they did not cite the provision of the Act by which such vesting occurs, and I cannot find any. They might be referring to Section 82 (*registration of title of land*), which provides for transfer of title from the former Housing Commission to the Corporation. But that provision is not self-executing. It provides a process by which title is transferred to the Corporation. It does not happen by operation of law. I reject the defendants' submission as being wrong in law.

29. The correct position at law is that title in the property, Section 6, Lot 25 Boroko, vested in the State until 27 February 2014. Though the lease was back-dated to commence on 11 February 2014, the Corporation had offered to sell the property to the second defendant and negotiated the sale with him, including executing a contract of sale, without itself having title in the property. It only held the title for one day before the transfer of the State Lease to the second defendant on 28 February 2014.

Conclusion

30. The transfer of title to the second defendant was unlawful and so unsatisfactory and irregular, as to be tantamount to fraud. The sale and transfer are properly regarded as constructive fraud. This is a "case of fraud" for the purposes of Section 33(1)(a) of the *Land Registration Act*.

REMEDIES

31. In view of the finding of fraud, it is open to the Court to take the very significant step of nullifying the title of the registered proprietor.

Such a step is not to be taken lightly. However there is ample precedent for such a course of action in the four Supreme Court decisions cited earlier (*Emas Estate, PNG Deep Sea Fishing, Lae Bottling Industries, Toki*) and in the numerous National Court decisions that have applied the constructive fraud approach. Having considered all the circumstances of the case and the submissions of counsel, I consider that it is the interests of justice that the second defendant's title be nullified.

32. In making that decision I am guided by the striking authorisation of Section 155(4) of the *Constitution*, which states:

Both the Supreme Court and the National Court have an inherent power to make, in such circumstances as seem to them proper, orders in the nature of prerogative writs and such other orders as are necessary to do justice in the circumstances of a particular case. [Emphasis added.]

33. The plaintiff has proven his case. His cause of action was fraud, and he has proven that this was a case of fraud. It is now time for the Court to exercise its discretion as to remedies and to make such orders as are necessary to do justice in the circumstances of this particular case.

34. The order of the Court will inevitably cause prejudice to the second defendant. He invested more than half a million Kina in the purchase of the property and he has not been able to occupy it for one day, almost three years after registration of the transfer. However, this situation has come about due to a certain degree of lack of prudence on his part, it would seem, in not ensuring that he was purchasing a property with vacant possession. He has acted naively, appearing to believe that purchasing a property from the National Housing Corporation would be as simple as writing a letter to see if they have any properties available and then receiving a letter six months later that says yes, and then purchasing it without further ado – without even inspecting it (as the second defendant stated in his oral testimony).

35. The second defendant appears not to have considered the possibility that it might be unlawful or improper for the Corporation to be selling its houses, not to people who have been occupying the houses for many years or to people of limited means, but to members of Parliament – leaders – elites – those who are well-off, those who are required under

the *Leadership Code (Constitution, Section 27)* to conduct themselves in such a way, both in their public lives and their private lives, so as not to allow their integrity to be called into question.

36. That the second defendant will be prejudiced by having his title nullified is also a function of the conduct of the Corporation. How could it, and Mr Dege and Mr Gore in particular, reasonably form the view that it would be proper and lawful to sell this property to someone – let alone a Member of Parliament – a Minister – who was not qualified to purchase the property? Why was the second defendant cherry-picked to be the purchaser? Was this a pure and lucky co-incidence? It is difficult for a reasonable observer of this peculiar state of affairs not to be suspicious that something more sinister than simple naiveté, or the perceived need to sell the Corporation's assets at market value, was afoot. But was it really market value? That is not known as the property was never put on the market.

37. Although the second defendant will be prejudiced, he appears, with respect, to have been the master of his own misfortune. He should, of course, seek a refund of the purchase price from the Corporation. But I do not think it would be proper in these proceedings for the Court to make an order to that effect. That is something for the Corporation and the second defendant to sort out amongst themselves, if they can; and if they can't, the Court can assist.

38. Once the second defendant's title is nullified, what should happen to the property? Title will revert to the Corporation, that part is simple. But where does that leave the plaintiff? He wants the Court to order that he be given the chance, again, to purchase the property. Would that be a proper order to make?

39. Again, I hesitate. The plaintiff has not been a model tenant. But nor has he been the chronic defaulter and unfaithful tenant and illegal occupier that the defendants have made him out to be. In the parlance of equity, his hands are somewhere between dirty and clean. My assessment, in light of the evidence and taking into account the oral testimonies of all witnesses, is that the plaintiff's hands are more clean than dirty. He appears to the Court to be a decent man, a long-serving public servant, caught in a difficult situation. He has given evidence of the members of

his immediate and extended family living in the house. They are not small in number. His evidence is not difficult to believe. This is Port Moresby. Life is hard. This is the norm. He is not living in luxury. He is not a cheat. He is not a young man. He is not a Big Man. He is the sort of person who should be given a chance. So I have decided to order in the interests of justice that the Corporation make another offer to sell the property to him.

40. Mr Ovia has submitted that the purchase price should be fixed at the value ascribed to the property by the Valuer-General in 2005: K70,000.00. Or if that submission is rejected, Mr Ovia suggests double that amount: K140,000.00. The defendants' counsel have not addressed the issue in their submissions. One option would be to leave it to the Corporation to determine. That would be consistent with Section 41 (*determination of sale price*) of the *National Housing Corporation Act*, which states:

- (1) Subject to Section 42, the sale price of a property sold under this Division shall be determined by the Corporation—**
 - (a) in accordance with a valuation of the property by a valuer approved by the Corporation; or**
 - (b) after considering such other evidence of the value of the property as in the opinion of the Corporation will enable it to fix a fair value.**
- (2) In determining the sale price under Subsection (1), no regard shall be had to any improvements to the property made by the purchaser or his spouse or any person claiming under or through the purchaser.**

41. In view of my criticism of the conduct of the Corporation I do not think it would be proper to allow the Corporation to decide on the price. It needs judicial guidance. There is evidence that the Corporation obtained a valuation of K390,000.00 in 2013. I consider that that would be too high a price, given my findings that it was because of a lack of diligence on the Corporation's part that the 2006 and 2008 offers to the plaintiff did not result in the plaintiff purchasing the property. I consider that the K70,000.00 2005 figure is too low and would not reflect the reality of today. I take judicial notice of the fact that Boroko is now a

prime residential location in the National Capital District and that property values throughout the city of Port Moresby have skyrocketed in recent years. I am unpersuaded by Mr Ovia's alternative submission of K130,000.00. I don't think there is enough science behind it. I think the best thing is a compromise: half way between K70,000.00 and K390,000.00 = K230,000.00. I will order that the Corporation's offer be no more than that amount.

42. I will make consequential orders to give effect to the primary orders, that the second defendant's title be nullified and that the Corporation offer to sell the property to the plaintiff. Costs will follow the event.

ORDER

- (1) The transfer by the first defendant to the second defendant of the State Lease over Section 6, Allotment 25, Boroko, National Capital District on or about 28 February 2014 is declared null and void and is quashed.
- (2) The second defendant and any other person with possession or control of the official copy of the State Lease over Section 6, Allotment 25, Boroko, National Capital District shall within 14 days after the date of this order, return it to the third defendant.
- (3) The third defendant, as a delegate of the Minister, shall within 21 days after the date of service of this order:
 - (a) execute a notice of forfeiture of the interest of the second defendant in the State Lease over Section 6, Allotment 25, Boroko, National Capital District, stating that the second defendant's interest in the State Lease is forfeited by order of the National Court at Waigani in WS No 799 of 2014 on 20 January 2017; and
 - (b) publish the notice of forfeiture in the *National Gazette*; and
 - (c) forward the notice of forfeiture to the Registrar of Titles; and
 - (d) forward a certified copy of the notice of forfeiture to the Registrar of the National Court at Waigani and to each of the other parties to these proceedings.

- (4) The Registrar of Titles shall within seven days after receiving the notice of forfeiture, amend the Register of State Leases and all other records of the State under his control to reflect forfeiture of the interest of the second defendant in the State Lease over Section 6, Allotment 25, Boroko, National Capital District and all the orders of the Court.
- (5) The first defendant shall within seven days after compliance with order (4): (a) offer, in writing, to sell the property, the subject of the State Lease over Section 6, Allotment 25, Boroko, National Capital District, to the plaintiff, for a sum of no more than K230,000.00, subject to normal and reasonable conditions; and (b) notify the plaintiff of rental arrears, if any, that are due and payable to the first defendant; and (c) in the event that the plaintiff accepts the offer, proceed to sell the property to him with all due dispatch, subject to the plaintiff paying rental arrears in addition to the purchase price before the State Lease is transferred to him.
- (6) If for whatever reason the first defendant does not sell the property to the plaintiff, the plaintiff shall be permitted to remain in the property as a tenant subject to compliance with a standard tenancy agreement and the first defendant shall not sell or attempt to sell the property to persons other than those prescribed by Section 37 of the *National Housing Corporation Act*.
- (7) These proceedings shall be called for mention, to check compliance with this Order, during the week commencing Monday 27 March 2017, at a time to be notified by the Registrar of the National Court.
- (8) Subject to any specific costs order made in the course of the proceedings, the first and second defendants shall pay the plaintiff's costs of the proceedings on a party-party basis, which shall, if not agreed, be taxed.

Judgment accordingly,

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Koisen Lawyers: *Lawyers for the Plaintiff*

Justin Talopa Lawyers: *Lawyers for the first Defendant*

Korerua & Associates Lawyers: *Lawyers for the second Defendant*