SOUTH PACIFIC LAND LAW: SOME REGIONAL CHALLENGES, CASES AND DEVELOPMENTS

Sue Farran*

Land in the South Pacific is largely regulated by introduced English Common Law. However, the vast bulk of the land in the region is held under different forms of customary land tenure, and the perceptions of land and its use are distinctly regional. In this article, the author considers how the Common Law has been adapted in the region to accommodate and reflect customary law and practice. Selected cases from the region are used to highlight the difficulties that the courts face in blending Common Law principles with customary practice and accommodating changing uses of land that challenge traditional solutions.

I INTRODUCTION

A Common Law lawyer coming to the South Pacific region hoping to understand land law faces a number of challenges. One of these is that the apparent acceptance of a number of Common Law concepts and principles is deceptive. In the law of property in the region, there is much that seems to be familiar. Often this can be explained by the fact that many of the available and documented sources of material are introduced law or are modelled on introduced law. Introduced law, however, governs only a very small percentage of total land

* Senior Lecturer, School of Law, University of the South Pacific. I am extremely grateful to Professor Tony Angelo and Professor Don Patterson for their helpful comments. The errors and views remain mine alone.

holding in the region.[1] Nevertheless introduced concepts from English Common Law are used to explain and give form to a number of issues – including those concerning customary land and land tenure - which come before the courts, especially appellate courts, where the procedures are those of introduced rather than customary law, and the personnel are more familiar with Common Law principles of land law than customary ones.[2] As a result of this process there appears to be a degree of accommodation of customary law and traditional practices relating to land and introduced concepts and structures. What is beginning to emerge is a unique regional jurisprudence which blends the context and traditions of the region with the language and form of introduced law, upon which the foundations of a new Pacific land law may be based.

This article considers some of the issues presented by selected cases to this process of accommodation and reformulation. These cases are drawn from the region of the University of the South Pacific,[3] and reflect some of the difficulties presented to the courts in articulating legal solutions where either there are challenges to certain fundamental Common Law principles of land law posed by different regional perceptions of land and its use, or where the changing use of land presents challenges to traditional solutions. Pragmatic solutions to these legal questions demonstrate that the Common Law, in its least abstract sense, as a law of the people, can survive and thrive with a little judicial nurturing and creativity.

II FEATURES OF CUSTOMARY LAND TENURE

It is not the aim of this article to elaborate in depth on different forms of customary land tenure. That has been done elsewhere by writers better qualified to do so.[4] However, in order

---

1 The two major estates of English Common Law post 1925, freehold and leasehold, are found in the region but freehold is very limited. The total freehold holding in the region is probably less than 20 per cent (10 per cent in Fiji; 6 per cent in Samoa; 1.5 per cent in Papua New Guinea and perhaps 1 per cent in Kiribati) Leasehold is more widely spread but the bulk of land is held under different forms of customary land tenure.

2 Although there are a number of regional judges who sit on the bench they and the lawyers who appear before them have usually received their legal training outside the region. The first law graduates from the School of Law of the University of the South Pacific, which focuses on training regional lawyers, only graduated in 1997.

3 This is the region of the 12 member nations of the University: Fiji, Vanuatu, Tonga, Tuvalu, Samoa, Nauru, Niue, Kiribati, Tokelau, the Federated Sates of Micronesia, Cook Islands and Marshall Islands.

4 See for example, Ron Crocombe (ed) *Land Tenure in the Atolls* (Institute of Pacific Studies of the University of the South Pacific, Fiji, 1987).

to understand some of the challenges that come before the courts it is necessary to appreciate that customary land tenure has certain features which distinguish it from Common Law principles relating to land.

Difficulties can arise not only as to what is meant by "land", but also regarding the nature of rights over land. The latter is an important issue because traditional use of land for subsistence agriculture is changing in many parts of the region. Greater economic exploitation is taking place. While customary land tenure may have been well suited to provide a legal framework for customary land use, it faces challenges when the benefit of land changes from cultivation and gathering to hard cash.

A What is Land?

Land is important in the Pacific region but it is not valued in the same way as Europeans might value land. For example, it has been suggested that Solomon Islanders measure the value of land "in terms of its social, economic and political significance in society",[5] and that in Vanuatu: "It [land] represents life, materially and spiritually".[6]

The English Common Law describes land in a number of ways. *Halsbury*, for example, describes land as including: [7]

> Any ground, soil or earth, such as meadows, pastures, woods, moors, waters, marshes and heath; houses and other buildings upon it; the air space above it, and all mines and minerals beneath it. It also includes anything fixed to the land, as well as growing trees and crops.

Common characteristics attributed to land are that it is indestructible and immovable. It includes the space above the land and the ground under the surface.[8] It also includes riverbeds and the seashore as far as the mean low water mark. It includes things which are

---

5 Colin H Allan *Report of the Special Commission on Customary Land Tenure in the British Solomon Islands Protectorate* (17 June 1957).

6 Jöel Bonnemaison in Peter Larmour (ed) *Land Tenure in Vanuatu* (Institute of Pacific Studies, Suva (Fiji), 1986). Consideration of the historical approach in the second part of this article indicates that there are echoes of this in the Common Law. Certainly the maxim "An Englishman's home is his castle" meant more than just bricks and soil.

7 *Halsbury's Laws of England* (4 ed, Butterworths, London, 1998) vol 39(2), Real Property, para 76, 65.

8 Epitomized in the well-worn maxim "He who owns the land owns everything extending to the heavens and the depths of the earth".

attached to the ground or sufficiently annexed to it[9] and land which arises by accretion. What land is, therefore, would seem to be fairly well established.

Nevertheless there are regional problems with these descriptions, as illustrated by the case of *Allardyce Lumber Company Limited v Laore*[10] and *Combined Fera Group and Three Others v Attorney General* from the Solomon Islands.[11]

1 Land and sea

Both the above cases concerned land covered by sea – that is, below the mean low water mark.

In *Allardyce Lumber Company Limited v Laore*, the Court held that land meant the opposite of sea, so that the seabed was not included within the Common Law definition of "land covered with water" which was limited to land under lakes and non-tidal rivers. Ward CJ was prepared to find that: "Some customary rights can exist over the sea and such customary rights can supplant the Common Law position".

The onus, however, was on the defendant to establish a customary right over the reefs and reclaimed land in question. Consequently submerged reefs could not be the subject of customary land ownership.

In *Combined Fera Group* there was a dispute as to whether land covered by water could be the subject of customary ownership. The Common Law introduced into Solomon Islands excluded land permanently covered by the sea. The seabed, or reefs under water could not be part of native customary "land". In 1964,[12] land was redefined to include "land covered by water". This did not immediately answer the question of whether the seabed could now be included in land. However under the Land and Titles Act,[13] title to land below the mean low water mark was vested in the Commissioner of Lands as owner of public land.

---

9 *Quicquid plantatur solo, solo cedit* – whatever is attached to the ground becomes a part of it.

10 *Allardyce Lumber Company Limited v Laore* (18 August 1989) High Court Solomon Islands Civil Case No 64/1989 <http://www.vanuatu.usp.ac.fj/> (last accessed 27 October 2001).

11 *Combined Fera Group and Three Others v Attorney General* (19 November 1997) High Court Solomon Islands Land Appeal Case No 4/1993 <http://www.vanuatu.usp.ac.fj> (last accessed 27 October 2001).

12 Under the Land and Titles (Amendment) Act 1964 (Solomon Islands).

13 Land and Titles Act (Solomon Islands) Cap 93.

The Magistrate's Court, hearing an appeal against the decision of the acquisition officer, held that under the old Land and Titles Ordinance 1963,[14] the Land and Titles (Amendment) Act[15] and the new Land and Titles Act,[16] land below the mean low water mark was not land for the purposes of customary land. Such land therefore vested in the Commissioner of Lands as public land.[17] On appeal to the High Court it was argued that the Common Law doctrine regarding land permanently covered by water was inconsistent with Solomon Island legislation. If such land was not "land" then it could not be registered as public land. For the legislation to be effective the meaning of land had to be redefined. If land was redefined then the dispute was whether there were any rights or interests that any person might have in respect of native customary land which the Commissioner of Lands would have to consider.

The definition of "native land" first found in the Kings Regulations[18] and then the Land and Titles Ordinance 1963[19] included: "Any land lawfully owned, used or occupied by a person or community in accordance with current native usage". Land was defined to include: "land covered with water, or any buildings on land, or any cellar, sewer drain, or culvert in or under land". It did not include "land covered by the sea at mean low water".

In the 1964 amended definition of land this limitation was omitted. Palmer J had to decide therefore if the definition of "land covered by water" could include land covered by sea. He held that if such land was capable of public ownership, then it followed that such land could be capable of customary ownership through claims of customary use or occupation. To hold that the seabed was "land" for the purposes of one area of the law and not the other was a

---

14 Land and Titles Ordinance 1963 (Solomon Islands) Cap 56.

15 Land and Titles (Amendment) Act (Solomon Islands) No 22 of 1964.

16 Land and Titles Act (Solomon Islands) Cap 93.

17 Under s 10(4) of the Lands and Titles Act (Solomon Islands) Cap 93, a perpetual estate in "land" is capable of being registered by the Commissioners of Land. Land under this section includes that below the mean low water mark; and between the points of mean high water and mean low water. This power vests in the Land Commissioner under s 47 of the Land and Titles Ordinance 1962 (Solomon Islands) Cap 56 (repealed). This Act vested in the Commissioner as public land all land below mean low water, the sea shore and land between high and low water that is, the foreshore and the seabed.

18 Kings Regulations (Solomon Islands) Cap 49.

19 Land and Titles Ordinance 1963 (Solomon Islands) Cap 56.

nonsense.[20] This contradicts the decision of Ward CJ in *Allardyce Lumber Company*. However, statute had already ousted the Common Law definition of land in which land covered by water did not include the seabed, by vesting land below the mean low water mark in the Commissioner of lands as public land. Once the disputed area was held to be land then the question was whether there was any evidence of ownership, use or occupation demonstrated by the appellants which would prevent such land being registered as public land.

In fact native usage of the seabed and in particular reefs had been long established in Solomon Islands. From the 1920s trochus shell was being harvested by diving and collecting these shells from the reef-beds.[21] These were sold to non-Solomon Island traders who exported them. In 1951 the question of ownership rights over the reef of Tavaru Island had been decided by the Judicial Commissioner in favour of the customary owners.[22] The defendant in that case relied on the Common Law right of the public to fish over the foreshore. The court accepted that this was the English law relevant in the circumstances, but even in England such law would recognise and could be limited by local customs in certain situations and subject to certain criteria. These were that:

- The custom was different or contrary to Common Law;
- There was certainty as to locality of application and to whom it applied and how;
- The custom had existed since time immemorial – or in the case of Solomon Islands, before 1893, when the English Common Law was introduced into the Protectorate;
- It had been observed without interruption;
- It had been reasonable at the time of its inception;
- It was not inconsistent with any enacted law.

What had happened in Solomon Islands was that measures had been implemented to declare land, which was not either customary land, public land, registered land or land

---

20 My words, not those of Palmer J.

21 Frank Kabui "Crown ownership of Foreshores and seabed in Solomon Islands" (1997) 21 The Journal of Pacific Studies 123.

22 *Hanasiki v OJ Symes* cited in Kabui, above n 21. Symes, a European had instructed his servants to dive for trochus without the permission of Hanasiki. A declaration of rights of ownership was granted to Hanasiki.

occupied or used by anyone for 25 years prior to 1958, as vacant land. This vacant land was then registered as public land. It was these measures which gave rise to subsequent disputes.

2 Native land determined by nature of rights

In the *Combined Fera* case, the test applied by the court was to determine which of the Appellants had demonstrated rights of ownership, use or occupation. The Common Law allows for land to be owned by one person and used or occupied by another or a number of others. In the C*ombined Fera* case it was apparent that the nature of the interest would define the category of land in question. In other words, use and or occupation defines what land is for the purposes of "native land".[23] This does not necessarily mean that such an interest amounts to ownership. Nevertheless the case suggested that if the magistrate, to whom the case was remitted, found that the appellants has such use or occupation at the relevant time, then this would prevent the land vesting in the Lands Commissioner as owner.[24] This would not necessarily be because the land was already owned – although that is the implication – but because it was native land. From this it might be suggested that "ownership" and customary land tenure are not so much incompatible as synonymous. The Common Law abhors a vacuum and seeks to establish the true owner – from whom other rights flow. Customary law sees no vacuum because if land is "native land" then that is the starting point from which other rights flow.

3 Re-claimed land

The above cases were complicated by the fact that the land in dispute was reclaimed land. If the seabed and foreshore could be customary land then the procedure for acquisition - here for the construction of a wharf - was rather different than if it could not.[25] The distinction between reclamation and accretion has been recognised elsewhere in the Common Law with

---

23 As in the original Kings Regulations (Solomon Islands) Cap 49 where it is stated that native land "means land owned by natives or subject to the exercise by natives of customary rights of occupation, cultivation or other uses".

24 Section 47(5) of the Land and Titles Ordinance 1963 (Solomon Islands) Cap 56 provides that s 47(1) (vesting the seabed and foreshore in the Commissioner) would not apply if the land " comprised in *an interest of which any person becomes or is entitled to become registered as owner* pursuant to the provisions of the Second Schedule*, or to any native customary land*" (Emphasis added).

25 In *Francis Waleilia & Others v David Totorea* it was held, applying the *Laore* case, that reclaimed land was not customary land as it had been previously an area permanently under water. These cases are cited in Kabui, above n 21.

the suggestion that it is possible for the Crown to have ownership over reclaimed land as a consequence of Crown ownership of the foreshore, with the riparian owners having concurrent interests over the foreshore.[26] However Palmer J indicated that this depended on the interest exercised over the foreshore prior to reclamation. If it was vested in the Crown then it remained the Crown's and any customary rights were by way of a licence.

4 Land and accretion

The Common Law principles regarding accretion of land also raise some interesting problems.[27] Under the Common Law, gradual accretions to land and alluvial land belong to the person who owns the land adjacent to the sea. The requirements for accretion are that the changes take place "slowly, gradually and by imperceptible increase".[28] In the Pacific region not only may accretion be sudden, but it may be over an area where there are already other "property" rights. This occurred in the case of *Nariki Kautu v Makirita Rinikarawa & Others* in Kiribati.[29] Here accretion took place across a lagoon. A dispute arose between the different riparian owners as to who owned the land, which, by the time of the dispute, joined opposite sides of the lagoon. The appellant claimed a stronger right owing to having previously had a fish trap in the water now displaced by accretion. The question for the court was whether a customary right to set fish traps could be converted to right to title to land. Here it was held that there was insufficient evidence to support such a claim.[30] Had there been sufficient evidence as to the nature of the right to set fish traps then it may well have been that the case would have been decided differently and the right to use the land – in this case the sea bed – in a particular way could have given rise to a right to the land gained by accretion.

---

26 *Attorney General of Southern Nigeria v John Holt & Company (Liverpool) Ltd and Others* [1915] AC 599 (PC).

27 Accretion is not uncommon in the region as evidenced by statutory provisions to take it into account, for example the Native Lands Ordinance introduced by the Native Lands (Amendment) No 2 Act 1983 of Kiribati specifically provides for accretion and erosion in the case of lease and sub leases (s 12(2).

28 Sudden accretions belong in Common Law to the Crown.

29 *Nariki Kautu v Makirita Rinikarawa & Others* (1986) High Solomon Islands Land Appeal Case No 13/1986.

30 In Common Law the right to set fishtraps might have been considered under a profit à prendre or a licence coupled with a grant, but these concepts – which one might think quite useful in the region – seem to be underdeveloped.

5 Land and crops

It should also be noted that "land" in the customary context of the region often excludes trees, crops and even buildings. For example, in the case of *Kosrae State v Molid Telenoa*,[31] which was a larceny case from the Federated States of Micronesia, it was stated that crops on land, even before harvesting, are considered the personal property of the person planting them. The Court had to overcome the problem posed by the Common Law that growing crops were part of the land and therefore incapable of being the subject matter of larceny – which only applied to personal property. The Court chose to follow developments in American law which avoided the fine distinction between the cutting of crops and taking them away – which was not larceny – and the picking up of cut crops which was. The Court also took into account traditional practices and customs of Kosrae State, where short term cash crops were generally regarded as being the property of the person who cultivated them – regardless of ownership of the land. Consequently the Court rejected the historical approach of the Common Law and held that sugar cane was the personal property of the person who cultivated it.[32]

Trees have similarly been held to be personal property rather than part of the land, on the grounds that they are agricultural crops, or by finding an implied or express agreement allowing another to enter and cultivate land, or because the trees have already been felled.[33] The right to grant timber rights or negotiate logging contracts may however, be rights held by landowners, or be rights only partly assigned by landowners.[34]

The distinction regarding things growing on land is important, particularly where crops represent the major or indeed only commercially exploitable asset. In Fiji there is special legislation for "crop liens" whereby a debt can be secured against planted crops.[35] The lienee has a lien over the crops produced by the lienor. The crop lien survives the sale of the land, but

---

31 *Kosrae State v Molid Telenoa* (14 December 1989) Kosrae State Court Criminal Case No 76-89 <http://www.vanuatu.usp.ac.fj> (last accessed 15 November 2001).

32 Interestingly the Court also rejected the defence of communality as regards the crops, the argument of the accused being that the land was his fathers and therefore his as were the original crops.

33 *Billy Ringalea v Daniel Karoa* (22 May 1997) High Court Solomon Islands, Civil Case No 90/1996 <http://www.vanuatu.usp.ac.fj> (last accessed 15 November 2001).

34 See for example the use of the terms "primary" and "secondary" right holders in the case of *Zephaniah Kinisita v Orkley Ramolele and Augustine Maemarine* (30 September 1996) High Court Solomon Islands Land Appeal Case No 1/1996 <http://www.vanuatu.usp.ac.fj> (last accessed 15 November 2001).

35 Crop Liens Act (Fiji) Cap 226.

is not an interest in land. Nevertheless the transferee of the land takes subject to it and does not have the right to harvest crops subject to such a lien. In the case of *Jai Wati v Baswa Nand & Others* it was clearly stated that "a crop lien is not a profit à prendre and is not an encumbrance within the meaning of the term as it appears in the Land Transfer Act (Cap 131)".[36]

The distinction is also important because it is very difficult to encumber communally owned land with a mortgage, or to charge it as security for a debt. Holding that certain aspects of land are personal property means that they can be considered as eligible assets to use as security for financial advances.

6 Land and buildings

Whether buildings on land are sufficiently fixed to the land to be part of it also raises some interesting questions, partly because of the nature of building construction in the region, which is very varied, and partly because custom recognised that non-owners of the land may have the right to build on it. The Common Law principle that buildings attached to the land are part of the land, was followed by default in the case of *Keke Itimwemwe v Karua Tekina* in Kiribati where it was held that there was insufficient evidence of customary law to displace the Common Law principle.[37] However, in the Tongan case of *Bank of Tonga v Vaka'vta* it was held that a motel was not a house but personal property and was therefore liable to be seized by bailiffs under a distraining order.[38] This distinction was significant because a house, where used as a home, was exempt from such seizures as was other personal property, including growing crops and fixtures.[39] The distinction here seems to have abandoned the Common Law niceties regarding the mode of attachment or affixation and considered more pragmatically what property could be seized to meet the demands of creditors.

B The Categorisation of Land

Besides the question of defining land, there are also problems regarding the categorisation of land. One of the categories of land introduced into the region has been that of "waste and vacant land".

---

36 *Jai Wati v Baswa Nand & Others* (21 November 1997) High Court Fiji Civil Action No 29/1997.

37 *Keke Itimwemwe v Karua Tekina* (25 March 1997) Court of Appeal Kiribati Land Appeal Case No 4/1996 <http://www.vanuatu.usp.ac.fj> (last accessed 15 November 2001).

38 *Bank of Tonga v Vaka'vta* [1994] Tonga Law Reports 25.

39 Magistrates Court Act (Tonga), s 59(d).

In the region, it is not unusual for land to be abandoned for long periods of time. Reference is made to this in the case of *Noel v Toto* in which Kent J held that: "custom ownership is not related to current or continuous occupation in land".[40] Similarly, in the case of *Bue Manie and Kenneth Kaltabang v Sato Kilman* Cooke CJ held:[41]

> In custom, it is accepted that the custom owner is the descendant of the person who first came here and built a Nasara. It makes no difference whether they left again for one reason or another, the fact that they were the first occupants of the land and built a Nasara there gives them the right to be designated as the custom owners.

If customary ownership is perpetual, then leaving the land does not divest the owners of their ownership. It is also clear that in most of the region occupation rights can be held by different persons than those having ownership rights, just as ownership can exist without occupation. Both can exist simultaneously and harmoniously.

To categorise land as waste and vacant is akin to categorising it as *res nullius* that is, property belonging to no one. Such categorisation justified the taking of land by the colonial powers under legislation or powers dedicated to that purpose, for example the Land and Titles Regulation of 1959 in the Solomon Islands. Such land was then exploited either for agricultural development by the granting of leases or for public benefit.

Problems with the conceptual framework of such legislation soon became apparent. In 1964 the Land and Titles Ordinance had to be amended because the definition of "native customary land" failed to take into account that Solomon Islanders regarded almost all land which had not been alienated to foreigners, as subject to native interests even if it had not been used or cultivated for many years. Consequently in Solomon Islands about 40,000 acres of land declared waste and vacant were found to be occupied under native custom and returned to the customary owners.[42]

---

40 *Noel v Toto* (30 May 1995) Supreme Court Vanuatu Civil Case No 18/1994, 6 <http//www.vanuatu.usp.ac.fj/> (last accessed 15 November 2001).

41 *Bue Manie and Kenneth Kaltabang v Sato Kilman* (5 July 1983) Supreme Court Vanuatu Land Case No L5/1984 <http://www.vanuatu.usp.ac.fj/> (last accessed 15 November 2001).

42 Frank Kabui "Crown ownership of foreshores and seabed in Solomon Islands" (1997) The Journal of Pacific Studies 123, 124. In 1968 further amendments were made to the Land and Titles Act.

C Rights and Interests in Land

1 Individual or communal rights?

Customary land tenure and introduced land law recognise different interests in land. These can come into conflict.

Firstly, customary ownership of land is rarely the right of an individual, but of a group.[43] Recognition of this can be found in American Samoa in the case of *Tufele Liamatua v Mose* in which it was held that "Samoan communal ownership of land does not confer any personal individual right of ownership".[44]

Where an individual does appear to be the owner, this is likely to only be in a representative capacity, a point recognised in the Vanuatu case of *John Noel v Toto*.[45] There, Kent J considering an earlier judgment of Cooke CJ, was faced by the problem that customary land was incapable of individual ownership, so that a person declared the owner of land following the resolution of a title dispute, owned in a representative capacity only. It was moreover difficult, according to Kent J, to translate the entire concept of customary ownership into Common Law principles, which, even though land my be held by way of an estate or tenure originally granted by the Crown, operates with an understanding that ownership is "a right fostered and protected by law for the exclusive use, enjoyment and disposal of a thing".[46]

While ownership by more than one person or by a corporation can be accommodated by the Common Law, a multiplicity of owners in the abstract tends to be discouraged.[47]

---

43 The problem of group rather than individual land rights is addressed in a paper by Kenneth Brown "The Language of Land: Look Before You Leap" (2000) Journal of South Pacific Law <www.vanuatu.usp.ac.fj> (last accessed 15 November 2001).

44 *Tufele Liamatua v Mose* (22 June 1988) High Court American Samoa Land and Titles Division <http://www.vanuatu.usp.ac.fj> (last accessed 15 November 2001).

45 *Noel v Toto,* above n 40.

46 RS Bhalla "Legal Analysis of the Right of Property" (1981) 10 Anglo American Law Review 180. It can be argued, certainly in respect to Common Law, that use and enjoyment are synonomous.

47 See for example, the Law of Property Act 1925 (UK), which restricts the number of legal co-owners who may appear on the title to land.

2 *Past, present and future rights*

There is also a temporal dimension to customary land holding which is not so evident in Common Law.[48] Land represents a continuum between ancestors, current users and occupiers and future generations. The significance of this, as stated in the case *Tufele Liamatua v Mose* is that "[c]ommunal lands are not freely alienable on the market".[49]

Similarly in the above case of *John Noel v Toto* Kent J found that "[t]he nature of custom ownership is that the land cannot be actually disposed of. It is retained for the benefit of future generations".[50]

Effectively custom ownership is perpetual.[51] Invariably the right to dispose of the land is restricted, not only as to who may dispose of it, but also to whom. For example, in Kiribati in the case of *Teretia Timi v Meme Tong*[52] it was held that a custom owner of land could sell land, a pit or a fish pond, but under section 14 of the Native Lands Code, the agreement of the vendor's next of kin was required as well as the approval of the court.[53] Similar restrictions may be placed on testamentary gifts of land. The Native Lands Code in Kiribati allows gifts to be made only to certain recipients on recognised grounds.[54] In the American Samoan case of *Liamatua v Mose*[55] it was recognised that "title" could pass from one family to another through

---

48 Although concepts such as "successors in title", "time immemorial", and, historically "entailed fees" are part of the language of Common Law, and the grant of a "fee simple absolute in possession" certainly extends beyond the current grantee.

49 *Tufele Liamatua v Mose*, above n 44.

50 *Noel v Toto*, above n 40.

51 The Constitution of Vanuatu, art 75 states: "Only indigenous citizens of the Republic who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of their land".

52 *Teretia Timi v Meme Tong* (25 March 1997) Court of Appeal Kiribati Land Appeal No 1/1996 <http://www.vanuatu.usp.ac.fj> (last accessed 15 November 2001).

53 See also for example, Native Lands Trust Act 1978 (Fiji) Cap 134, s 4(1); *Daniel v Cook and Others* (1971) Nauru Land Appeal No 1 B33, where it was held that agreement from the family was required before land could be alienated.

54 *Tooma Tokintekai v Tabotika Obera* (21 March 1997) Court of Appeal Kiribati Land Appeal No 6/1996 <http://www.vanautu.usp.ac.fj> (last accessed 15 November 2001).

55 *Tufele Liamatua v Mose*, above n 44.

the latter's adverse long-term use, and by conveyance – provided there was consent by the family and certain statutory provisions were complied with.[56]

3 Transfer of rights to land

Although there are limits to individual property rights and the free alienability of land in customary law it appears that in a number of cases land can be transferred, especially between family members. For example in the case of *Noel v Toto*, Kent J found that "it is accepted that the head of the family can give land to members of the family and that once it is given, that person is regarded as the custom owner of that piece of land".

Indeed it is not unusual to find parties to a dispute basing a claim of title to land on a previous gift or grant. What is less clear is whether these grants – which are to a degree discretionary and may be revoked in the case of undeservedness – are perpetual or only for life. The extent or existence of the donor's reversionary interest is also unclear.

Some freedom to alienate rights in or over land is increasingly important in the region because of the economic benefits to be gained from doing so. For example, in the case of logging contracts and the granting of leases, there is clearly some form of disposal. Whether the interests disposed of flow from ownership is not always clear. This illustrates a third point. Customary law accomodates a number of simultaneous interests over land. For example, in the Solomon Island's case of *Tovua v Meki* there was a dispute as to entitlement to logging royalties.[57] The difficulty was that timber rights were distinct from land ownership. What was unclear was whether they were sufficiently distinct so as to entitle those who held timber rights to grant logging contacts to third parties without consultation with the landowners. This led to the possibility that the landowners could find themselves owners of a wasteland. The legislation was framed so as to facilitate logging contracts and sought to simplify matters for investors by identifying a limited class of people with whom agreements had to be made.[58] Clearly the Act was inspired by the same sort of considerations which one finds behind much colonial land legislation, namely facilitation of marketability of land and its resources. What the Act did not do was to indicate the relationship between the timber right holders and the landowners. Although the Court found that representatives of such rights may be loosely

---

56 As happened in *Satele v Afoa* (1930) 1 ASR 424 and *Mauga v Soliai* (1954) 3 ASR 108 cited in the above case of Tufele *Liamatua v Mose*, above n 44.

57 *Tovua v Meki* (3 November 1989) High Court Solomon Islands Civil Case No 141/1989.

58 Forest Resources and Timber Utilisation Act (Solomon Islands) Cap 40.

referred to as "trustees" by the area councils who rule on their identity, this was not stipulated in the Act. Following previous case law,[59] Ward CJ held that the Council took the money (the royalties) under a "constructive trust". He went on to recognise however, that there was no guidance as to how they were to carry out this fiduciary role. Moreover, it appears from his obiter statement that even the imposition of a constructive trust was doubtful – as well it might be with no legal precedent or clarification – as it would be possible:[60]

> For one member of a tribe to enter into an agreement and take and use the royalties without consultation with, or the knowledge of, those other members of the tribe who live in isolated parts of the land and depend on the land entirely.

4 Changing use of land

The existence of a number of interests in land can co-exist without a problem when those interests relate to different forms of agricultural use. For example one group may have rights of cultivation and another rights of harvesting fruits. Or one group may have the right of ownership and another the right of occupation. Problems arise when the land is taken out of traditional use and in effect rendered useless. This arose in the case of *Zephaniah Kinisita v Orkley Ramolele and Augustine Maemarine*.[61] In this case there were both primary and secondary right holders concerning the land in question. The primary right holders owned the land as customary owners and the secondary right holders had rights of gardening and cultivation. The primary right holders wished to grant a lease over the land for the building of a school. Clearly this would take it out of production for the secondary right holders. Muria CJ ranked the primary right holders first, holding that they alone had the right to decide whether to grant a lease or not. However, he held that the secondary right holders could not be ignored but must be taken into account because "[i]n the Solomon Islands context nobody is landless, whether that be in terms of ownership or just usufructary right which is closely associated with the right of occupation".

---

59 *Allardyce and Others v Attorney General and Others* [1988/89] SILR 78 (HC Solomon Islands).

60 Problems relating to trusts and especially the accountability of trustees are discussed by Kenneth. Brown.

61 *Zephaniah Kinisita v Orkley Ramolele and Augustine Maemarine* (30 September 1996) High Court Solomon Islands Land Appeal Case No 1/1996 <http://www.vanuatu.usp.ac.fj> (last accessed 15 November 2001).

In order to accommodate both sets of rights within the change of land use which the lease would bring about, the judge held that these right holders should be included as trustees of the money realised by the lease. He did not apportion the beneficial interest but left this to the Acquisition Officer or the Magistrates Court. Although the judge's articulation of trust principles in the case is unclear – he refers to the secondary right holders as "trustees, although not on an equal share basis"[62] - it is evident that the communal and simultaneous rights enjoyed in custom are being recognised and upheld through the institution of the trust, here a trust of the lease money.

The exchange of land for income presents particular challenges in the region.

This is exemplified in the case of *Noel v Toto.*[63] The land in question was a very beautiful, unspoilt white sand beach on the northern island of Espiritu Santo in Vanuatu. The idyllic setting was an attraction for visiting cruise ships, which would put in at the beach in order for tourists to enjoy the location. This generated income. Although the original dispute had been about land, it became one about money generated by the land. Customary law relating to land offers little assistance as to what is to happen in such circumstances. The Constitution states that the rules of customary shall form the basis or ownership and use of land in the Republic of Vanuatu.[64] While other members of a customary owner's family could request customary land to use, Kent J found that this "right" was not a "legal right" in the Common Law sense because it was not enforceable. What sort of right was it? In the Common Law it might be regarded as equivalent to the right an object of a discretionary power has, except that it was not clear what power Obed Toto had. The Court found that he was a customary owner of land, but as a representative of his family not in his own right.[65] However he had the right to decide what areas of land each member could have for customary use. The members of the group were also owners and therefore entitled to the benefits of the land.

---

62 The report of the case seems to confound the trustees management powers with the beneficial owners interests. Poor articulation of trust principles is a problem in the region and worthy of a separate paper, but too large a topic to be engaged on here.

63 *Noel v Toto* , above n 40.

64 Constitution of Vanuatu, art 74.

65 He was also described as a "manager", "representative" and "custom owner" but at no point as "trustee".

A further problem was that while in custom there was evidence of discrimination in the allocation of land between male and female claimants, the Constitution of Vanuatu confers fundamental rights relating to freedom from discrimination and the right not to be deprived of property.[66] The problem was compounded by provisions under article 74 of the Constitution that rules of custom are to form the basis of ownership and use of land in Vanuatu. The right to share in the income of the land was derived from rights as customary owners but also differed from customary rights in so far as first, the income had to be able to be used and could not be kept in perpetuity for future generations as land would be, and second, the allocation of such income could not be discriminatory on the grounds of sex, but must be fair and reasonable.

The Court also had to consider that whereas it might be possible to support a number of people on the same land through communal rights and different types of rights over the same land, this was not possible with money. If the money were distributed too widely it would be of no practical use. The approach adopted in this case was to limit distribution to the highest level of descent and divide the money equally between these people.

The judge in this case was careful to point out that if the income were generated through labour on the land, such as the cultivation and selling of crops, this would not have to be shared among others. Some tricky distinctions are made here. For example income from logging is bracketed with income from tourism, which leaves unanswered questions as to the cultivation of trees or the selling of natural or manufactured produce to tourists. A modern interpretation of the rationale behind this distinction, was given by Kent J, who held:

> A person is not to be deprived of that income which they generate from their own ideas and labours. The incentive to develop must not be stifled. Family members equally ought not to be able to sit back and derive the benefits of the work and initiative of others.

III CONCLUSION

The above cases reflect some of the challenges which come before the appeal courts of the region when trying to accommodate the traditional aspects of Pacific land law within recognisable Common Law concepts. Customary law and traditional forms of land tenure remain enormously important in the region and this has to be recognized not only in

66 Constitution of Vanuatu 1980, ch 2.

customary dispute forums but also in the higher courts. This is particularly important if legal decisions are to be acceptable. As stated by Kent J in *Noel v Toto*:[67]

> Custom ownership is of course, not only concerned with the financial benefits of the land. It is concerned with the tradition and culture of the people themselves. This must continue to be recognised.

At the same time, as indeed is evident in *Noel v Toto*, development and change are creating new problems and challenges for customary land tenure. In the cases considered a degree of pragmatism is evident along with a desire to provide some firm foundations for future developments relating to land and the law that governs it. Regional Common Law – as articulated through the courts – must accommodate local realities and embrace and provide for changes, especially where legislation is unable to or legislators are reluctant to introduce reforms.[68]

At the same time it is apparent that not all English law principles of land law fit in. For example, the rule against perpetuities has been held to have no application to communal land because the policy behind the rule – seeking to remove fetters on the free marketability of property – has no place in a system where land is not on the market.[69] Also, a rule which seeks to avoid remoteness of vesting of title is inapplicable when title vests permanently in the extended family, even if the identity of members of that family may cause problems from time to time.

Other introduced concepts which may present challenges, include: easements, because often the holder of the right over another's land has no land himself;[70] adverse possession, because customary ownership is in perpetuity;[71] mortgage, because there will rarely be a right

---

67 *Noel v Toto* , above n 40.

68 Land is an emotive political issue in most of the region. Political parties which are elected into power are reluctant to jeopardize their position by suggesting land reforms, which may have to be radical and far reaching if they are to be effective to meet future needs.

69 *Tufele Liamotua v Mose*, above n 44.

70 Rights exercised over the land of another are often limited to an individual and his immediate family, and so cannot be public rights. Similarly they rarely meet the usual requirements of a profit à prendre in gross.

71 This is so even in the case of absentee landlords. Although both historically and today land squatters claim title by virtue of long occupation, acquisition by adverse possession is rarely recognised.

for the mortgagee to both come into possession and sell the land; and in tort, trespass, because there may not be a person in possession eligible to bring the claim. Lawyers aware of the land tenure context of the region have to be selective, and recognise what aspects of introduced land law will and will not work

It must also be acknowledged that customary law and customary forms of land tenure will remain significant in the region and many of the issues relating to such land will not come before the highest courts of the region. It is also evident however, that while land rights will remain important for the status and identity of people, the significance of land as a place to live or cultivate may diminish.[72] Land is being exploited in different ways. Increasingly, currency is entering the equation so that those who grant exploitation rights are in turn entering a domain not previously governed by customary law.[73]

The cases demonstrate that introduced Common Law principles can be adapted to provide workable solutions to current problems provided judges are sufficiently aware of customary practices and local context, and that legal accommodation in plural legal systems can provide a sound foundation for future development.

---

72 For example, if a custom owner can give land away to members of his family perpetual ownership may remain but in diminishing parcel – a point made by Kent J in *Noel v Toto,* above n 40. Similarly if there is portion entitlement, for example to all males, then resources are going to be stretched with population growth. Absence from but affinity with land it very evident in some Pacific countries, for example Niue, Samoa and the Cook Islands.

73 This is a point remarked on by Brown, above n 43. Whereas previously it might be inappropriate to hold a trustee of land liable to account to his people for misuse of custom land, where he holds money as a result of doing so this remedy may now be appropriate.