

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

Civil Appeal Case No. 14 of 2009

BETWEEN: TIMOTHY WASS
Appellant

AND: FRANÇOIS TARI
First Respondent

AND: GIDEON CHARLIE
Second Respondent

AND: JOHN KNOX
Third Respondent

AND: DIRECTOR OF LAND RECORDS
Fourth Respondent

Coram: *Hon. Chief Justice Vincent Lunabeck
Hon. Justice John Mansfield
Hon. Justice Mark O'Regan
Hon. Justice Nevin Dawson
Hon. Justice Daniel Fatiaki*

Counsels: *Mr. Saling Stephens for the Appellant
Mr. Justin Ngwele and Alan O. Frederick for 4th Respondent
Mrs. Marisan Pierre Vire for 1st, 2nd & 3rd Respondents*

Date of Hearing: 19 October 2009

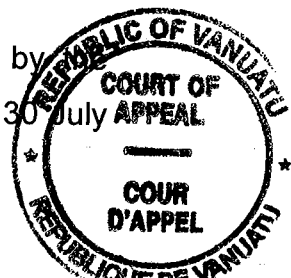
Date of Decision: 30 October 2009

JUDGMENT

1. This appeal is about who is entitled to the Leasehold Title 03/KI03/007 over land at Chapis Area, Luganville, Santo (the lease).

The lease and the transfers

2. The lease was granted to Rose Mala for residential purposes by Luganville Urban Land Corporation for 50 years, commencing on 30 July

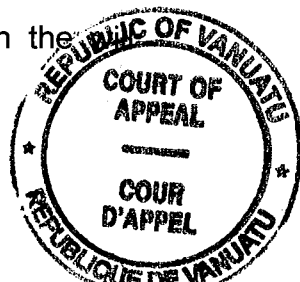


1980, although it was not signed until 18 July 1986. The lease is signed by Rose Mala by the name 'Rosie' awkwardly printed. Her address as given is Box 56, Santo. Rose Mala died on 10 January 2006.

3. By transfer dated 7 October 1995, the lease appears to have been transferred by Rose Mala to François Tari for VT300,000 (the first transfer). The first transfer has apparently been signed by Rose Mala by placing her thumb print on the instrument and the initials "RM". Her address is given as c/- François Tari at his address. The first transfer refers to the lease as being dated 5 September 1986, rather than 18 July 1986. Nothing was made of that inaccuracy. It was accepted that the first transfer purported to transfer the lease. The first transfer was duly registered by the Director of Land Records.
4. The lease was subsequently transferred on 18 March 2002 by François Tari to Gideon Charlie, apparently for VT300,000. That transfer of the lease (the second VT 100,000 transfer) was also duly registered.
5. The lease was further transferred on 22 June 2004 by Gideon Charlie to John Knox, apparently for VT100,000. That transfer of the lease (the third transfer) was also duly registered.

The proceedings

6. On 11 March 2004 Rose Mala made a will. She appointed a solicitor as the sole executor. She bequeathed the lease and improvements to Timothy Wass absolutely. If she had any other assets, she did not dispose of them by the will. The will was signed by Rose Mala also by the name 'Rosie', even more awkwardly printed than on the lease.
7. Apparently the nominated executor did not apply for probate of Rose Mala's will. On 2 October 2007, Letters of Administration with the



annexed was granted to Timothy Wass. That order identified the estate of Rose Mala to which it referred as being only the lease.

8. Timothy Wass brought proceedings in the Supreme Court (shortly before the grant of the Letters of Administration) claiming that the first transfer to François Tari happened without his knowledge or consent (it appears that he intended to say: without Rose Mala's knowledge or consent) and "*fraudulently*". The claim setting out the statement of the case under Rule 4.1 of the Civil Procedure Rules did not explain in what manner François Tari fraudulently procured the first transfer. Particulars of that allegation were not sought.
9. The proceedings also claimed that the second transfer and the third transfer were also fraudulent. It is not necessary to refer to those transfers further, because counsel for Timothy Wass accepted that it was necessary to satisfy the trial judge, and, because of the decision of the trial judge, to satisfy the Court of Appeal, that the first transfer was fraudulent if the claim were to succeed. The Director of Land Records was a party to the proceedings because, if the claim succeeded, it would have been necessary to direct the registration of the final transfer (and of the second and third transfers) be cancelled.
10. Section 100 of the Land Leases Act [CAP. 163] provides:

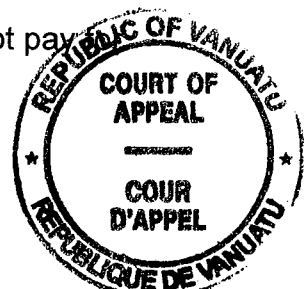
"(1) Subject to subsection (2) the Court may order rectification of the register by directing that any registration be cancelled or amended where it is so empowered by this Act or where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the interest for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought; or cause such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."



Timothy Wass accepted therefore, that he had to prove as a starting point that the first transfer was procured and registered through fraud.

11. We note that, ultimately, each of François Tari, Gideon Charlie and John Knox gave evidence at the hearing before the trial judge. Despite each of the three transfers referring to a price paid for the transfer, they said the first transfer and the second transfer were without consideration. Consequently, if it were established that the first transfer and so its registration was procured by fraud, section 100 (2) may not have presented too great an obstacle to correcting the register in so far as that also affected the status of the second transfer. However, section 100 (2) would not have applied to the third transfer because John Knox acquired it for valuable consideration.
12. The trial judge, Saksak J, heard evidence from Timothy Wass. His evidence did not directly touch on the circumstances of the first transfer. He did not know Rose Mala in 1995, or for some years after that date. He really relied on features of the documentation to make out the case of fraud. He correctly accepted that the onus of proof rested on him: *Solomon v. Turquoise Ltd. [2008] VUSC 64*. In addition to the fact that the signatures of Rose Mala on the lease and on the will were different from the signature attributed to her on the first transfer, he also relied on a typed letter to a solicitor dated 26 August 2003 on which the signature of Rose Mala appears above the typed name of her husband Thomas Mala. That letter (the letter of 26 August 2003) also has her signature as “Rosie”, again printed apparently very awkwardly. It related to outstanding property tax, apparently in respect of the lease.
13. Timothy Wass also contended to the trial judge that the evidence of François Tari itself supported the finding that the first transfer was registered through fraud because it specified the consideration as VT300,000 when François Tari’s own evidence was that he did not pay the transfer.



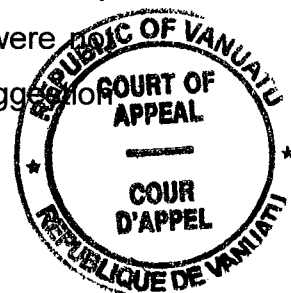
The conclusions of the trial judge

14. After briefly reciting the evidence of François Tari, Gideon Charley and John Knox, the trial judge said that he was not satisfied that the first transfer was registered through fraud because:-

- (1) there was no direct evidence that the thumbprint on the first transfer was **not** that of Rose Mala, and there was direct evidence from François Tari who was present at the time (and which his Lordship apparently accepted) that it was her thumb print; and
- (2) Although Timothy Wass had given evidence (it is not clear whether that was without objection) that Rose Mala had told him sometime after he first met her in 2001 that it was not her thumb print on the first transfer, some considerable time had then passed before Rose Mala's death without her taking action to have the first transfer declared invalid.

The trial judge also found that there was no evidence to suggest the second transfer or the third transfer was registered through fraud.

15. The trial judge did not overlook the evidence that François Tari did not pay VT300,000 for the first transfer. His evidence was that that figure had been inserted by an officer of the Lands Department. The trial judge apparently accepted that evidence. There was in fact no contradictory evidence, and no attempt by Timothy Wass to call any officer of the Lands Department to contradict it. The first transfer appears to have been prepared on the one occasion, when the figure and words VT300,000 were inserted. It may be that it was prepared by an officer in the Lands Department to assist the parties to it to complete the necessary document, because both signatures of Rose Mala and François Tari are witnessed by the same two officers of the Lands Department. Those officers were called to give evidence. His Lordship also did not overlook the suggestion



that François Tari should not be believed because he apparently used two somewhat different signatures on certain documents which were in evidence.

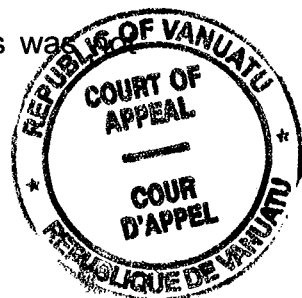
16. The trial judge then said that because the lease was in the name of John Knox, he should be substituted as the person to whom the Letters of Administration of 2 October 2007 should have been granted.

The grounds of appeal

17. The grounds of appeal largely reargued matters of fact which were put to the trial judge. They can be dealt with collectively. It was also asserted, but not really maintained in oral submission, that the onus of proof shifted to the respondents once it was shown that the signature attributed to Rose Mala on the first transfer was different from her signature on the lease. Next, it was said that the trial judge wrongly attributed to the Director of Lands (who gave evidence at the trial) that the initial "RM" on the first transfer was that of Rose Mala, when the Director of Lands was present at the time. Finally, it was said that the trial judge wrongly revisited the grant of the Letters of Administration to Timothy Wass.

Consideration

18. In our judgment, in all but one minor respect, the grounds of appeal must fail.
19. The trial judge is not shown to have overlooked any evidence or to have misunderstood it.
20. His Lordship did not (contrary to the grounds of appeal) say that the evidence of the Director of Lands was that Rose Mala signed the first transfer; he said only that the use of a thumb print and initials was



uncommonly used by the Department of Lands to record the signature of persons with little literacy.

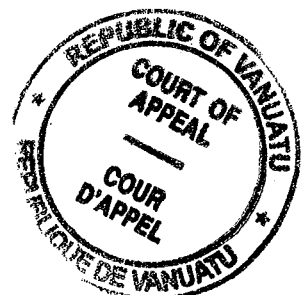
21. Nor did the trial judge misapply the onus of proof. His Lordship said at [8.1]:

*“As for the standard, it is the higher standard of proof on the balance of probabilities. But this does not mean that where a serious allegation such as fraud is in issue the standard of proof required is higher. **It means only that the inherent probability or improbability of fraud as itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, fraud occurred. The more improbable the fraud, the stronger must be the evidence that it did happen before, on the balance of probability, its occurrence will be established.**” (per McGrath, J in Z v. Dental Complaint Assessment Committee [2008] NZSC 55 cited in Solomon (above).)”*

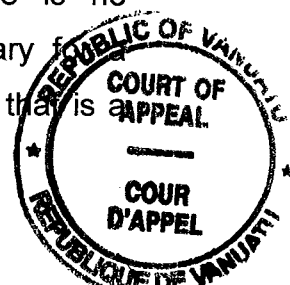
That is unexceptional. No authority was cited to support the proposition that, as a matter of law, the onus of proof somehow shifted to François Tari. It did not. Moreover, even if an inference adverse to him might have been drawn from the documentary evidence if he did not give evidence, he in fact gave evidence. The trial judge appears to have accepted his evidence about the signing of the first transfer by Rose Mala.

22. As to the overall assessment of the evidence, it must be borne in mind:

- (1) that the trial judge accepted the evidence of François Tari about the signing of the first transfer by Rose Mala; and
- (2) that Timothy Wass did not call either of the two apparently independent officers of the Lands Department at Luganville who witnessed the signing of the first transfer by Rose Mala.



23. The Court of Appeal has previously explained two things: the role of the Court by way of rehearing when findings of fact are challenged, and the particular advantages of a trial judge in assessing the reliability of a witness or witnesses, and the relative disadvantage of the Court of Appeal which has not seen the witness give evidence. See e.g. *Atkinson v. Gee* [2002] VCA 1 at [36] – [40]. We shall not repeat them. We were not asked to depart from them in this matter.
24. It is therefore difficult, where a finding of fact has been made based upon the evidence of a particular witness whose evidence the trial judge has seen, for that finding to be overturned on an appeal. That is the case here. The trial judge accepted the evidence of François Tari that he was present, and saw, Rose Mala sign the first transfer. The reasons why Timothy Wass now says that finding was wrong are based upon documents which the trial judge had, and considered, when he accepted that evidence of François Tari. Moreover, as we have noted, Timothy Wass did not call the two independent witnesses to her signature. There was no evidence to explain why they could not be called as witnesses. Although counsel for Timothy Wass also pointed out that the bottom of the pages of the transfer also had the initials of François Tari and the two witnesses, but not of Rose Mala, that matter was also one which could have been explored in evidence, including from the two independent witnesses to the first transfer, but it was not.
25. Consequently, we do not consider that any of the principal grounds of appeal are made out. Because the first transfer was apparently witnessed by, and signed by, two independent witnesses, one of whom knew Rose Mala, it was unrealistic of Timothy Wass to think that he could prove that the person who signed the first transfer as Rose Mala was not in fact Rose Mala on the basis of the use of a different signature from that used by her on other documents, without calling those witnesses. There is no suggestion they were unavailable. It may have been necessary for a subpoena to be issued to require their attendance at Court, but that is a

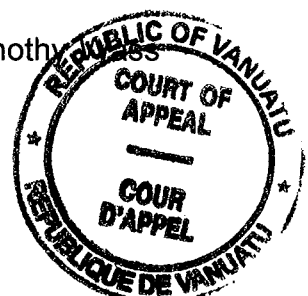


routine procedure. As apparently independent officers of the Lands Department, their evidence would have been most telling one way or the other. Even if such a conclusion might have been drawn without the evidence of those witnesses' evidence, there was other direct evidence of Rose Mala signing the first transfer. That was the evidence of François Tari, accepted by the trial judge. We have not had any cogent reason put forward as to why the trial judge should not have accepted his evidence. The only direct attack on his evidence was that it was improbable that the Lands Department would have put the typed data (including the transfer price of VT300,000) into the first transfer. The obvious answer, again, is for Timothy Wass to have called the two departmental officers on the question. Their evidence was clearly very important. It was not presented to the trial judge. Overall, we are simply not persuaded on our reconsideration of all the material before the trial judge that the decision on this issue was wrong.

26. There is one relatively minor respect in which we think the trial judge erred. That is by his order substituting John Knox for Timothy Wass as the person to whom the grant of the Letters of Administration was made. There was no reason to make that order. Rose Mala, by her will, gave Timothy Wass all her interest in the lease. But, by that time, she did not have an interest in the lease. That did not mean that Timothy Wass as the specified beneficiary could not be appointed by the Letters of Administration. It simply meant that, in fact, he did not benefit under the will. John Knox, by then, was the registered owner of the lease. That was no reason why he should have been, or could have been, appointed under the Letters of Administration to administer Rose Mala's will. That order of the trial judge should be set aside.

The application to amend the grounds of appeal

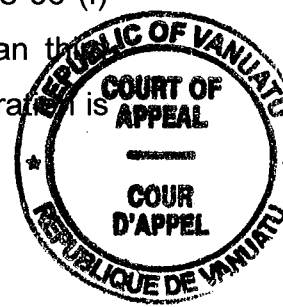
27. By oral application at the start of the hearing, counsel for Timothy Wass applied to add two grounds of appeal.



28. The first of the further grounds was that:-

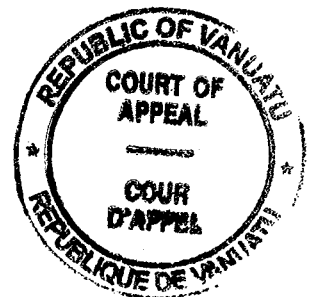
- (1) Clause 36 (f) of the lease provides that the lessor was to be notified of the price at which any proposed transfer of the lease was to take place and the lessor, for a period of six weeks, should have the first option of repurchasing the lease at that price;
- (2) Section 36 of the Land Leases Act [CAP. 136] requires a notation on the register of a term of a lease which requires the consent of the lessor to its transfer, and prohibits the registration of any dealing with such a lease without the written consent of the lessor;
- (3) Section 41 (h) of the Land Leases Act [CAP. 163] prohibits a lessee of such a lease from disposing of it without the written consent of the lessor; and,
- (4) Because each of the transfers did not comply with those requirements, each was invalid.

29. We do not give leave to amend the grounds of appeal in that way. Firstly, we are not satisfied that it can be done without unfair prejudice to the Respondents. If that issue had been raised at the trial, the Respondents would have had an opportunity to call evidence about any notification, even informally, being given to the lessor. If such evidence was given, it may explain the apparent failure to comply with clause 36 (f) of the lease. The lessor may have known of the first transfer and may not have been concerned about it or it may have waived compliance with that clause. It may have given its consent. There are other possibilities. A similar circumstance arose in *Telecom Vanuatu Limited v. Minister for Infrastructure and Public Utilities* [2007] VUCA 8. Secondly, clause 36 (f) of the lease is obviously for the benefit of the lessor rather than the parties. We were told that the lessor Luganville Urban Land Corporation is



now in essence the Urban Lands Department. Whether or not that is the case, the lessor has not taken any step to enforce clause 36 (f) of the lease, even though it was aware of the transfer of the lease at least by 26 August 2003, by receiving a copy of the letter of that date referred to above. It has elected not to enforce such a right. There is no reason to think that Timothy Wass should be permitted to do so, on its behalf. Thirdly, the lessor is not a party to these proceedings. It would be unfair to determine what, if any, rights it had in the circumstances asserted without it being given an opportunity to be heard and to present evidence. Finally, counsel for Timothy Wass did not advance any cogent argument that the effect of any contravention of sections 36 and 41 of the Land Leases Act [CAP. 163] would result in the invalidity of each of the transfers so that they should be deregistered, especially as the facts alleged do not fall within the scope of section 100 of that Act.

30. The second proposed new ground of appeal is that the trial judge should have disqualified himself from hearing the trial because he was a “*close relative*” of François Tari. Leave to add that ground of appeal is also refused. There is simply no evidence to support it. Indeed, when pressed, counsel for Timothy Wass could not even describe with any accuracy the closeness or otherwise of the asserted relationship. He could not say, for instance, whether it was any closer than that a second cousin of the wife of François Tari may have been a cousin or second cousin of the trial judge. If there was any familial relationship at all, it may well have been so remote that the trial judge did not even know about it. In those circumstances, to make the application at all was quite irresponsible on the part of counsel. Such allegations should only be made when there is a realistic factual basis available for making them, and when the relationship asserted can be properly described as a potentially disqualifying one.



Conclusion

31. For those reasons, the appeal must be dismissed, except for an order setting aside the order of the trial judge substituting John Knox as the person to whom the Letters of Administration with will annexed of the will of Rose Mala. The Appellant Timothy Wass must pay the costs of the Respondents of the appeal. The Court makes those orders.

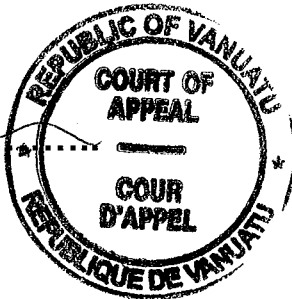
DATED at Port Vila, this 30th day of October, 2009

BY THE COURT


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Hon. Vincent Lunabeck CJ.


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Hon. J. Mansfield J.


.....
Hon. M. O'Regan J.




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Hon. N. Dawson J.


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Hon. D. Fatiaki J.