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

Civil Appeal
Case No. 17/916 CoA/CIVA

BETWEEN: **Jimmy Kas Kolou and Jonah Kalengor**
First Appellants

AND: **Stephen Dorrick Felix**
Jimmy George Langros
Meles Kalsilik
Sial Kalsilik
Song Kalsilik
George Kalsilik
Kalsei Kalowi Masfir
Kalopa Kalsilik
Second Appellants

AND: **Gilbert Trinh**
First Respondent

AND: **Republic of Vanuatu**
Second Respondent

AND: **Irreparabile Limited**
Third Respondent

AND: **The Proprietors – Strata Plan No. 00085**
Fourth Respondent

AND: **Arabella Limited**
Fifth Respondent

AND: **Tran Nam Trung**
Sixth Respondent

AND: **National Bank of Vanuatu**
Seventh Respondent

Coram: *Hon. Vincent Lunabek, Chief Justice*
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice David Chetwynd

Counsel: *Avock Godden for the First and Second Appellants*
Christina Thyna for the First Respondents
Lennon Huri (SLO) for the Second Respondent and Cross Appellant
Felix Laumae for the Third Respondent
No appearances of Fourth, Fifth, Sixth and Seventh Respondents

Date of Hearing: *14th July 2017*
Date of Judgment: *21st July 2017*

JUDGMENT

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1. The Minister of Lands claiming to act on behalf of the custom owners granted lease 12/1024/001 to Mr Trinh (the first respondent). Mr Trinh transferred the lease to Irreparable Ltd. Lease 001 was then surrendered, and the Proprietors of Strata Plan 0085 took over the lease. There were then transfers to the 5th, 6th, and 7th respondents.

2. In these proceedings the appellants said they were the undisputed custom owners of the land in lease 001. And so the Minister had no lawful authority to lease their land to anyone. The lease to Mr Trinh has therefore been registered by mistake and should be cancelled (s.100(1) Land Leases Act Cap

163). Mr Trinh claimed he had received the land as a bona fide purchaser for value and so the registration should not be set aside (s.100(2) Land Leases Act).

3. These proceedings however focused on the transfer of the lease from Mr Trinh to Irreparable. Irreparable said they were bona fide purchasers for value and their lease should not be cancelled. The fourth to seventh respondents did not participate in these proceedings with the agreement of the appellants.

4. And so the proceedings and the judgment in the Supreme Court focused on two main broad points. Was there a mistake (in term of s.100(1)) which gave rise to the registration of the lease to Mr Trinh. If there was a mistake then secondly was Irreparable a bona fide purchaser for value with respect to the transfer of the lease from Trinh to Irreparable (s.100(2)) such that no rectification of the lease should occur.

5. The Judge in the Supreme Court concluded the lease to Trinh was registered by mistake but that the transfer from Trinh to Irreparable was bona fide and for value and so that transfer of lease 001 from Trinh to Irreparable would not be set aside and the Register not rectified.

6. From those decisions:

   (i) The appellants appeal the Judge's conclusion that Irreparable was a bona fide purchaser for value but agree with the Judge that the Minister had no lawful authority to deal with the lease.

(ii) The first respondent, Mr Trinh, appeals the Judge's conclusion that the Minister had no lawful authority to deal with lease 001 but agrees with the Judge's conclusion that Irreparable was a bona fide purchaser for value.

(iii) The second respondent (who also filed a cross appeal) says the Judge was wrong to hold the Minister had no authority to transfer the lease and therefore the lease was not registered by mistake.

(iv) The third respondent, Irreparable, supports the Judge's conclusions that they were bona fide purchasers for value but disputes the conclusion that the Minister had no lawful authority to deal with the lease and therefore disputes that the lease to Trinh was registered by mistake.

Background Facts

7. The land concerned in this case is the Eul custom land in Eton village. In 2004 Mr Trinh applied to the Lands Department to lease land near Eton village the subject of these proceedings. He was issued a negotiators certificate which included a list of those persons who were said to be the custom owners of the land. They included the appellants. Mr Trinh spoke to a number of groups relating to the land but not all those identified in the negotiators certificate as custom owners. During these discussions all those identified by the Lands Department as the custom owners of the land wrote to Mr Trinh advising him they did not consent to his proposed lease. Mr Trinh however claimed he had spoken to other groups who claimed they were custom owners and they had consented to the proposed lease.

8. By this time Mr Trinh's negotiator's certificate had expired. He applied for a new certificate. A further negotiators certificate was issued. This certificate described the custom owners as "Disputed – several families of Eton Village". The Minister of Lands then signed a lease in Mr Trinh's favour apparently accepting custom ownership of the land was disputed.

9. The appellants or at least some of them objected to the signing of the lease and opposed registration. Representatives of the Department of Lands also became concerned about the lease and an instruction was given by the Director General of Lands not to register the lease. A further 18 months passed with no resolution and no registration of the lease. In June 2008 Mr Trinh issued judicial review proceedings to attempt to require the Director-General to register his lease. The Minister of lands then told the Director General not to register any lease relating to the Eton land without "the approval of the Eton Chief and or full council of Eton."

10. There was some disputed consultation by Mr Trinh about the lease and a document signed by some people of Eton village but the evidence at trial did not establish the Eton Chief or the full council had approved the lease.

11. The Minister signed the lease in July 2009. Registration of the lease has on 4 August 2009 and almost immediately Mr Trinh sold the lease to Irreparable. That lease was registered on 14 August 2009. Irreparable carried out a strata subdivision and as a result the old lease was surrendered. On 7 November 2011 there were further transfers of strata titles to the 5th, 6th and 7th defendants.

12. These proceedings were issued in June 2011 well after the transfer to Irreparable and before the creation of the strata titles and the subsequent transfers to the 5th, 6th and 7th respondents.

13. These issues therefore arise from the various challenges to the Supreme Court's decision before us:

(a) Did the appellants have standing to bring these proceedings against 2nd and 3rd respondents?

(b) Was there a dispute over the custom ownership of the land at the time of the issue of the first or second negotiators certificate to Mr Trinh?

(c) If this Court finds, contrary to the Supreme Court's decision, that there has a dispute then, in approving the lease did the Minister err and as a result was the registration of the lease to the Trinh a mistake (s.100(1) Land Leases Act)?

(d) If this Court concludes there was no dispute as to the custom ownership of the land nevertheless given no Court had made a declaration of custom ownership with respect to the land did the Minister (pursuant to Section 8 Land Reform Act [Cap 123] still have the authority and power to lease the land on behalf of the custom owners?

(e) If the Minister did have such a power (as in (d)) did the Minister in granting the lease make an error which resulted in a mistake when the lease was registered (s.100(1) Land Leases Act)

(f) If the registration of the lease to Mr Trinh was as a result of a mistake was Irreparable a bona fide purchaser for value such that despite the mistake no rectification of the Lease should be ordered (s.100(2)).

Standing

14. The second respondent's submissions were that because there was a dispute about custom ownership of the land the appellants had no standing to bring these proceedings. They had not been declared custom owners by any Court. They had merely asserted ownership. We have concluded that at the relevant time the appellants were the undisputed custom owners (see below). We therefore reject the second respondent's submission.

15. The third respondent's submission on standing is slightly different. It submits that the appellants had failed to produce any documentary evidence, including Court orders, that the appellants were the exclusive custom owners of the land. Nor had the appellants any signed document from all the custom owners that the appellants were authorized to represent the custom owners. In support the respondents referred to Worwor v. Pio, Civil Appeal Case 26/2010 Vanuatu Court of Appeal; Tunala v. Tabir [2015] VUSC 72; Ishmael v. Kalsev [2014] VUSC.

16. The facts in each of the three cases are fundamentally different than these proceedings. In each of the three cases there was a dispute about custom

ownership. It is only in cases where there is a dispute about custom ownership that there must be a decision by a competent authority established with the authority to finaly resolve that dispute: Valele Family v. Toura [2002] VUCA 3. In this case at the relevant time there was no dispute as to custom ownership and so we are satisfied the appellants had standing to bring these proceedings.

Dispute as to Land Ownership

17. The Judge concluded that the claimants in the Supreme Court were at the relevant time (when the first and second negotiator certificates were signed) the undisputed custom owners of the land in lease 001. The Judge accepted the evidence of the claimants that there had never been any dispute of any kind in relation to the land. The claimants had consistently maintained that position throughout this dispute. While there had been a dispute between the custom owners as to whether they should agree to or oppose the proposed lease to Mr Trinh this had not been a dispute as to ownership.

18. Mr Laumae submitted that evidence of the fact that custom ownership of the land was disputed could be found in the records of the Efate Island Court in case 09/84. In a judgment given by that Court on 24 April 1989 the Court referred to a counter-claim no.2 which referred to title 593. Title 593 was the predecessor of the current lease 001.

19. However a reading of the judgment makes it clear that the dispute was with respect to the land between title 593 and title 2764. The dispute was therefore not about the land in old title 593 (now Lease 001).

20. The Republic's submission was that there was a dispute about land given the evidence of various residents from Eton. This, as we have noted, confuses a dispute about custom ownership (of which there was none) with a dispute about how to deal with the land between the custom owners (which existed).

21. We are satisfied the Judge was correct when he concluded that as at the date of the two negotiator certificates there was no dispute as to the custom ownership or the land.

22. However the second and third respondents say in any event because there was no declaration by a competent Court that the appellants were the custom owners of the land the Minister could still exercise his s. 8 authority and lease the land on behalf of the custom owners. Section 8(1) of the Land Reform Act provides as follows:

> " ***(1) The Minister shall have general management and control over all land–***
>
> ***(a) occupied by alienators where either there is no approved agreement in accordance with sections 6 or 7 or the ownership is disputed; or***
>
> ***(b) not occupied by an alienator but where ownership is disputed; or***
>
> ***(c) not occupied by an alienator, and which in the opinion of the Minister is inadequately maintained."***

Section 8(1), therefore gives the Minister management rights with respect to land (including lease rights see s. 8(2)(b)). Under s. 8(1)(a) those might arise where either there is no approved agreement in terms of S.6 or 7 of the Act or

ownership is disputed. In this case we have concluded there is no dispute as to ownership. The first part of s .8(1)(a) refers to occupation by "alienators". Alienators are defined in section 1 of the Act in the following way.

> ***"1."alienator" means a legal or natural person or persons who immediately prior to the Day of Independence and whether or not their rights were registered in the Registry of Land Titles provided for in the Anglo/French Protocol of 1914 –***
>
> ***(a) had freehold or perpetual ownership of land whether alone or jointly with another person or persons; or***
>
> ***(b) had a right to a share in land by inheritance through will or operation of law where no formal transfer of that land had taken place; or***
>
> ***(c) had a life interest in land; or***
>
> ***(d) had a right to land or a share in land at the end of a life interest; or***
>
> ***(e) had a beneficial interest in land."***

23. It is clear from the context of the Act that an alienator is not a custom owner. Custom owner is defined separately in the Act. Section 6 of the Act sets out the circumstances where an alienator may negotiate with the custom owners and S.7 is concerned with agreements between Alienators and custom owners.

24. To return to Section 8(1) we are satisfied in view of the above conclusions that Section 8(1)(a) does not apply to the circumstances in this case. The land in question is not occupied by alienators and so agreements under Section 6 or Section 7 are not relevant here. The land is occupied by the custom owners. And as we have noted the second part of Section 8(1)(a) does not apply given we have concluded there was no dispute about custom ownership. For the same reasons we are satisfied that Section 8 did not authorize the Minister to

exercise the jurisdiction given under Section 8(2)(b) to sign the lease of the land to Mr Trinh.

25. We are therefore satisfied that on these grounds alone registration of the lease to Mr Trinh was made by mistake in term of Section 100(1) of the Land Leases Act.

26. Given that conclusion we do not need to consider in detail the other grounds of challenge to the Minister's decision to grant the lease given we are satisfied he had no lawful authority to grant such a lease. However we are satisfied as the Judge in the Supreme Court concluded that even if the Minister had lawful authority to grant the lease that:

(a) The Minister did not undertake adequate consultation with the custom owners of the Land before signing the lease which in turn resulted in the lease being registered by mistake (s.100(1) Land Leases Act).

(b) The Minister signed and the Registrar of Lands registered the lease in direct conflict with a direction that no lease of the relevant land was to be registered without the approval of the Eton Chief and the Eton Council. No such approval was ever obtained before registration. This failure resulted in registration of the Lease to Mr Trinh by mistake pursuant to s.100(1) Land Leases Act.

Alienated Land

27. Mr Laumae submitted, as he did in the Supreme Court, that the provisions of the Alienated Land Act applied to this land and that this Act effectively authorized the Minister to deal with the land on behalf of the custom owners. We reject that submission.

28. First for reasons we have already given (paragraphs 22, 23) we are satisfied the appellants are not alienators. We note s.1 of the Alienated Land Act provides that "alienator" has the same meaning in that Act as the Land Reform Act. And so the Alienated Land Act can have no application to this case.

29. In any event if we assume the land was alienated it would not provide authority for the Minister to lease the land.

30. We assume under s.3 an application was not made and the land was subject to surrender.

31. It is common ground the appellants did not apply under s.3 Section 24 sets out the consequences of such a failure.

Section 24 provides:

"24. Vacation of alienated land

(1) Subject to subsection (2) a person shall vacate and surrender to the Minister land occupied or claimed by him as an alienator either in person or through agents –

(a) if he does not make application under section 3(1) in which case he shall vacate and surrender up the land not later than 3 months after the coming into force of this Act; or

(b) if he is a person to whom section 5(2) applies but he does not make a reference thereunder in which case he shall vacate and

surrender up the land immediately on the expiration of the 30 days referred to in that section; or

(c) if he is a person who makes a reference under section 5(2) in which case he shall vacate and surrender up the land within 30 days of the decision of the Court that he is not an alienator of the land;

(d) if the custom owners of the land indicate to the Minister in accordance with section 16(2) that they are willing only to negotiate payment for improvements to such land in which case he shall vacate and surrender up the land within 60 days of notification to him by the Minister of the wishes of the custom owners; or

(e) within 60 days of a referral by the Minister under section 20.

(2) Any person referred to in section 9 shall vacate and surrender up to the Minister all land of which he or it claims to be the alienator within 30 days of the coming into force of this Act.

(3) Where any person who has been required by the Minister to vacate or surrender land as required by the provisions of section 24(2) fails, neglects or refuses to do so, a warrant may be issued by a magistrate authorizing the police to use such force as is necessary to remove such person or persons from the property named or described in the order of the Minister."

32. These provisions are concerned with possession of land not with providing the Minister with rights to control the land. Section 24 is concerned with the "surrender" of land occupied. Subsection (2) requires vacating the land. We are satisfied Section 24 would not authorize the Minister to lease the land. The power of the Minister to deal with the land is in s.8 Land Reform Act.

33. In summary we are therefore satisfied that:

(a) the appellants had standing to bring these proceedings;

(b) at the material time the appellants were the undisputed custom owners of the land in lease 001;

(c) the Minister had no authority to sign the lease of the 001 land to Mr Trinh, and as a result the lease to Mr Trinh was registered by mistake;

(d) neither the Alienators Land Act nor section 8 of the Land Reform Act gave the Minister authority to sign the lease ;

(e) in any event the Minister did not consult the custom owners of the land before signing the lease and the lease was signed and registered in direct conflict with a Ministerial directive as to approval by the appellants;

(f) the lease to Mr Trinh was therefore registered by mistake.

Section 100(2) Bona Fide Purchaser

34. In the Supreme Court the Judge found Irreparable was a bona fide purchaser in terms of Section 100(2) and therefore refused to order rectification of the transfer of the lease from Mr Trinh to Irreparable. The Judge concluded that there was no evidence to contradict Irreparable's claim it knew nothing of the

disputes between the various parties and simply purchased Mr Trinh's lease at full value.

35. The appellants challenged the Judge's conclusion that Irreparable was a bona fide purchaser. There was no dispute that in terms of s.100(2) Irreparable had paid full value for the lease. Section 100(2) also requires, to avoid rectification that the proprietor (here Irreparable) be "in possession" of the land.

36. The appellant's raised the issue of possession before us during submissions. They said there was no specific evidence that Irreparable was in possession. This issue was not raised by the appellants at trial. It would clearly be unfair to now allow it to be raised given a resolution of whether Irreparable was "in possession" of the land would require evidence. Irreparable had no opportunity at trial to call such evidence. It is therefore too late for the appellants to raise this issue now.

37. Much of the appellant's submissions before us related to the position of the 5th, 6th and 7th respondents and what they knew of the dispute. These submissions had no relevance to this case. The position of these respondents has not part of the case before the Supreme Court or this Court.

38. The critical transfer as to the application of Section 100(2) is from Mr Trinh to Irreparable. This lease was transferred to Irreparable before these proceedings had commenced. Counsel for the appellants could not point to any evidence that contradicted Irreparable's evidence that it knew nothing of the earlier transactions and dispute. Counsel simply invited us to speculate that Irreparable must have known what was going on. We decline to do so.

We agree with the Judge that the only evidence was that Irreparable was in terms of Section 100(2), a bona fide purchaser and was therefore able successfully resist rectification of the transfer of the lease to it from Mr Trinh.

39. For these reasons therefore this appeal will be dismissed.

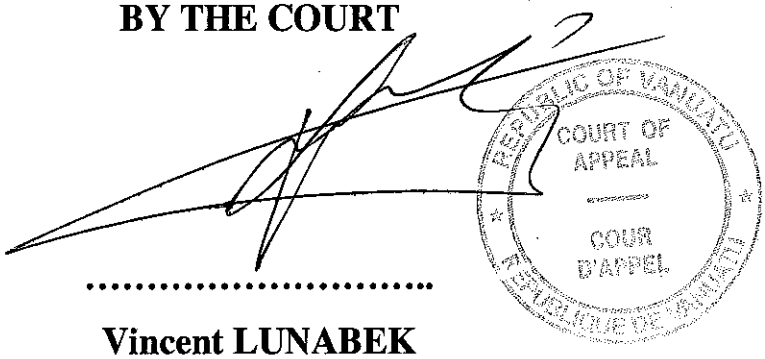
COSTS

40. The appellants have failed in their appeal although their support for the Judge's finding that the lease to Mr Trinh was registered by mistake has been upheld. Mr Trinh and Irreparable have been in part successful, on the bona fide question but in part unsuccessful, on the mistake point. The Republic failed in its appeal against the finding of mistake. We consider the appellants should pay costs to Irreparable only to be fixed on a standard basis. All other parties to meet their own costs.

41. We note there remains the issue of the indemnity claims under Section 102 and the position of the 5th to 7th respondents to be resolved.

DATED at Port Vila this 21st day of July, 2017.

BY THE COURT



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Vincent LUNABEK

Chief Justice