

(Civil Jurisdiction)

BETWEEN: PETER W. COLMAR

First Claimant

AND: VALELE TRUST

Second Claimant

AND: ROSE VANUATU LTD

First Defendant

AND: DINH VAN THAN

Second Defendant

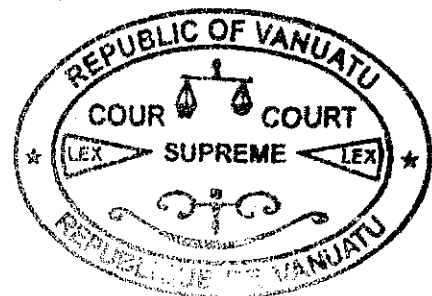
AND: MINISTER OF LANDS

Third Defendant

**Coram: Mr Justice Oliver A. Saksak
Mrs Anita Vinabit – Clerk**

**Counsel: Mr Nigel Morrison for the Claimants
Mr Felix L. Kabini for the First and Second Defendants
Mr Tom Joe Botleng for Third Defendants**

**Date of Hearing: 27th-28th July 2006
Date of Judgment: 12th February 2007**



JUDGMENT

Preliminary Matters

On 27th July 2006 Mr Botleng sought leave from the Court to be excused from the trial hearing. Upon there being no objection by Mr Morrison, leave was granted. The Third Defendant would simply abide by any Court Orders.

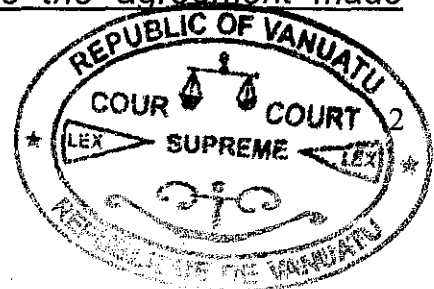
Also on 27th July 2006 during his opening address Mr Morrison sought to amend paragraph 13 of the Claimants claims. Mr Kabini objected to leave being granted by the Court. The Court merely received the amended version but did not rule on whether it would allow it or not. It would be the first issue to be dealt with by the Court.

Paragraph 13 of the original claim reads:-

"The Claimants further seek rectification by the Third Defendant by the cancellation of the transfer registered to the First Defendant referred to in paragraph 9 herein and together with costs and interest and such other relief as the Court may deem fit."

The proposed amendment reads:-

"The Claimant further seeks rectification by the Third Defendant by the cancellation of the Transfer registered to the First Defendant referred to in paragraph 9 herein or alternatively orders that land title 04/2624/001 be transferred to the First and/or Second Claimants pursuant to the agreement made



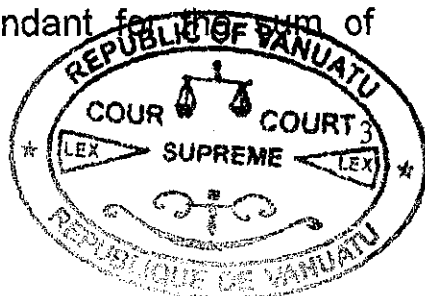
between the First Claimant and the Second Defendant dated 5th June 2004 or in the alternative the First and/or Second Claimant be entitled to register a transfer of the said property into their names and pursuant to the agreement referred to herein before and together with costs and interest and such other relief as the Court may deem fit."

The rules governing amendments are specified under Rule 4.11 of the Civil Procedure Rules No. 49 of 2002.

In the circumstances of the case the Court would allow the amendment. It was not too late in the proceedings. The First and Second Defendants could have requested for an adjournment with costs but they did not do so. They were not prejudiced as the agreement was raised in the pleadings and the Defendants had responded. The alternative orders sought were subject to legal arguments and submissions which have now been done by both counsels. Therefore the objections by Mr Kabini are overruled and the proposed amendment as submitted by Mr Morrison are allowed.

Background Facts of Case

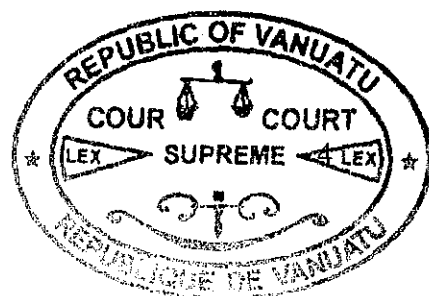
This case arose as a result of the transfer of leasehold title no. 04/2624/001 located on Aese Island East Santo. It all started sometimes in 2002. Yves Peter Stuart had the original lease. He transferred it to the Second Defendant for the sum of



VT6,000,000 as consideration. The Second Defendant had the transfer of lease registered in the name of the First Defendant on 23rd May 2005. The Claimant assert that this transfer was made in or about March 2005. The dates given by the Defendants and the Claimants do not correspond. In any event, it appears to be accepted that there was a transfer. This transfer is challenged by the Claimants on the grounds of mistake pursuant to section 100 of the Land Leases Act Cap. 163. It appears also that upon being aware of these transactions taking place Titus Valele purportedly lodged a caution which is dated 4th April 2003. It does not appear to be registered. This was tendered into evidence by the First Claimant as Exhibit C3.

Early in or about 15 July 2002 Titus Valele purportedly granted power of attorney to the First Claimant for the purposes of all dealings in respect to land situate on Aese Island in title No. 04/2624/001. This document was tendered into evidence by the First Claimant as Exhibit C2.

Then in or about June 2004 Valele Trust, the Second Claimant entered into an agreement where by they agreed to pay the Second Defendant for all his rights and improvements and/or lease of the Island. That Agreement was handwritten by the First Claimant and signed between him and Dinh Van Than, Second Defendant on a post at the Airport as the Second Defendant was boarding the plane to travel back to Vila.

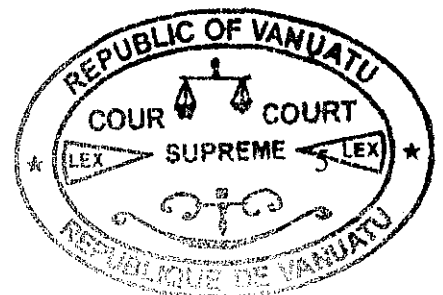


In about March 2005 the transfer of lease of Aese Island was registered recording a transfer to the benefit of the First Defendant, a company owned and associated with the Second Defendant.

Claims

Against those background facts the Claimants claim:-

- (1) That such transfer was entered despite: (a) a caution that has not been removed, (b) the Agreement of June 2004; and (c) Titus Karu, the major custom-owner not giving his consent to the transfer.
- (2) That the registration of the said transfer has caused damages and loss to Titus Karu Valele as represented by his power of attorney the First Claimant who claims against the Defendants severally for their fraud and/or negligence which has caused the loss.
- (3) As per paragraph 13 of their Claims as amended and which amendment the Court has accepted earlier at pages 2 and 3 of this judgment.



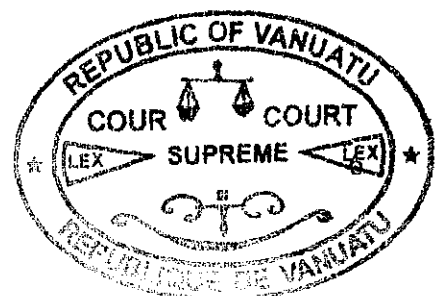
Issues

The following issues were raised by the Claimants who made submissions in support of them dated 28th August 2006:-

- "(1) Did the First Defendant Rose Vanuatu Ltd receive good title to leasehold title 04/2624/001?"*
- (2) Did the Second Defendant agree to sell all his "rights and interests and improvements in Aese Island including consents and shares in any company which owns the improvements and/or lease to Aese Island" to the Claimant Peter William Colmar?"*
- (3) Consequent upon the answers to issues 1 and 2 above what are the appropriate orders or relief which the Court should grant?"*

The Defendants on the other hand raised the following issues:-

- "1. Whether there was fraud and/or mistake in the transfer or lease over Aese Island from Lessee Stuart Family to First Defendant?"*
- 2. Whether the First Claimant and the Second Claimant have locus standi to sue as far as the dispute over transfer of lease over Aese Island is concerned?"*



3. *Whether the purported hand written agreement is valid and has binding effect on the First Defendant?*
4. *If the purported hand written agreement is valid at all, can it be enforced under the laws of Vanuatu?*
5. *If the Court accepted the proposed amended relief sought by the Second Claimant at trial, whether the Court has power by law to effect such transfer without following statutory requirements?"*

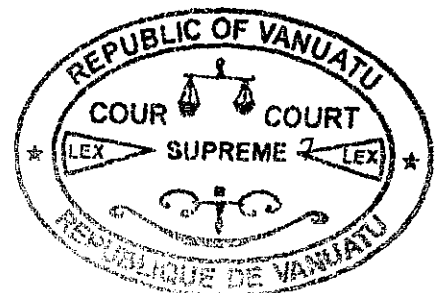
Onus of Proof

The burden of proof in this case rested on the Claimants to prove their claims on the balance of probabilities.

Evidence

A. For the Claimants -

1. Peter Colmar, the First Claimant gave evidence by sworn statement dated 27th October 2005 including its annexures and exhibits numbered 2 to 4. He confirmed those statements in his examination in chief and was cross-examined by defence counsel.



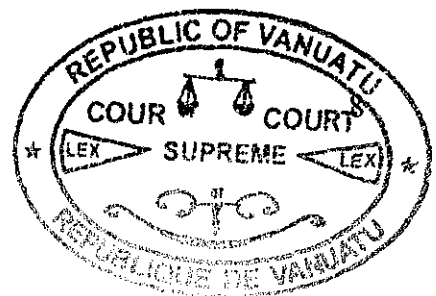
2. Michael Louze gave evidence by sworn statement dated 20th October 2005 which he confirmed in his examination in-chief and was cross-examined by defence counsel. Basically he witnessed the purported signing of a agreement between Valele Trust and Dinh Van Than at the airport. Further he organized two different deliveries of heifers on 8th June and 2nd July 2004 respectively resultant from the agreement making a total of 187 heifers delivered. The remaining 13 heifers were paid for by cheque on 19th April 2005 for the sum of VT234,000.

Comments, Observations and Ruling on Claimants' Evidence

Much of Peter Colmar's evidence was irrelevant. The letters he annexed as annexures "G" and "H" are irrelevant. They are letters written by Robinson Toka, Acting Senior Lands Officer at the time. Mr Colmar alleges corruption against this person. But this case is not a claim against Robinson Toka and therefore those letters are irrelevant.

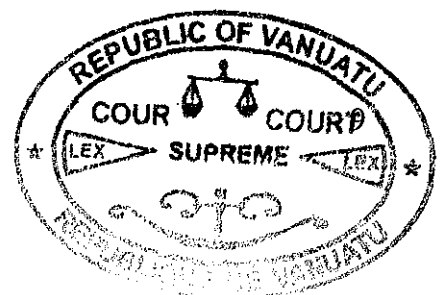
His annexures "J" and "K" are also irrelevant as the maker of those letters Titus Valele did not give evidence to confirm and be cross-examined as to the contents thereof. Similarly the letter by Willie Atole annexed "L" is also irrelevant. He did not give evidence in person or by sworn statement to confirm all that is said therein.

Further all those annexures from "M", "N", "O", "P" and "Q" are irrelevant to the issues before this Court and are disallowed.

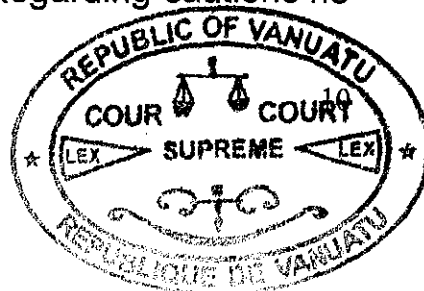


B. For the Defendants -

1. Dinh Van Than – He acknowledged the purported agreement but said he did not read it. He said he was rushed into signing it. He said he understood that Peter Colmar was paying him compensation for the trouble Valele had caused on Aese Island. He otherwise agreed to signing an agreement. He denied seeing Louze present during the signing. He said an invoice was issued to the custom owner shortly before meeting Mr Colmar at the airport. He denied any threats or court action made against the Valeles to get them to make payments. He acknowledged that heifers had been delivered. He also acknowledged a payment of VT234,000 by the Claimants.
2. Roy Moli – He made allegations about the status of Titus Karu. He said he is the duly authorized representative of the Valele Family. He said Valele Family are entitled to one part of Aese Island and that when title 04/2624/001 was created Titus Valele had signed on behalf of the family a long with the other custom-owners. But he was the one who gave consent for the transfer of lease from Stuart family to Rose Vanuatu Ltd.
3. John Tari Molbarav – He confirmed he gave his consent to transfer leasehold title 04/2624/001 from Stuart family to Rose Vanuatu Ltd.



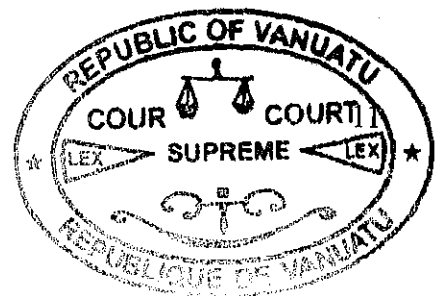
4. Maurice Tari – He said he was with Mr Than at the Airport where he saw only Mr Colmar and Mr Than. He confirmed seeing the signing of the purported agreement on a post and that he did not see Mr Louze.
5. Willy Berry – He too said he was with Mr Than at the airport and saw Mr Colmar and Mr Than outside. He saw them sign under a tree. He did not hear what was said. He did not see Mr Louze. He said he had made the calculations in the document exhibited as “WK1”. He said there was a possibility that calculations could be wrong as drivers of bulldozer would keep a different log or record of driving or working hours. He said the bulldozer was working on the Island for up to one month.
6. Stephen Tahī – He gave evidence as an expert. He was formerly the Director-General of Lands. Prior to that he worked for many years at the Lands Department as Lands Officer. He said it was not uncommon for delays in the registration process. On the date of receipt a document for registration would be noted in a ‘day book’ pending formal registration later. He said that once a document is receipted, it may only be rejected by lawful process. He said also that documents in respect to a particular title must be dealt with by the registry in the order of their receipts. That means that the first document must be fully dealt with before the Second and so on. Regarding cautions he



said the only lawful way to deal with one after it has been lodged is by removal process as specified in the Land Leases Act or by a Court Order. He said that if a later document be it a mortgage or a transfer, was registered before an earlier document such as a caution was lodged, then such registration of that lease to the seller who would only have occurred by mistake. He said there was no restriction upon entering into a contract for sale of lease prior to registration of that lease to the seller who would only have to gain registration of that lease before a settlement, or completion of sale could occur. He confirmed that this process is not uncommon.

The Law As Submitted By Counsels

- Firstly Mr Kabini submitted Articles 73, 74 and 75 of the Constitution in support of his submissions that the First and Second Claimants did not have standing to sue as far as the dispute over the transfer of lease over the Island is concerned. Further under the Land Leases Act Mr Kabini submitted Sections 15; 22; 60; 61; 76 and 100 in support of his submissions that there was no fraud and/or mistake to warrant rectification by cancellation, and further that the Court did not have the power to order specific performance under section 100 of the Act.
- Thirdly Mr Kabini submitted that under the principle of privity of contract only parties to a contract can sue on it; and secondly that only parties to a contract can claim a benefit under it. He submitted



that this was not such a case. Mr Kabini cited the following cases in support of his submissions –

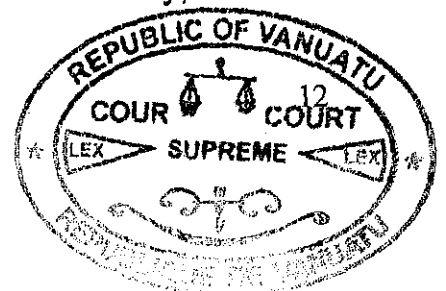
- (a) Valele Family v. James Toura CC Appeal 1 of 2002;
- (b) Naflak Teufi Ltd & Kalman Kiri v. Joshua Kalsakau & Others Appeal 7 of 2004;
- (c) Tom Violet & Others v. Michael Hoctene and Lina Hoctene & Others SC 186 of 2003;
- (d) Valele Trust v. Edson Sangari & Others SC 15 of 2005;
- (e) National Housing Corporation v. Bladiniere Estate (Urban) Ltd CC Appeal 31 of 2005;
- (f) Ramdin v. Singh 1977 23 FLR 128
- (g) Scammell & Nephew Ltd v. Ouston [1941] AC 251; and
- (h) Sherani v. Jagroop & Others (1973) 19 FLR 85.

Lastly Mr Kabini relied on section 46(1)(a) of the Companies Act [Cap. 191] which states:-

“(a) a contract which if made between private persons would be by law required to be in writing and under seal shall be made on behalf of the Company in writing under the common seal of the Company;.....”

Mr Morrison submitted sections 36; 93; 94; and 100(1) of the Land Leases Act in support of his clients claims that because there was a caution in place before the transfer of the title, a mistake was made and therefore rectification of the register is necessary.

Secondly Mr Morrison submitted that according to the law of non est factum, firstly the Defendants did not plead it and secondly, that the



defence is not available to the defendants because Mr Than is not a disable person, that there was no sufficient difference between the document as it is and as the signer believed it to be; and that the signer was careless. Counsel relied on the case authorities of Fiji Development Bank v. Navita Lai Raguona (1984) 30 FLR 151 and Alfred Hinge v. Enterprise Roger Brand SC 189 of 2004.

Determination of Issues in Light of Facts and Law

1. Did the First Defendant receive good title to leasehold title 04/2624/001?

Section 15 of the Land Leases Act [Cap 163] states :-

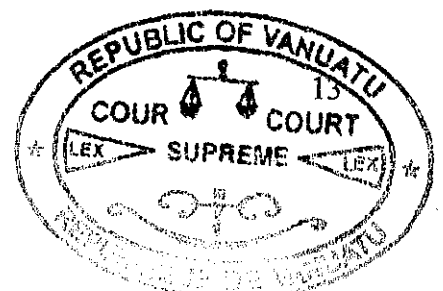
“The rights of a proprietor of a registered interest, whether acquired on first registration or subsequently for valuable consideration or by an order of the Court shall be rights not liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all rights, privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to –

(a) the encumbrances and to the conditions and restrictions shown in the register;

(b)” (emphasis added)

Section 100 provides for the exception but only if the Court is satisfied that there has been fraud or mistake made in the registration process. It reads:-

“(1) Subject to subsection (2) the Court may order rectification of the register by directing that any

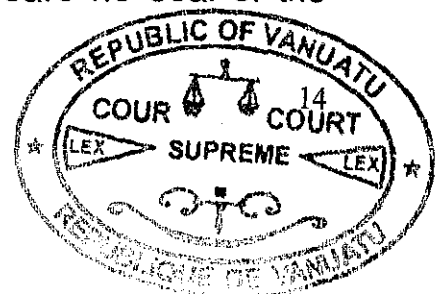


registration be cancelled or amended where it is so empowered by this Act or where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.

(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 caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default." (emphasis added).

The Court finds there to be no evidence by the Claimants showing fraud on the part of the Defendants in this action. But there remains the allegation of mistake. The Claimants contended that because they had put a caution in place, the transfer of leasehold title 04/2624/001 by Stuart family to the Second Defendant should not have been made and where made, it was a mistake.

The evidence by Peter Colmar was that there was a caution – exhibit C3. It appears to bear the name "Titus Karu Valele". His address is given to be at Tutuba Island, Vunasori Village. It is dated at Santo on 4th April 2003. It is signed by Titus. It was witnessed by Peter Colmar of PO Box 171, Santo. It is not registered as no date is provided and it bears no seal of the



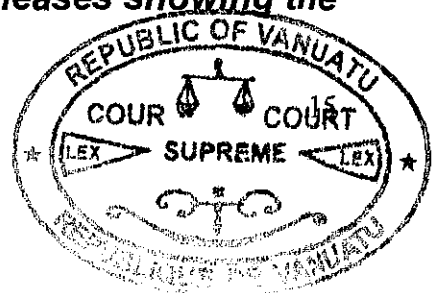
Land Records Office. Annexure "F" to Mr Colmar's sworn statement shows a receipt No. 969940 for an amount of VT1,125 received from Mr Peter Colmar Box 171, Santo being registration fee for caution on title no. 04/2624/001 dated 4th April 2003. It bears the stamp of the Land Records Office.

Mr Colmar did not call evidence from anyone in the Land Records Office to confirm issuing the receipt and receiving the money claimed to have been paid. He did not produce any evidence that Mr Than had knowledge of the existence of the caution.

The Land Records Office is established by Section 2 of the Land Leases Act which states:-

"2. There shall be maintained in Port Vila a Land Records Office in which shall be kept –

- (a) a register to be known as the Land Lease Register;***
- (b) parcel files containing the instruments and certified copies of survey plans which support entries in the register;***
- (c) a book to be known as the presentation book, in which there shall be kept a record of all applications numbered consecutively in the order in which they were presented to the Land Records Office;***
- (d) an index, in alphabetical order, of the names of the proprietors of registered leases showing the***



numbers of the titles in which they are interested; and

(e) an index, in alphabetical order, and file of powers of attorney."

None of the extracts from this Register was produced into evidence by the Claimants. They had the onus to do so.

Section 4 of the Land Leases Act states:-

"(1) The Land Leases Register shall comprise a register maintained in both the English and French languages in respect of each lease required to be registered by this Act.

(2) Each register shall be divided into three sections as follows:-

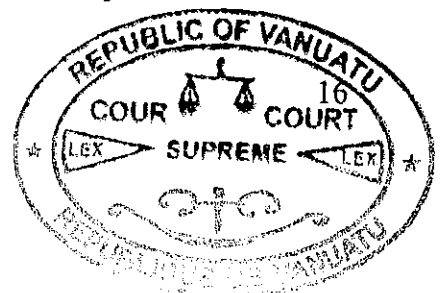
(a) the property section, containing a brief description of the lease together with particulars of its appurtenances; and

(b) the proprietorship section, containing the name, postal address in Vanuatu of the proprietor and a note of any caution or restriction affecting his right of disposition; and

(c) the encumbrances section, containing a note of every encumbrance affecting the lease required by this Act or any other law, to be registered."

(emphasis added).

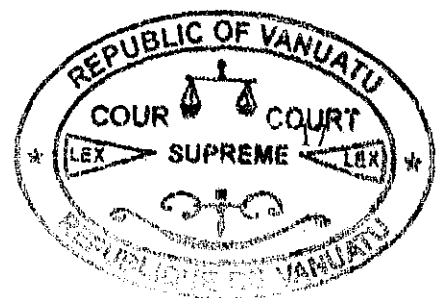
Again the Claimants failed to show any evidence of any extract of the register that contained a note of their caution. And they have failed to



produce any evidence showing any subsequent steps taken by them to ensure or press for the registration of their caution.

Section 93 of the Land Leases Act provides for lodging of cautions by persons who claim any interest, a benefit, a license or who had presented a bankruptcy or winding up petition against the proprietor of a registered interest. Merely lodging a caution and paying a registration fee is in the view of this Court insufficient. The Cautioner is obliged to ensure that his caution is registered and that is done by entering a note of caution on the register. If that was not done on the day the fee was paid but was not entered in the register because the Director may have been away from office, what would a reasonable serious thinking person do in that circumstances? Obviously a reasonable person who took the situation seriously would ring up the secretary the following day and enquire as to whether his caution was registered yet, and if not, why not? This caution it seems was just lodged and no subsequent steps was taken to ensure it was registered. Even after this action was filed and the defendants pleaded the ineffectiveness of the caution due to its non registration, it is apparent the Claimants did nothing about it.

The Court concludes that the purported caution lodged by Titus Valele on 4th April 2003 is ineffective due to its lack of registration, and as such it cannot be used as a basis to challenge the registration of the transfer of leasehold title 04/2624/001 from the Stuart family to the First Defendant.



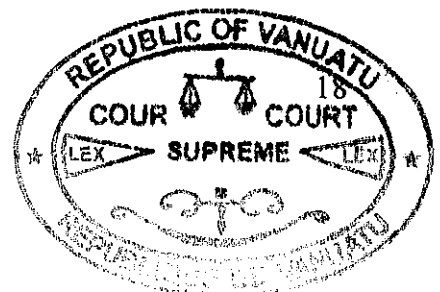
The second limb of this argument by the Claimants was that Titus Valele did not give his consent to the transfer. However the evidence of Roy Moli was that he gave consent to the transfer of lease by Stuart family to Rose Vanuatu Ltd on behalf of the Valele Family. Titus Valele did not give evidence to rebut that evidence. It is even suggested by Counsel for the defendants that after three other custom owners representatives had given their consent Titus Valele was unreasonably withholding his consent. I find some merits in that submission but no legal provision was provided by Mr Kabini to reinforce it. This is therefore an issue of fact and the fact shows that consent was given and as it is not challenged, that was sufficient or adequate consent for the transfer to take place as it did.

Having come this far the answer to this issue is that Rose Vanuatu Ltd had good title and the Claimants have not proved fraud or mistake adequately or at all to defeat the title.

2. Did the Defendant agree to sell his "rights" and interests and improvements in Aese Island to the Claimant?

The answer is in the negative for the following reasons:-

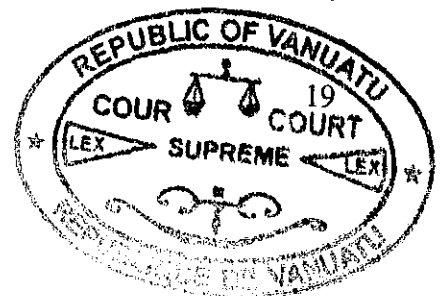
- (a) There was no meeting of minds. It was Mr Than's evidence that he was rushed. It was also his evidence that he thought he was being paid for improvements. The invoices amounting to about VT4,635,460 is sufficient proof of that. This was the evidence of Willy Kalo Berry. Mr Than's evidence was that he paid consideration of VT6,000,000 for the transfer of lease. His



argument therefore that if he intended to sell the lease, it would have been for a sum exceeding VT6,000,000. That is a logical argument which the Court accepts, to show that there was no meeting of minds. Mr Colmar was thinking differently and Mr Than was thinking differently. Taking for instance the cost of 200 heifers at VT18,000 each would cost a total of VT3,600,000, still nowhere near VT4,635,460 claimed by the Second Defendant. But it shows the logical argument by Mr Than, that it was not his intention to agree to any sale of lease that was less than VT6,000,000.

(b) The purported agreement was not done on any letter head. It was signed on a post at the airport. Both Mr Colmar and Mr Than are well-known businessmen who often have lawyers representing their interests in Court litigations. In a matter of such importance one wonders why the rush that the document should only be handwritten and signed on a post and at the airport at time when Mr Than was boarding the plane. Both Mr Colmar and Mr Than did not have the opportunity to get legal advices before signing such document. The case of Enterprise Roger Brand v. Alfred Hinge CC Appeal 13 of 2005 lend support to this reasoning.

(c) The terms of the purported agreement were so uncertain that the Court cannot possibly give effect to it. When Mr Colmar had the purported hand written agreement typed, it was radically different. See exhibit C4. There are additions which did not

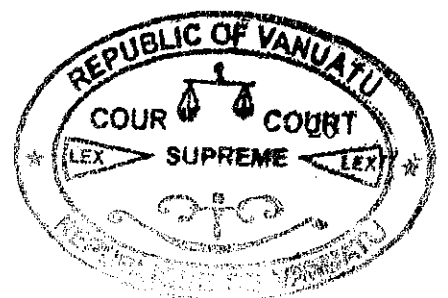


exist in the original version or text. The original version has only 5 paragraphs. The typed version has 7 paragraphs. It indicates clearly that there were uncertainties and ambiguities in the purported agreement. The Court cannot therefore give effect to such an agreement.

(d) The purported agreement does not bear the Common Seal of the parties signing it as required by section 46(1)(a) of the Companies Act [Cap. 191]

(e) The witness to the purported agreement, Mr Louze signed but did not state the date on which he signed, unlike Mr Than or Mr Colmar. That may explain why witnesses on behalf of the defendants say they did not see Mr Louze during the signing at the airport.

The circumstances surrounding the drafting of the purported agreement and its signing at such time, place and around whom it was signed, all tend to support Mr Than's argument that he was rushed into signing something which he did not really turn his mind to, or something which he thought was different from what it really was. In my opinion those were enough to entitle Mr Than to raise the issue of non est factum. But even if he was not entitled to raise it because he did not plead it, it does not matter as the agreement would still fail without that argument.

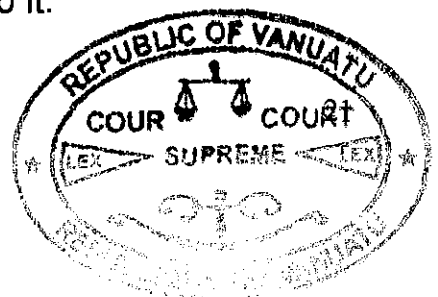


That is enough to dispose of this matter. But Mr Kabini raised other issues concerning locus standi of the First and Second Claimants.

Firstly, it is clear and it is judicially noted, that by the way the claim is framed that there are two separate claimants: Peter William Colmar as First Claimant and Valele Trust as Second Claimant. Mr Colmar asserts that he is acting under a power of Attorney given by Titus Valele and not by Valele Trust. Titus Valele is not a party to this case. It begs the question as to whom exactly Valele Trust represents or is a trustee of. This has never been made clear either in this action or others. In order to be more proper the claim should have been by Valele Trust by its Power of Attorney Peter William Colmar as the only Claimant.

This claim concerns in part land, its ownership and transfers. Article 73 of the Constitution cannot be anymore clearer as to who owns land in Vanuatu. To challenge a registered lease on the basis of customary ownership it would have been proper in view of Article 73 that Mr Colmar was not the First Claimant but perhaps Titus Valele. But the way it is, the Court will accept Mr Kabini's submissions that at least the First Claimant has no standing to sue in this matter. He could not sue separately. He could sue only as power of attorney for Titus Valele or for Valele Trust.

As to the Third issue raised by Mr Kabini, the answer is that for reasons already advanced the purported agreement is not valid, and as such it has not binding effect on the parties to it.



As to the Fourth issue raised, the answer is that if the agreement was valid, it could be enforced under the laws of Vanuatu.

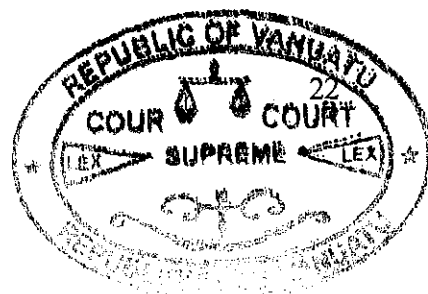
As to the Fifth issue raised, the Court has allowed the proposed amendment in, but having ruled that the purported agreement is invalid, the Court has no power to order specific performance. The Court notes that despite the fact that the purported agreement was void abinitio, the parties acted upon it. Mr Colmar paid Mr Than in the forms of heifers. 187 of those have been delivered. 13 more have not yet been delivered but a cash payment of VT234,000 was made instead. It is now a matter for Mr Than to look into and resolve in an amicable way. It is either the return of the 187 heifers already delivered or their monetary value of VT3,366,000 + cash payment of VT234,000.

As things stand, the Court accepts Mr Kabini's submissions and the case authorities cited in support of those submissions.

The cases raised by Mr Morrison are helpful but they do not assist the Claimant's position.

Conclusion and Orders

For the reasons given, the Claims of Claimants as regards rectification of the register due to fraud or mistake, and for specific performance based on an agreement are not successful. The First



Claimant is removed as a party to this case. But they have shown losses in the sum of VT3,600,000. They have judgment in their favor against the First and Second Defendants for the refund of those moneys.

In the circumstances of the case, there will be no order as to costs.

DATED at Luganville this 12th day of February 2007.

BY THE COURT


OLIVER A. SAKSAK

Judge

