

**IN THE SUPREME COURT OF THE  
REPUBLIC OF VANUATU  
(CIVIL JURISDICTION)**

**Civil Case No. 32 of 2008**

**BETWEEN**                    **PETER COLMAR AS TRUSTEE OF  
VALELE TRUST**  
**Claimant**

**AND**                            **ROSE VANUATU LIMITED**  
**First Defendant**

**AND**                            **DINH VAN THAN**  
**Second Defendant**

**AND**                            **MINISTER OF LANDS**  
**Third Defendant**

**AND**                            **JOHN TARINOLBARAV, SAMSON  
LIVO, JOSEPH SAVA, ROY  
MOLIVALELE, JOSEPH WARI AND  
BEN MATA**  
**Fourth Defendants**

**AND**                            **ALJAN (VANUATU) LIMITED**  
**Fifth Defendant**

*Coram:*                    *Justice J E Macdonald*

*Hearing:*                *13, 14 & 15 October 2010*

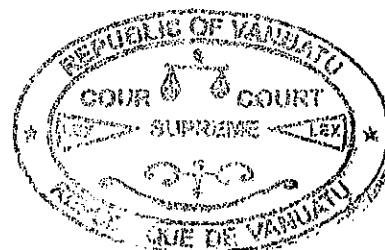
*Counsel:*                *Mr N Morrison for the Claimant*  
*Mr Kabini for the First & Second Defendants*  
*Mr J Ngawele for the Third Defendant*  
*Mr J Malcolm for the Fourth Defendants (Sava, Molivalele, Wari  
& Mata)*  
*Mr Timakata for the Fourth Defendants (Tarinolbarav & Livo)*  
*Mr M Hurley for the Fifth Defendant*

*Judgment:*            *10 March 2011*

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**JUDGMENT**

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## Background

[1] In a judgment dated 24 August 2007 (in Civil Appeal Case No. 02 of 2007) the Court of Appeal ordered that the claimant was entitled to specific performance of a contract he had with the first and second defendants for the transfer of a lease.

[2] The contract dated 5 June 2004 was for the transfer of a lease over land on Aese Island. It was lease title no. 04/2624/001 (the "001 lease"). The claimant had paid a total of VT3,600,000 and 200 heifers to the first and second defendants as consideration for the lease.

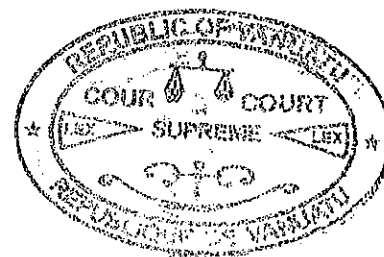
[3] The first and second defendants had sought to get out of the contract and initially had succeeded in doing so before the Supreme Court on 12 February 2007, but on appeal the claimant was successful in obtaining an order for specific performance.

[4] The Court of Appeal referred the matter back to this Court to give effect to the orders made. This in part was because the lease was over custom land and as such the custom owners had to consent to the transfer.

[5] The claimant says that at all material times the lease was encumbered by a caution protecting his equitable interest and this had been claimed and proved at the Court of Appeal hearing on 17 August 2007. The caution was lodged against the lease title on 12 May 2005, with notification of it having been registered given on 17 January 2007.

[6] The caution was withdrawn by the third defendant on 12 August 2007, but without notice being given to the claimant as the cautioner.

[7] On 27 July 2007 the first defendant, through the actions of the second defendant, had signed a transfer of the 001 lease to the fifth defendant. This transfer was purported to be consented to by the fourth defendants as the purported custom owners of the lease.



[8] On 14 August 2007 the third defendant registered the transfer of the 001 lease to the benefit of the fifth defendant.

[9] On 13 June 2008 the fifth defendant surrendered the 001 lease and was then issued with a new lease title no. 04/2624/003 (the "003 lease"). This was a 75 year commercial lease.

[10] Although the first and second defendants were plainly on notice of the prospect of specific performance being allowed on appeal they nonetheless agreed to transfer the 001 lease to the fifth defendant. Significantly this transaction was not brought to the attention of the Court of Appeal.

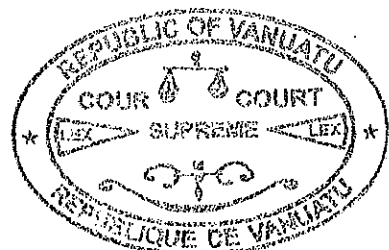
[11] The fifth defendant had engaged Mr Toka, a former Lands Department officer, to obtain the consents of the custom owners to the transfer. These were obtained in June 2007 and, as mentioned, the transfer was registered on 14 August 2007, which was only a matter of days before the Court of Appeal heard the appeal and subsequently ordered specific performance.

[12] The fourth defendants made no mention of this to the Supreme Court when orders were made on 12 November 2007 noting them as interested parties.

*The claim*

[13] The claimant contends:

- (a) That the actions of the first and second defendants were contemptuous of the orders of the Court of Appeal and have caused or may cause damage to the claimant.
- (b) The actions of the third defendant in registering the transfer of the 001 lease likewise have caused or may cause damage to the claimant.
- (c) The actions of the fourth defendant involved falsely representing themselves as the true custom owners of the 001 lease.



- (d) The fifth defendant knowingly acted in concert with the first, second and fourth defendants to endeavour to defeat the claimant's equitable interest in the 001 lease, thereby causing damage to the claimant.

[14] The claimant contends that although the fifth defendant had been the registered proprietor of the 001 lease since 14 August 2007 it held it as trustee for the claimant, whose equitable interests were established by the Court of Appeal.

[15] The claimant claims, subject to custom consent and necessary payments to custom owners and the third defendant, the transfer to it of the 003 lease. The claimant also seeks damages against the defendants and costs.

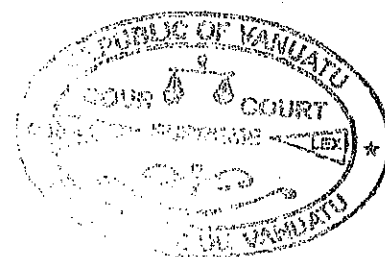
*The defence – first and second defendants*

[16] By way of defence the first and second defendants say that they lawfully transferred their interest in the 001 lease to the fifth defendant, and the transfers were made prior to the restraining orders made by Bulu J on 20 March 2007. They also point to the fact that the custom owners of the 001 lease did not want to consent to the transfer to the claimant.

*The defence – third defendant*

[17] The third defendant says that the claimant's caution should never have been registered in the first place because the claimant did not have a claim of any interest in the registered lease.

[18] The third defendant further contends that it was unaware of any restraining order that might prevent it transferring the 001 lease. The restraining orders of 20 March 2007 did not amount to or mention a restraining order relating to any dealing concerning the 001 lease. The third defendant therefore maintains that it acted in good faith and based on the information provided. There is also reliance on ss 9 and 24 of the Land Leases Act.



*The defence – fourth defendants*

[19] There is no unified stance by the fourth defendants but the point is made that they were not involved in the Court of Appeal proceedings, and no orders were made against them. They had no knowledge of a restraining order or of any registered caution by Mr Colmar. They deny that they falsely represented themselves as the true custom owners.

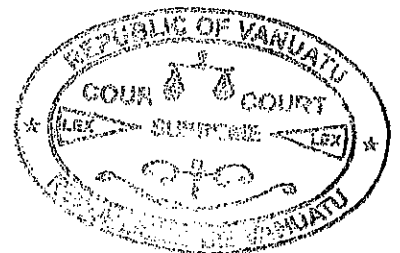
*The defence – fifth defendant*

[20] As for the fifth defendant it says that it was not a party to Civil Proceeding No. 20 of 2005, nor to Court of Appeal Case No. 02 of 2007, and no orders were made in relation to it. The fifth defendant further says that the claimant has never complied with the pre-conditions to the transfer of the 001 lease in para 1(b) of the Saksak J orders of 12 November 2007 in Civil Case No. 20 of 2005, in that he has not obtained “from all the custom-owners, necessary written consents in compliance with the provision of the lease” and is unable to do so.

[21] The fifth defendant denies that there was any order of any Court, which imposed any restraint on the fifth defendant obtaining a transfer of the 001 lease. According to searches and enquiries carried out by its lawyers there were no cautions protecting any interests of the claimant on the title of the lease. The fourth defendants as the lawful custom owners consented to the transfer of the lease. The fifth defendant was therefore a *bona fide* purchaser of that lease, without notice of the interest of any other person in that title.

[22] As to the surrender of the 001 lease on or about 13 June 2008 the fifth defendant says that was lawful. As to the new 003 lease it was for a substantially longer term, on enhanced terms and conditions of use by the lessee, and it was therefore of substantially greater value and duration than the original lease.

[23] As to the claim for damages the fifth defendant denies that the claimant has suffered any loss, as it is unable to satisfy the pre-conditions imposed by the Court in Civil Proceedings No. 20 of 2005.



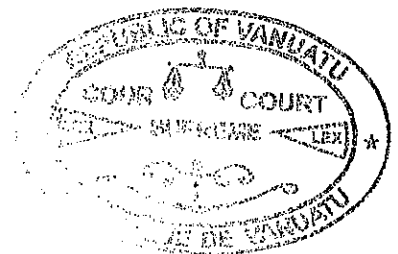
[24] As mentioned, the fifth defendant says that at the time the transfer of the 001 lease was registered there was no encumbrance of a lawfully registered caution on the title. The basis of that contention is that any caution, even if it was registered, was defective on its face and disclosed no lawful interest of the claimant, which was thereby sought to be protected.

[25] The fifth defendant admits that it has been the registered proprietor of the 001 lease from on or about 14 August 2007 until that lease was surrendered on or about 13 June 2008 and the 003 lease was issued. The fifth defendant denies that it holds the new lease as trustee for the claimant because the transfer of the 001 lease and the granting of the 003 lease, were consented to by the fourth defendants, in circumstances where the claimant has not and could not obtain any such consents. The 003 lease is in a form and duration of tenure that is entirely different from the original lease. And, of course, the 001 lease no longer exists, and any interest held by the claimant (which is denied) has been extinguished.

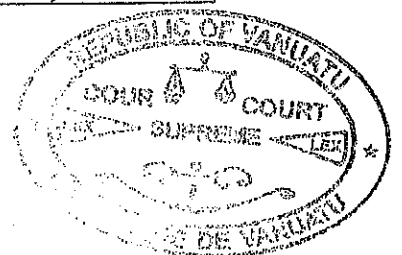
[26] I now set out a chronology of events for ease of reference:

#### Chronology of Events

Date	Comment
30 July 1980	Lease commences over title no. 04/2624/001 – 30 year term
8 February 1988	Registration of Santo Land Council's identification of custom-owners (title no. 04/2624/001)
5 June 2004	Colmar (as trustee of the Valele Trust) gains equitable interest by purchase from Rose Vanuatu Limited – Than
12 August 2005	Colmar lodges caution
12 February 2007	Supreme Court decision (Saksak J)
12 March 2007	Supreme Court decision appealed
20 March 2007	Bulu J made restraining order staying orders of Saksak J pending appeal



Date	Comment
28 June 2007	Aljan's consents obtained from custom owners to transfer from Rose Vanuatu Limited to Aljan
28 June 2007	Aljan's consents obtained from custom owners to surrender 001 lease and execute new lease
18 July 2007	Colmar letter to Trans-Melanesian Legal confirming restraining order of Bulu J
27 July 2007	Transfer of lease from Rose Vanuatu to Aljan VT25,000,000
14 August 2007	Registration of transfer of lease
17 August 2007	Letter from Director of Lands concerning withdrawal of caution by Titus and James Rad-Elsie Kaman
24 August 2007	Court of Appeal judgment
6 September 2007	Letter from Director concerning withdrawal of caution
27 September 2007	Approval of order submitted by Mr Morrison (counsel for Valele) giving effect to Court of Appeal judgment
12 November 2007	Matter returns to the Supreme Court before Saksak J – modifying orders of 27 September 2007 and declaring who the custom-owners were (i.e. who had to give their consent)
10 December 2007	Colmar attends at Lands Department and arranges for transfer of lease from Rose Vanuatu Limited to the Valele Trust
13 June 2008	Registration of reinstatement of transfer of lease to Aljan, surrender of 001 lease and new 003 lease
25 June 2008	Saksak J issues restraining order effecting subject land and joins Aljan as second interested party to this proceeding
13 August 2008	Civil Case No. 32 of 2008 issued
30 October 2009	Court of Appeal judgment in that case
30 July 2010	The 001 lease expires (the lease term was 50 years)



## Evidence

[27] The sole witness for the claimant was Mr Colmar. He confirmed that he lodged a caution against the title of the 001 lease on 12 May 2005. The cheque to pay the lodgement fee was presented for payment on 25 August 2005. He received advice of registration dated 17 January 2007. Prior to that the purchase price of VT3,600,000 had been paid to the first and second defendants.

[28] Mr Colmar confirmed that specific performance proceedings were issued against the first and second defendants. The matter was heard in this Court by Saksak J on 27 and 28 July 2006 and in a judgment of 12 February 2007 the application for specific performance was refused. He therefore appealed.

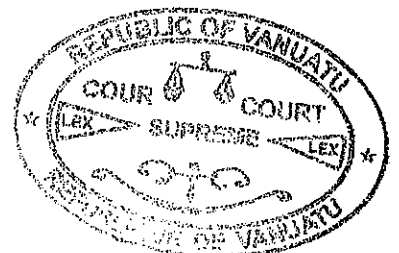
[29] On 20 March 2007 Bulu J made the stay orders. Those were in terms that, "Orders of the Supreme Court of 12 February 2007 were stayed until further orders of this Court". Presumably the first and second defendants would have received copies of the stay orders through the Supreme Court registry in the usual way.

[30] The appeal before the Court of Appeal was heard on 17 August 2007, with the judgment being delivered on 24 August 2007.

[31] Despite that apparent success Mr Colmar said that he still had on-going concerns about possible dealings with the land. Therefore on 18 July 2007 he arranged for his solicitors to send a letter to Mr Kabini of Trans-Melanesian lawyers advising of the appeal and of the stay orders made by Bulu J.

[32] At about the same time he also checked that the caution lodged by Valele was still in place. On 15 August 2007 he handed an officer of the Lands Department a copy of the Bulu J stay orders.

[33] After the appeal was successful Mr Colmar believed that he had to then complete settlement. This would include submission of a transfer consented to by the custom-owners for registration, along with payment of registration fees and stamp duty.





[34] After writing to the Lands Department Mr Colmar received advice that the Rose to Aljan transfer was to be reversed, which it was, but of course it was later reinstated.

[35] On 13 September 2007 Mr Colmar received a letter from the Director of Lands dated 17 August 2007 (it was not posted until 6 September 2007) that the caution of 12 August 2005 had been withdrawn.

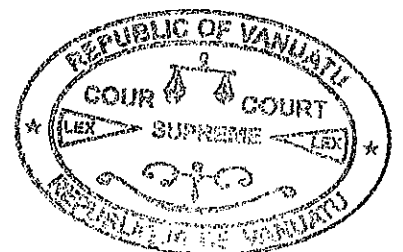
[36] It is noteworthy that counsel for the third defendant was present at the hearing before Saksak J in July 2006 and was also present at the Court of Appeal hearing in August 2007.

[37] The second defendant, Mr Than, gave evidence and said that after the Supreme Court judgment of 12 February 2007, which held that his contract with Mr Colmar was invalid, he instructed his lawyer to write to Mr Colmar to arrange for the reimbursement of the money paid to them and the return of the 200 heifers given to him by Mr Colmar.

[38] Mr Than further says that he entered into an agreement with the fifth defendant on 21 June 2007 to sell Aese Island. He says that it was not until later that he received advice of the Bulu J stay orders.

[39] After the Court of Appeal judgment Mr Than said that the custom owners refused to consent to the transfer of Aese Island to Mr Colmar.

[40] In cross-examination by Mr Hurley, counsel for the fifth defendant, Mr Than confirmed that there was a meeting on the Bakissa Island Resort in June 2007. Mr Than was present along with Mr Bouchard and Messers David and Alan Cort. The meeting was about selling the 001 lease to the fifth defendant. At that meeting Mr Than accepted that Mr Cort asked about whether the court case with Mr Colmar was finished and he replied that it was. He said that he had won the Court case and this was a reference to the Supreme Court judgment of Saksak J in February 2007.



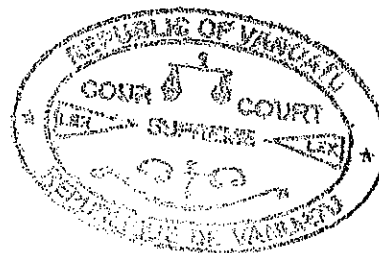
[41] Mr Than said that he went to a meeting at the offices of Geoffrey Gee & Partners in June 2007. Mr Gee and Mr Alan Cort were present. At that meeting Mr Than again agreed that he said that his argument with Mr Colmar about the 001 title was all over.

[42] When cross-examined by Mr Morrison, counsel for the claimant, Mr Than accepted that Mr Kabini had represented him at the appeal before the Court of Appeal on 17 August 2007 and that he (Mr Than) was also present at the hearing. He accepted that the Court of Appeal was never told of the sale to the fifth defendant. He accepted that his lawyer knew of the sale. He accepted too that he had signed the agreement and transfer after 21 June 2007 and before 17 August 2007. He confirmed that the sale to the fifth defendant was for AUD\$4,000,000.00 and that there were then later contracts on 21 June 2007 for VT25,000,000 and AUD\$500,000.00. He did not remember the fifth defendant asking for repayment of the AUD\$500,000.00.

[43] On behalf of the third defendant evidence was given by Mr Mangawai who was the Acting Director of the Department of Lands Survey & Records. He says that at the time of the transfer of the 001 lease from the first defendant to the fifth defendant (it was registered on 14 August 2007) the department was unaware of the Supreme Court and Court of Appeal proceedings. However, when the department was informed of the Court of Appeal decision in favour of the claimant the lease was rectified for the benefit of the Valele Trust. This took place on 10 December 2007.

[44] Then on 23 May 2008 the director wrote to the claimant advising of the intention to rectify the register and reinstate the transfer of the lease to the fifth defendant (this was in the letter MM13). This reinstatement occurred on 13 June 2008. On the same date the department registered the surrender of the 001 lease and the registration of the new commercial 003 lease.

[45] Mr Mangawai says that all land dealings relating to the lease titles 001 and 003 were registered in good faith, in accordance with the powers of the director under the Land Leases Act, and based on the information supplied to the department



by Mr Toka who was a former employee of the department. As for delays in registration Mr Mangawai confirmed that this was common place.

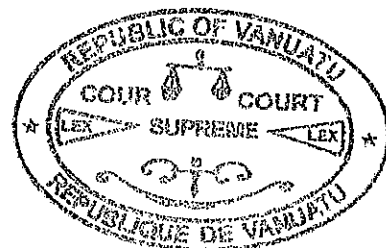
[46] Mr Livo, one of the fourth defendants, gave evidence. He confirmed that in late June or July 2007 Mr Toka, who was acting for Aljan and Mr Alan Cort, was trying hard to get he and others to consent to the purchase of Aese Island from Mr Than. Mr Livo said that there were many promises and agreements that were made, but none were kept. Interestingly he now had no objection to Mr Colmar acquiring the Aese Island lease.

[47] When cross-examined by Mr Hurley however, he accepts that in July 2007 he received VT360,000 from Mr Alan Cort. He further conceded that in September 2008 there was a letter written to the fifth defendant by all the custom-owners in which they sought a premium of VT85,000,000. This request was later repeated at a meeting at the Lands Department when two land officers, Mr Toka and Messrs Alan and David Cort were present.

[48] In cross-examination from Mr Morrison, Mr Livo was referred to Mr Colmar's sworn statement and said that he did not recognise the signature on the consent as being his. He said that it looked completely different. Mr Livo said that Mr Toka was instrumental in getting the signatures to the consents. He also confirmed that Mr Toka had been trying hard to get them to sign the consents, which reflected that there was some urgency in getting them to sign.

[49] Mr Alan Cort gave evidence. He was a director and one of the beneficial owners of the fifth defendant. He confirms that the fifth defendant was never a party to the Supreme Court Civil Case No. 20 of 2005, until joined as a party by Saksak J by order dated 25 June 2008.

[50] Mr Cort confirmed that he was present at the meeting on Bakissa Island in mid June 2007 when Mr Than confirmed that the dispute or case with Mr Colmar was finished, and that he had won the Court case.



[51] Mr Cort says that based on that information a second meeting was arranged and this was the one at Mr Gee's office on about 21 June 2007. Mr Than was present. Mr Gee had prepared a draft agreement. Mr Gee asked Mr Than if there were any court cases pending about this property and again the response from Mr Than was that there were none and that it was all finished. On that basis the fifth defendant proceeded with the purchase. An agreement for sale and purchase was signed on the same day with Geoffrey Gee & Partners acting for the fifth defendant.

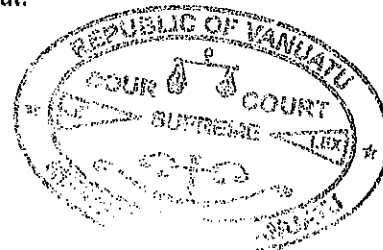
[52] The fifth defendant, having engaged Mr Toka to arrange for the necessary consents from the custom-owners, became the registered owner on 14 August 2007.

[53] As for the letter of 20 August 2007 received from the Valele Trust, Mr Cort insisted that this was the first time that he became aware that there was any challenge to the ownership of the title.

[54] Realising that the Valele Trust was seeking specific performance of its contract with the first defendant, and also becoming aware that it needed the consent of the custom owners, Mr Cort sought to find out what the attitude of the custom owners was to determine whether there was any possibility that the title that the fifth defendant had acquired on 14 August 2007 was at risk. According to Mr Cort he found that the custom owners were all unfavourably disposed towards Mr Colmar. In any event Mr Cort believed that the 001 lease was virtually worthless because it was due to expire on 30 July 2010, and was for agricultural purposes only.

[55] The fifth defendant paid VT25,000,000 for the land. At the time of purchase Mr Cort says that he had no knowledge of the claimant's ongoing interest in the 001 lease. He paid the custom-owners VT2,000,000 for the surrender of the old lease and their consent to the issue of a new 75 year commercial lease.

[56] In cross-examination Mr Cort confirmed that VT2,000,000 was paid for the 003 lease but AUD\$500,000.00 (which is equivalent to about VT40,000,000) had been paid for the 001 lease. On that basis Mr Cort was questioned as to how he could claim that the 001 lease was virtually worthless and that the 003 lease was far more valuable. Mr Cort did not appear to have an answer to that.



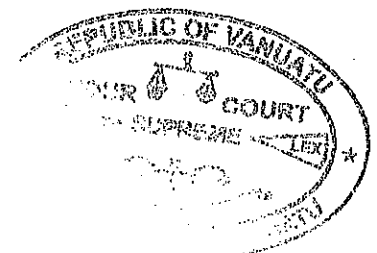
[57] Mr Gee gave evidence. He was the managing partner of Geoffrey Gee & Partners. His account of the meeting in his office on 21 June 2007 was the same as recounted by Mr Than and Mr Cort. I do not recall him being challenged on that. He accepted the fifth defendant's instructions to prepare an agreement for sale and purchase. He also arranged for a search of records held by the Department of Lands. Initially no file concerning the title could be found but he later obtained a copy of the lease register. He found that none referred to any registered cautions. However, on 19 July 2007 he obtained a copy of two cautions (James Rad and L C Karman and Titus Karu). On 17 July 2007 he wrote to the director seeking their removal, although he has no record of receiving any response.

[58] As to the letter from the Valele Trust of 20 August 2007 Mr Gee says that was the first time that he had become aware that it was challenging the ownership of the title.

[59] Mr Gee said that his instructions from the fifth defendant had simply been to carry out title and related searches and to prepare an agreement for sale and purchase. The fifth defendant arranged for the consents to be obtained from the custom-owners and the lessors and for them to be lodged for registration.

#### Law

[60] The problem in legal terms can be expressed quite simply. The lessor of Aese (the first and second defendants) had originally contracted with the claimant for the transfer of the lease. However, this arrangement was resisted through the Courts and by the time the claimant obtained judgment for specific performance the lessor had transferred and registered the lease in favour of the fifth defendant. During the transfer to the fifth defendant, none of the standard protective mechanisms of the claimant's equitable interest were successful. The caution on the title was illegally removed, and the restraining order of Bulu J was never brought to the attention of the fifth defendant. Consequently the fifth defendant claims to be a *bona fide* purchaser without notice, and therefore entitled to the indefeasibility provisions of the Land Leases Act.



[61] Essentially the claimant seeks damages from all the defendants, that an order that the 003 lease is held on trust in its favour by the fifth defendant, and that the third defendant rectify the register to record the claimant's propriety in the 003 lease.

[62] This requires an assessment of the liabilities owed to the claimant by the defendants. The actions of the fifth defendant will also need to be assessed to determine the trust claim but having said that there is little evidence to support it.

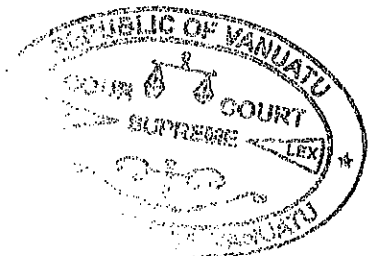
[63] Behind such an assessment is a difficulty in determining what was lost, or the nature of the damage suffered by the claimant. It also seems apparent that the 003 lease is only relevant in the sense of a loss of a chance or a loss of the opportunity to be in a position to negotiate a new lease once the 001 lease expired. However, again I have not received submissions on that and it has not been specifically pleaded. The lack of development of how to proceed with damages presents difficulties and is surprising considering the Court of Appeal comments in:

- (a) The 24 August 2007 judgment at [44] stating that it was up to "the parties and the Judge in the Supreme Court to resolve what form the final order should take based on our conclusions"; and later
- (b) The 30 October 2009 decision at [21] and [22] where indications of the extent of prima facie wrong doing were alluded to.

[64] I will consider the position of each defendant in turn. Obviously the onus of proof is on the claimant, and the standard of proof required is the civil standard: *Neel v Blake* [2004] VUCA 6; Civil Appeal Case 33 of 2003 at page 12.

*The first and second defendants*

[65] As to the first two defendants, it is apparent from the history of this matter that they knew full well of the interests of the claimant. In 2002 Mr Than had purchased the 001 lease for VT6,000,000. On 5 June 2004 Mr Than sold that lease for VT3,600,000. This contract was not honoured and the lease was sold to the fifth defendant for AUD\$4,000,000.00.



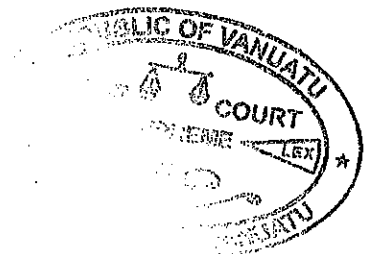
[66] Having regard to the evidence I am in no doubt that the first two defendants were aware of Bulu J's restraining order and of the claimant's appeal at the time they agreed to sell to the fifth defendant. They were also aware of the possibility that the appeal might be successful and that they would be held to the contract with the claimant. Despite that they proceeded with the sale to the fifth defendant and in an underhand way. They certainly kept it from the claimant. In doing so they were in breach of their contractual obligations with the claimant and they acted in breach of the restraining order of Bulu J. Their actions were also highly contemptuous of the Court of Appeal. Consequently I find that the claimant is entitled to damages against them.

[67] Assessing those damages is problematic. I am unsure if the VT3,600,000 was refunded to the claimant. I am also unsure if it was the expectation of counsel that there would be a separate hearing to assess damages once issues of liability had been determined. I will return to this point later. Mr Morrison did, however, specify what the claimant sought in respect of the claimed loss of equitable interest in the 001 lease and I will deal with that.

[68] Essentially the claimant seeks the difference between what he paid for the lease (VT3,600,000) and the AUD\$4,000,000.00 paid by the fifth defendant. The submission is that the latter figure represents the true market value of the lease.

[69] While sympathetic to that proposition it is still a question of assessing the claimant's loss, as opposed to looking at what the first and second defendants gained in a financial sense from their wrongdoing. Of course, on one view in paying VT3,600,000 in 2004 the claimant is accepting that figure as being the value of the lease at that time. And, arguably it could only have decreased in value since then as it got closer to the expiry date in July 2010.

[70] At best the claimant lost the possibility of an equitable interest in the 001 lease but that was still dependent upon obtaining the necessary consents. In my view his equitable interest only crystallised once the purchase was completed and the transfer was registered. It was only at that point that he had something to lose and



put simply that point was never reached. I therefore conclude that the claimant has not established any loss in this regard.

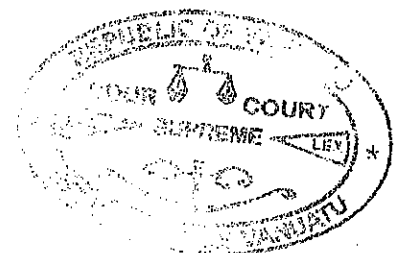
[71] If I am wrong on this, and the claimant had been able to perform the contract, then given the time required to obtain consents and complete the stamping and registration process it is unlikely that he would have been the registered lessee before the end of 2007. There would have then been about two and a half years to run on the lease. What that might be worth I do not know. I simply record that I have no evidence as to the value of the 001 lease at that point in order to assess damages.

[72] Looking at the relief sought in a more general way the claimant was asking the Court to wind back the clock to July/August 2007 so that he could enjoy the benefits of his successful appeal. Mr Morrison has suggested ways in which that might be achieved and I have considered them.

[73] Again, perhaps in seeking a just result, I am attracted to the proposition advanced but in a practical sense I fail to see how it can be achieved. The fact remains that while the 001 lease was surrendered in June 2008, it would in any event have expired with the effluxion of time on 30 July 2010. I do not see how that lease can be resurrected or that there is the power to grant relief in respect of a lease that has ceased to exist.

*The third defendant*

[74] The actions of the third defendant in this matter are unfortunate. I accept that the claimant's caution was invalid for the reasons advanced by the fifth defendant, but the fact remains that it was accepted and it was registered. Once there it had to be dealt with lawfully. There was only one way for the caution to be removed and that required notice to be provided to the claimant: s 97(3). No notice was given. Without following the legislative provisions, the removal was ineffectual: s 22(1). The caution should have been on the register at the time the transfer of the 001 lease to the fifth defendant was sought to be registered. If this had occurred it is highly unlikely that the current problems would have arisen.





[75] I sensed that the third defendant was in effect arguing against the findings of the Court of Appeal on this matter in *Colmar v Rose* [2007] VUCA 18 at [16] – [18].

[76] The possibility of indemnity (s 101) to the claimant from the third defendant was not specifically pleaded although such a possibility may be inappropriate for any number of reasons.

[77] In determining whether the third defendant should be liable for damages I am hampered by a lack of evidence as to what actually occurred at the department or who was involved. The suggestion is that Mr Toka was involved in some deceptive or fraudulent conduct which might have influenced what took place. That would not necessarily absolve the third defendant from blame but it could be relevant. There is also nothing to show that the department necessarily acted in bad faith. In light of those matters I am not prepared to hold the third defendant liable.

*The fourth defendants*

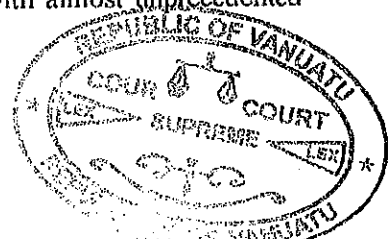
[78] I am not satisfied that it has been established that the fourth defendants had falsely represented themselves as the true custom owners of the 001 lease. I am also not satisfied that any enforceable duty owed to the claimant has been breached.

*The fifth defendant*

[79] The fifth defendant had no contractual relationship with the claimant. Its potential liability is claimed to arise from its complicity in the steps taken by the first and second defendants to defeat the claimant's interest in the 001 lease.

[80] There are several factors supporting a conclusion that there was complicity. Its agent Mr Toka plainly knew of the Colmar caution, as according to a letter from Mr Saniel, on behalf of the director, he had requested its removal in mid July 2007. Mr Toka was even armed with a copy of Saksak J's orders of 12 February 2007 and might have misrepresented their effect.

[81] If Mr Toka had this knowledge did the fifth defendant also know? The registration of the transfer appears to have taken place with almost unprecedented



speed. That was suspicious. It was also curious that the fifth defendant paid so much for the 001 lease, one that Mr Cort had described as "virtually worthless".

[82] As against that I did not hear from Mr Toka. He was not called as a witness. That was surprising given that he could have given evidence relevant to the issue of the fifth defendant's knowledge. Perhaps as a matter of fairness if it was being suggested that he had acted dishonestly then he should have been given the opportunity to respond.

[83] The other evidence I am faced with is of the two meetings when Mr Than informed those present that there was no longer any dispute with Mr Colmar. While that could be viewed as self serving insofar as Mr Than and Mr Cort are concerned I had no impression that Mr Gee was being untruthful on this aspect. Accepting that Mr Than gave such assurances it was not unreasonable for the fifth defendant to have relied upon them.

[84] In the end, albeit with some reservations, I am not satisfied that the fifth defendant was complicit in the actions of the first and second defendants.

[85] Without such complicity I am also satisfied that there is no basis for finding that the 003 lease is being held in trust for the claimant. I consider that such a proposition is untenable in any event because the 001 lease and the 003 lease were so substantially different in their terms and duration.

[86] Liability against the fifth defendant has not been established.

#### **Result**

[87] As mentioned before I am uncertain as to whether counsel expected the opportunity to be heard further on the issue of damages once issues as to liability had been determined. This was either by way of a further hearing or by filing further submissions.



[88] Leave is therefore granted to file further submissions on the damages issue but that would necessarily be restricted to matters that remain undetermined. This applies to the claimant and the first and second defendants.

[89] I appreciate that I have not heard from counsel on the issue of costs. However, in the particular circumstances of this case I have reached a clear view.

[90] Costs in favour of the claimant are awarded against the first and second defendants on an indemnity basis, pursuant to rule 15.5(5) of the Civil Procedure Rules. In all other respects costs are to lie where they fall.

Dated at Dunedin, New Zealand this 10<sup>th</sup> day of March 2011

  
J E Macdonald  
Judge



The seal of the Supreme Court of Vanuatu is circular. It features a central emblem with a scale of justice and a book. The text around the emblem includes 'REPUBLIC OF VANUATU' at the top, 'COUR SUPREME' in the middle, and 'REPUBLIC OF VANUATU' at the bottom. There is also a small star on the right side of the seal.