

(Civil Jurisdiction)

**BETWEEN: VANUATU COPRA AND COCOA
EXPORTERS (VCCE) Ltd. PO Box 213,
Luganville, Santo.**

Claimant

**AND: PETER COLMAR, Trustee of Valele Trust,
Luganville, Santo.**

Defendant.

Mr Justice Oliver A. Saksak

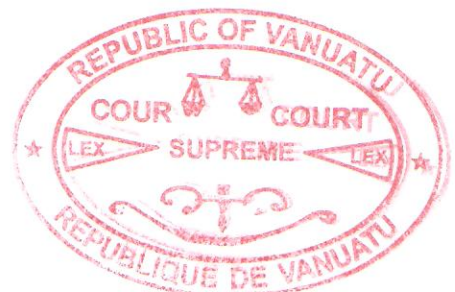
Mr James Tari for the Claimant
Mr Nigel Morrison for the Defendant

Dates of Hearing: 13 August 2012 and 23 October 2012.
Date of Judgment: 7 February 2013.

JUDGMENT

Background Facts

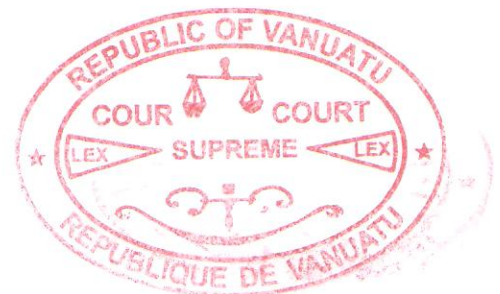
1. The Sheriff of the Supreme Court (the Sheriff) issued a Notice of Sale by Tender dated 19 October 2007 over Leasehold Title No. 03/0471/026 (the Title). On this Title stand two large Docks used by both the Claimant and Defendant for storage of copra and other marketable commodities such as cocoa and kava.
2. The Docks and Title was formerly owned by the Vanuatu Commodities Marketing Board (the VCMB). The Claimants had use of one Dock and Title under a rental arrangement since May 2003 until on or about 30 June 2006 when the VCMB consented to transfer the Title to the Valele Trust.



3. Prior to the transfer the defendant filed Civil Case No. 15 of 2004 against the VCMB for the sum of VT2 million on 18 April 2005. When the VCMB was unable to pay its debt, the defendant through an Enforcement Warrant (Non-Money Order) enforced by the Sheriff with authority to transfer possession and ownership of one of the two storage docks on the Title to the defendant.
4. On 30 June 2006 the VCMB consented to surrender the Title and for a new urban commercial lease to be created and transferred to Valele Trust. On 21 September 2006 the Minister (Maxime Carlot Korman) gave consent to surrender and transfer. The new Title created and transferred was 03/0H71/.... but no final number was allocated.
5. Subsequent to that arrangement the Defendant took steps on 19 December 2005 to forcibly evict the Claimants and seizing the dock and all the Claimant's goods and chattels on the premises. This gave rise to the Claimants filing of Civil Case No. 7 of 2006.
6. Under those circumstances the transfer has not been effected. Both the Claimants and Defendant have continued to use and occupy the two separate docks on the Title.
7. After the Sheriff had advertised the sale by tender, the Claimant had put in their bid for the Title for the sum of VT8 Million and were successful. On 10th March 2008, the whole Title was registered in favour of the Claimant. They have paid all lawful charges over the said Title. They have served a notice to quit the property but the defendant has not vacated.

Claims of the Claimants

8. On 19 May 2009, the Claimant filed proceedings against the defendant seeking orders for –
 - (a) Eviction within 14 days;
 - (b) Mesne Profits of VT1,500,000; and
 - (c) Costs.



9. On 13 August 2012, they abandoned their claims for Mesne Profits.

Defence and Counter-Claims

10. The defendants filed a defence separately denying that the Claimants are entitled to the whole Title. They also filed a Counter-Claim on 15 July 2009 claiming that pursuant to a Warrant of Enforcement executed first in time, they are entitled to the other dock and part of the Title. The defendant seeks the following reliefs –

- (a) An order for rectification of the Title or in the alternative;
- (b) Damages to be assessed;
- (c) Interests on damages; and
- (d) Costs.

Evidence

11.1. A. **By Claimant**

The Claimant relied on the oral evidence and sworn statements of Sethy Luwi William dated 28 August 2009 (Exhibit C1); 12 March 2012 (Exhibit C2) and 14 March 2012 (Exhibit C3).

11.2. B. **By the Defendant**

The Defendant gave oral evidence and also relied on the evidence by sworn statement dated 23 November 2009 (Exhibit D3); Advices of Registration of Dealing (Exhibit D2 and Exhibit D3). The defendant also adduced oral evidence from the Sheriff of the Court in relation to the execution of the Enforcement Warrants and the Notice of Sale by Tender and Sale of the Title. This evidence was received at Court in Port Vila on 23 October 2012.

Submissions



- 12.1. Mr Tari filed written submissions on 13 August 2012 setting out the chronology of events occurring from 18 July 2005 through to 19 May 2009 and facts, the three issues to be determined and the relevant law.
- 12.2. Mr Morrison filed written submissions in response on 13 November 2012 basically contending that based on the impartial evidence by the Sheriff, the sale made at the price of VT8 Million was in relation only to half of the property on the Title. He further contended that the Claimant was knowingly deceptive in proceeding to register the whole Title in their name in 2008.

Discussions and Considerations

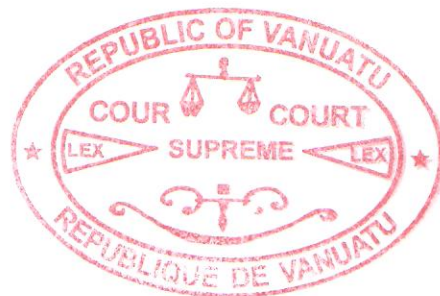
- 13.1. The Court now considers the issue raised by the Claimants in their written submissions in the following manner –
- (a) Whether the Claimant had an interest to acquire the Title prior to 15 November 2007 when they bided for the tender in Civil Case No. 26 of 2004?

The Claimant acknowledges and accepts in their submissions that the answer to this issue is in the negative. The Court endorses that view. However at paragraph 7, the Claimant submit and emphasized by underlining as follows –

"It is finally submitted that the Claimant has acquired its leasehold interests in land lease title 03/OH71/026 lawfully. The Court therefore must order the defendant to vacate the property immediately."

With respect to the Claimant and their Counsel, this is not the answer to the issue raised. It is inconsistent and the Court rejects it in relation to the first issue raised.

- (b) Whether the terms of the Enforcement Warrant can be enforced after 30 November 2005?



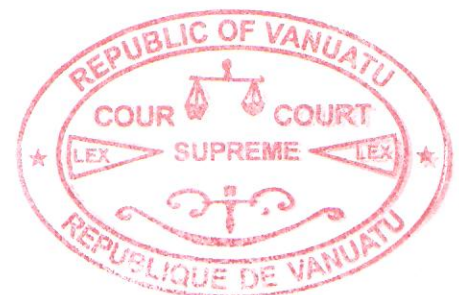
13.2. This is an appealable issue for the Court of Appeal. This Court is not exercising an appellate jurisdiction. In Civil Case no. 15 of 2004, the defendant was the Claimant and the defendants were the VCMB and its officers. The Claimant in this case was not a party to that proceeding. Therefore, it appears that they have no standing to raise this issue. That was a matter for the defendants in that case. They did not raise any objection to the enforcement being done after its expiry date. Neither did they appeal. But the clear evidence of the defendant is that the VCMB conceded liability of their debts and undertook to surrender the Title to be subdivided and consented to transfer part of the Title to the defendant in full settlement of their debts. (See Exhibit D3 – Annexure “PC 17”). For those reasons the Court will not answer this issue.

13.3. Section 100 of the Land Leases Act provides –

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

2. The register shall not be rectified so as to effect 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.”

13.3.1. The defendant did not seek leave at any stage by the proceeding to join the Government or the State as a defendant to his Counter-Claim. So that is a difficulty for the defendant.



13.3.2. The defendant pleads full knowledge on the part of the Claimant under paragraph 7 of the Counter-Claims. That is enough to qualify the claim for fraud under section 100 of the Land Leases Act.

13.3.3. There arises some sub-issues to be determined –

(a) The first is whether the acquisition of the Title by the Claimants by successful bidding is lawful? The evidence of the Sheriff is clear that he was seeking only the other half of the title and one dock which was not granted to the defendant in settlement of his debt.

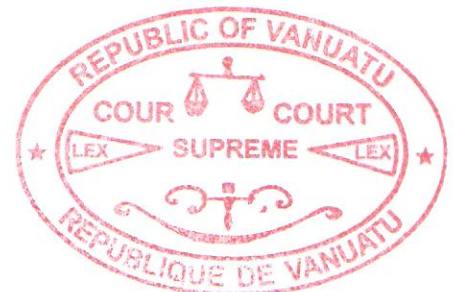
(b) Secondly, whether consideration made was valuable?

The evidence of the Sheriff is that he advertised for sale of part of the Title and that it was to be sold for bids above VT15 Million. It was sold to the Claimant who bid for only VT8 Million. Clearly VT8 Million was valuable consideration but only for one part of the property and Title, not for the Whole Title. All these were within the knowledge of the Claimant. However, when they permitted registration of the whole Title in their favour, the Government and its servants and agents were mistaken to allow such registration. But the Claimant with clear knowledge that the whole property and Title was worth more than VT8 Million and by allowing its registration and transfer into their name, they were dishonest. As such, they were guilty of fraud and therefore their acquisition was not lawful.

13.4. Under those circumstances, the Court accepts the defendant's submissions in relation to his Counter-Claims. He is therefore successful on his Counter-Claims and is entitled to the orders he seeks.

Conclusion

14. The Court concludes that –



- (a) In relation to the Claimant's claims, they are unsuccessful and are hereby dismissed.
- (b) In relation to the Counter-Claim the Court gives judgment in favour of the defendant and orders that –
- (1) The registration made to VCCE Ltd, the Claimant on 10 March 2008 be hereby vacated.
 - (2) Both Parties be hereby required to expeditiously assist the Lands Department to complete registration of two (2) new separate titles in place of Title 03/OH71/026.
 - (3) On completion of registration of the said two titles, one to be for the benefit of the Claimants and the other to be for the benefit of the Defendant.
 - (4) The Parties shall gain the titles over those portions of Title 03/OH71/026 that they were occupying and using in 2005.
 - (5) Each Party shall bear their own costs.

DATED at Luganville this 7th day of February 2013.

BY THE COURT


OLIVER A. SAKSAK

Judge

