

**IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU**

*(Civil Jurisdiction)*

**Civil Case No. 32 of 2014**

**BETWEEN: BESSIE LOPE**  
*Claimant*

**AND: EST OF LATE MACLEAN LOPEZ by its Administrators  
Kaye Lopez, Clino Lopez and Zimaco Lawac**  
*First Defendants*

**AND: THE REPUBLIC OF VANUATU**  
*Second Defendant*

**Hearing: 7 August 2014**

**Further Evidence: 14 August 2014**

**Submissions: 8 August, 30 September, 9 and 21 October 2014**

**Judgment: 25 November 2014**

**Before: Justice Stephen Harrop**

**Appearances: Evelyne Robert for the Claimant**

**Marisane Vire for the First Defendant**

**Christine Lahua and Hardison Tabi (SLO) for the Second Defendant**

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**RESERVED JUDGMENT OF JUSTICE SM HARROP**

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**Introduction**

1. On 23 September 1986 a residential lease, 03/OI82/002 (“the lease”), was registered over land at Luganville, Santo. It was a 50-year lease, from 30 July 1980. The lessor was the Luganville Urban Land Corporation and the lessees were John and Bessie Lope.
2. On 27 February 2008, the Minister of Lands consented to the transfer of the lease from the Lopes to their son Maclean at the minimum inter-family value of Vt 500,000.
3. On 5 December 2008, John Lope died but no transfer of the lease to Maclean had by then occurred. On John’s death his interest vested in Bessie as the surviving proprietor by virtue of s.75 of the Land Leases Act [Cap163] (the Act”) but no documentary proof of this was

provided to the Director of Lands, Survey and Records (“the Director”). Accordingly no transmission to Bessie as surviving proprietor was registered.

4. On 13 October 2010, an application for registration of the transfer of the lease was lodged with Lands, Survey and Records (“the department”) for consideration and approval. The registration fee of Vt 25,000 was paid, apparently by Maclean.
5. No transfer document was however signed by Bessie until 26 April 2011. On that day when she was being driven by Maclean and his wife Kaye to the airport on her way back to Maewo, they stopped at the Luganville office of the department. Bessie, who is illiterate, was asked by Maclean to affix her thumb print as transferor. She did so and that was witnessed by Gorden Willie, a lands officer with the department. Maclean also signed as transferee and his signature was also witnessed by Mr Willie.
6. The transfer was registered on 12 May 2011.
7. On 8 December 2012, Maclean died and the administration of his estate was granted on 8 May 2013 to his widow Kaye Lopez (“Kaye”), Clino Lopez and Zimaco Lawac.
8. Later in 2013, for reasons which are of no relevance to this case, Zimaco Lawac was removed as an administrator.
9. On 20 May 2014, Bessie filed this claim alleging that the registration of the transfer was obtained by Maclean by fraud, based on undue influence. She also invokes the doctrine of non est factum. Bessie claims in the alternative that the registration of the transfer occurred through mistake because there was no evidence before the Director to show that John was deceased. That meant the Director had no power to register a transfer signed only by Bessie. Further, there were alterations to the transfer document which were initialed by Maclean but not by Bessie. She seeks relief under section 100 of the Act by way of an order for rectification of the register by directing cancellation of the registration of the transfer.

10. The administrators of Maclean's estate deny that there was any fraud or other irregularity. Kaye, who was present at the time Bessie signed the transfer, says that Bessie knew what she was signing and intended to transfer the lease to Maclean. They say there has been no relevant mistake because it was well known to all involved, including the department staff at Luganville, that John had passed away long before the transfer was signed on 26 April 2011. They say the uninitiated alterations are immaterial.
11. The Republic says that the department's officers acted in good faith at all times and are protected by sections 9 and 24 of the Act from any liability, not that there is a claim for damages against the Republic. It abides the orders of the Court except as to costs.

### **Issues**

12. The issues I need to determine are :
  - (a) Is the registration of the transfer liable to cancellation because Bessie's "*signature*" was obtained by fraud on the part of Maclean in that he dishonestly, through undue influence over his mother, obtained the benefit of the lease?
  - (b) If not, does the non est factum principle apply to relieve Bessie of responsibility for the transfer she signed?
  - (c) Was the transfer registered by mistake because the Director had no proof of the death of one of the proprietors, John Lope and/or because Bessie did not assent to alterations to the transfer by initialing them?
13. In relation to the first issue, counsel agree that given the relationship of mother and son between Bessie and Maclean, from which arises a presumption of undue influence, the onus is on Maclean's estate, which ultimately acquired the benefit of the lease, to prove that the transaction was free of undue influence. The estate must satisfy the Court that in signing the transfer Bessie was acting of her own free will and independently of any influence from Maclean, with full appreciation of what she was doing.
14. In these circumstances, I see no need to consider the alternative ground of non est factum, in respect of which the onus of proof lies on Bessie. If the estate can prove that Bessie was not

under Maclean's influence and therefore the victim of fraud, then in my view she has no prospect of proving that she was not careless in signing the document, that being an essential matter she would need to prove to establish non est factum. If however the estate cannot discharge its burden on undue influence then Bessie will have succeeded in establishing fraud on her primary ground and does not need a further basis for cancellation of registration of the lease.

15. Accordingly, the allegation that the transfer was obtained by fraud depends solely on whether the estate can prove on the balance of probabilities that Bessie signed the transfer free of undue influence from MacLean.
16. Rather than recount all the evidence given by the witnesses (Bessie, Kaye, the Director Jean-Marc Pierre and Gordon Willie) I will refer to aspects of the evidence which are relevant to the issues in the course of discussing the submissions.

### **Undue Influence?**

17. In her closing submissions for the estate Mrs Vire addressed what generally constitutes fraud and noted that one definition is obtaining a material advantage by unfair or wrongful means. The usual way of proving the latter is by proof of a false representation made knowingly, without belief in its truth or recklessly as to whether it is true or not. Applying these principles (which I accept are in themselves correct) to the evidence here she submitted there was no evidence that Maclean's conduct conveyed a false or wrong impression or deceived Bessie into signing the transfer.
18. This initial submission however overlooks the basis on which this part of the case is advanced by Bessie, namely undue influence. Here, as counsel have agreed, the nature of the relationship between the parties gives rise to a *presumption* of undue influence. Indeed Mrs Vire acknowledges this later in her submissions and refers to one of the leading English cases, *Allcard v. Skinner* (1887) 36 Ch. D. 145. Because there is no dispute about this, I will not explore the relevant history of the equitable doctrine in any detail. I do note however that the usual way in which a presumption arises as between parent and child is where the child

has made a gift to the parent; it is based on the likely inexperience of the child. Here it is the other way around. But there is no doubt that the relationship between MacLean as adult donee and his elderly illiterate mother as donor qualifies, so Mrs Vire's concession that the presumption applies was rightly made. The context of Bessie having transferred her only substantial asset only serves to reinforce this. As between the two, it was MacLean who was in the position of strength and worldliness; Bessie was susceptible to his influence.

19. The doctrine is in any event not confined to particular categories of relationship. In *Johnson v Buttress* (1936) 56 CLR at 134-5 Sir Owen Dixon observed:

*'...the doctrine which throws upon the recipient the burden of justifying the transaction is confined to no fixed category. It applies whenever one party occupies or assumes towards another a position naturally involving an ascendancy or influence over that other, or dependence or trust on his part.'*

20. Both Mrs Vire and Ms Robert referred to the Privy Council judgment in *Inche Noriah binte Mohamed Tahir v. Shaik Allie bin Omar bin Abdullah Bahashuan* [1929] AC 6. This confirms that where a special relationship exists and there has been a gift, it is the donee who must rebut the presumption of undue influence. The Privy Council applied the *Allcard v. Skinner* principle and held that an illiterate elderly Malay widow who had made a gift of almost all of her property to her nephew by marriage was entitled to have the deed of gift set aside. It was held that the nephew had to prove that the gift was a spontaneous act of the donor acting under circumstances which enabled her to exercise an independent will. The Court held that independent legal advice was not the only way in which the presumption of undue influence might be rebutted, but it was one way. There, even though the widow had received independent advice from a solicitor, he did not know at that time that her gift comprised almost all of her property, nor did he advise her that she could equally well have benefited her nephew by will.

21. What is required for rebuttal of the presumption? The estate must satisfy the Court that in signing the transfer Bessie was acting of her own free will and independently of any influence from Maclean, with full appreciation of what she was doing. See *Equity, Doctrines and Remedies* by Meagher, Gummow and Lehane (Butterworths, Australia, 3<sup>rd</sup> edition, 1992)

at [1525] where it is said that it is: “*not sufficient to show that the weaker party understood what he was doing or the significance thereof. What has to be shown is that the formation of his intention was free from the influence of the other party, and that he was at the time of the gift “emancipated” from that influence. The circumstances of the case thus will require close examination; the stronger party may rebut the presumption in any manner open to him on such circumstances. But in many cases the courts have placed particular reliance upon the presence or absence of improvidence and independent advice...The size of the gift...is important.*”

22. The authorities generally involve gifts. Here on the face of the transfer this was not a gift as it records consideration of VT500,000 having been paid by MacLean., receipt of which was acknowledged by Bessie. Bessie denies ever receiving from MacLean such a sum, or any sum, in connection with the signing of the transfer, or otherwise. The estate has not provided any evidence of such a payment having been made. Kaye did not refer to any knowledge of such a payment or to any discussion about money on the day in question. It is a substantial sum and if it was paid it would surely have been possible for the estate to provide documentary proof of it. In view of her denial of payment, I do not accept that the signing of the document alone by the illiterate Bessie can be treated as proof of payment. I therefore proceed on the basis that the transfer of the lease was effectively a gift to MacLean.
23. This is not a case where Bessie needs to prove that MacLean made a false representation or otherwise deceived her. Rather the administrators of his estate need to prove that Bessie not only knew what she was doing but also that she acted independently, of her own free will and without any of the influence from MacLean which it is presumed was operative.
24. It can be seen that, on the undisputed facts coupled with my finding this was a gift, the estate has a difficult task, even though the standard of proof is only on the balance of probabilities. This is because Bessie is illiterate, she gave away her only significant asset to one of her seven children rather than sharing it between them, she had no advice, let alone legal advice, about the prudence (or lack of it) and effect of signing the transfer, and there was no time given to her to reflect on the matter. In short there is a significant power imbalance in favour

of the party who stood to gain, an improvident and substantial gift and no independent advice.

25. In addition, though the estate disputes it, Bessie says on oath that she did not know what she was signing, but did so because she trusted MacLean.
26. The estate faces the further difficulty that its primary witness, MacLean, has since died. Even though Kaye was present during the journey to the lands office and at the time of signing, she is self-evidently not in as good a position as MacLean would have been to respond to the claim of undue influence.
27. There are however a number of reasons why Mrs Vire submits that the administrators of the estate have discharged the onus which rests on them. I will deal with these under the sub headings employed by Mrs Vire in her submissions.

Statement from MacLean to the claimant

28. Kaye said that MacLean had announced in the course of the journey to the airport words to the effect of: "We will go to the Lands Department for you to sign the documents concerning the land". Accepting for present purposes that MacLean did make that statement, even though Bessie denied that she knew where they were going, this certainly does not amount to an explanation, let alone independent advice, as to the meaning and effect of the document she was going to be asked to sign. There was no suggestion from Kaye that that sort of advice was proffered by MacLean.
29. In referring to MacLean's statement Mrs Vire noted that Kaye had said in evidence that Bessie had told her she was getting old and that it was right to give the land to MacLean. This was absolutely denied by Bessie who, although appearing relatively frail while giving evidence, was very firm on a number of key points including this one. It also seems a surprising statement for Bessie to have made because, as Ms Robert points out, there is no suggestion from anyone else that Bessie intended to deprive the rest of her children of any inheritance from either her or effectively from their father since she was the beneficiary of

their only joint asset of significance. Ms Robert notes that the only evidence supporting the intention of Bessie to transfer the property to MacLean comes from his widow who as a primary beneficiary of his estate stands to benefit from the Court dismissing this claim. I do not find myself in a position to reject Kaye's evidence as being given on such a self-serving basis but I do accept the weight to be given to it must be limited in light of the position of the person giving that evidence. When I weigh that up against Bessie's adamant denial of saying any such thing and of the objective unlikelihood of her choosing only one of her seven children to benefit from the property, I do not place much weight on Kaye's evidence that Bessie made the statement.

#### Attendance at Lands Department

30. Mrs Vire submits that the attendance at the Lands Department where Bessie was quite happy to affix her thumb print when requested and did so without any questions either to MacLean to Kaye or to Mr Willie, confirms that she knew what was happening.
  
31. I do not accept this submission. There is no suggestion that there was any explanation prior to arrival at the Department, or while there, of the nature and effect of the document Bessie was going to sign. In those circumstances the absence of any discussion about its meaning or any checking by Mr Willie with Bessie as to her understanding of the meaning, means that I have no reason to reject Bessie's evidence that she simply did not understand what she was being asked to do. There is no dispute that Bessie is illiterate and relatively unworldly. In those circumstances, she needed a far more detailed and step-by-step explanation of what was being done than she received. I am entirely satisfied based on the evidence as to what happened, or more accurately did not happen, at the department, that Bessie simply did as MacLean asked her and trusted him to be asking her to do something appropriate, but she did not understand what she was actually doing. Both Kaye and Mr Willie may well have believed that she did but I find that she did not know what she was signing, as she was adamant to say in her evidence.

#### The claimant's actions confirm she did act independently



32. Mrs Vire makes the point that if Bessie had been acting under the influence of MacLean and in ignorance of what she was signing, then after she found out what MacLean had done, she would surely with the assistance of her other five surviving children have done something about it but prior to filing this claim, nothing was done. Bessie accepted this in cross-examination but said she had been waiting for MacLean to come to speak with her about the land but he did not do so before he died suddenly. Mrs Vire points out that was no reason for MacLean to speak to her about the land because she had agreed to transfer it to him. She also highlights that it is suspicious that no issue was taken with the transfer while MacLean was alive.
33. On this issue I accept Ms Robert's submission that as a Melanesian woman and a mother, Bessie wanted to be approached by her own son to explain himself. Her first reaction was not to go to Court, or even other family members, to solve an issue that went to her son's dishonesty and depriving her of her only asset of value. In any event, I do not find the evidence on this issue particularly informative on the question of whether Bessie knew at the time she signed the transfer what she was signing. Her conduct and that of MacLean afterwards is ambiguous in relation to that issue. However I am inclined to accept Ms Robert's submission about the cultural effect on a Melanesian woman and mother living on a different island of waiting for her son to see her. That does not strike me as odd at all.

Consent obtained by the Minister pursuant to section 38 of the Land Leases Act dated 27 February 2008

34. Mrs Vire points out that back in 2008 appropriate applications must have been made to the Minister for the grant of consent to a transfer by John and Bessie to MacLean. She submits it follows that Bessie must have intended in 2008 to dispose of the property to MacLean. It was based on that consent that the registration was ultimately effected in 2011. Accordingly Mrs Vire submits that Bessie knew from long before the signing of the transfer in 2011 that this was simply a completing a transaction to which she had already long ago agreed.
35. On the face of it this is a compelling argument but the problem is that Bessie denied ever intending to dispose of the land to MacLean. There was no evidence that she had any

involvement in making an application to the Minister for consent. In fact, as Ms Robert emphasises, Bessie had long been separated from John who had left her for a younger woman many years before. There is no evidence that Bessie did anything in 2008 or at any other time to advance the transfer of the land to MacLean. Further, as Ms Robert submits, the consent document itself does not show the intentions of the lessees but rather is simply the formal consent of the lessor to a particular transaction. As Ms Robert also points out, it was not put to Bessie that she and John had lodged the application for consent. In summary, I do not consider that the fact of the Minister's 2008 consent assists the estate's case.

36. Mrs Vire also relies on the transfer which was annexed as exhibit KL4 to Kaye's sworn statement of 30 May 2014. This document purports to be signed, although not witnessed, by John and by Bessie affixing her thumb print. There are also thumbprints next to John's initials on five alternations to the document, which is dated 2008. Kaye said that the transaction was intended at that stage but was not finalized because they were waiting for the Minister's consent. Mrs Vire points out that although there was some debate about the dates, Bessie confirmed she was staying with MacLean at Santo for a week in 2008. Accordingly, regardless of her separation from John, there was time they may have spent together working on the intended transfer. Mrs Vire describes it as "amazing" that Bessie can remember her whereabouts clearly in 2008, referring to trip to Australia, but claims that she can only count from numbers one to ten but cannot identify them when written.
37. Bessie however absolutely denied that the thumbprints on the 2008 transfer were hers. She also said that she was in Australia from December 2011 until March 2008 and accordingly cannot have signed this document in 2008 because the Minister's consent on which the parties were apparently waiting was signed in February 2008.
38. Ms Robert also points out that there was in any event no witness to either John's apparent signature or the placing of the thumbprints by Bessie. In rejecting the suggestion she had signed that document Bessie again emphasized that she had had nothing to do with John for a long time before that.

39. Ms Robert also points out that even if Bessie contrary to her evidence is found to have signed the 2008 document, that does not mean that she knew what she was doing in 2011 when signing the transfer.

40. I am not at all satisfied that the estate has proved that Bessie did sign the 2008 transfer. She adamantly denied having done so. Even if her recollection is wrong, there is no indication that any explanation was provided to her as to what *that* document meant. Furthermore, I accept Ms Robert's submission that even if, despite Bessie's denial, at that time there were an intention to transfer land to MacLean, it does not necessarily follow that she was of the same mind in 2011. I note there was no evidence from Kaye to suggest that MacLean explained to Bessie in 2011 that what she was being asked to sign was linked to a document she had already signed in 2008.

#### Motive

41. Mrs Vire submits there is a clear motive for Bessie to initiate this case so as to have the property removed from MacLean's estate. No doubt that is true but so is there a motive, indeed arguably a greater one, for the estate to dispute the claim to try to retain for one child's family an asset which the whole family, including the estate, ought to share. I do not find the suggestions of motive of any persuasive weight one way or the other.

42. Under this heading Mrs Vire referred to a statement which Bessie had made supporting an unsuccessful probate application by her daughter Juliette Tischenko. I do not accept that Bessie's statement in that proceeding is indicative of anything of significance to the present one. I understand from the hearing and from Mrs Vire's submissions that Kaye rather feels like the other children are "ganging up on her" and using Bessie's claim as means of getting back what they regard as their rightful inheritance. It may be that there is some family pressure on Bessie in that regard but in the end, she - not her family- has gone to the trouble not only of instituting Court proceedings but also of giving evidence in support despite being relatively elderly, frail and not at all comfortable in the Court environment. Despite that she was in my view clear on the key points. By giving evidence she opened herself up to cross-examination but was unshaken on the key points. Frankly, I think it unlikely that Bessie

would have gone to all this trouble if she knew that she had in truth voluntarily and knowingly transferred the lease to MacLean; her conduct in relation to the claim is far more consistent with the contrary view.

43. Mrs Vire asked Bessie whether she would still be happy for MacLean to be living on the property if he was still alive and the answer was yes. Bessie also said that she had wanted to sort the matter out without Court proceedings and to obtain some rent from one of the buildings but Kaye had refused. Had that not happened, then the parties would not have been in Court.

44. Mrs Vire seeks to use this evidence as the foundation for her submission that the reason for the Court proceedings is not because of any fraud by MacLean but because of the dissatisfaction on the part of Bessie and the rest of the family about their being deprived of the land now that MacLean has passed on. In short this she submits is a personal dispute and a family matter but not a fraud case.

45. I do not accept that the evidence referred to justifies what Mrs Vire seeks to make of it. In my view Bessie's evidence is consistent with a natural willingness to try to resolve issues without Court proceedings but her efforts in that regard were not successful. I am not at all satisfied that Bessie's claim can be dismissed as having been made for the ulterior motive ascribed to her.

### **Conclusion on undue influence**

46. In the end, I am not satisfied either individually or collectively by the evidence and submissions put forward by the estate that Bessie both knew the nature and effect of the document she was signing in 2011 *and* that when she signed the document she was entirely free of any influence from MacLean. On the contrary I find it more likely that her evidence is correct when she said she did not know what she was signing. But even if she did, there is no doubt that MacLean's influence, especially given that he accompanied her at the signing, remained a factor and she was certainly not free from it.

47. I return to the points I noted at paragraph 24 above. This was a situation where an elderly illiterate woman gave away her only significant asset to one only of her seven children. She had no advice about the meaning and effect of the document she was signing, let alone legal or independent advice. Nor was she given any time to reflect on the matter.
48. I am not satisfied that the evidence and submissions put forward by the estate overcome the compelling presumption of undue influence in these circumstances.
49. I therefore conclude that the signing of the transfer was obtained by fraud and that the claim based on the first cause of action must be upheld. It follows that I make an order pursuant to section 100 of the Act rectifying the register by directing cancelation of the transfer which was registered on or about 26 April 2011 from John and Bessie to MacLean.

**Was the registration also obtained by mistake?**

50. Although not necessary to my decision, I am also satisfied that the registration of the transfer was obtained by mistake for at least the first of the reasons advanced by Bessie. Because it is not essential to my decision I will provide only brief reasons. The transfer was registered without the department having any documentation confirming that John had died and entitling Bessie as survivor to sign the transfer alone. I accept without hesitation that it was well known in Luganville that John had died in 2008 so I can understand that Mr Willie, for himself, did not require any proof. However, the land registry is a very important repository of rights, and of transfers of rights, and it is essential that changes in those rights such as are reflected by a transfer must be properly documented and processed. Informal understandings, no matter how pragmatic, simply will not do. The Director himself, in answer to a question from me, was absolutely clear that he would not have registered the transfer without proof of John's death and that it was a mistake for the department to have done so. That evidence was unchallenged and no doubt correct.

51. Here, the department records showed that the lease was jointly owned by John and Bessie. In the absence of proof of death of one of them, it was a mistake to register the transfer of the lease which was signed by only one of them.
52. Mrs Vire correctly pointed out that the Court of Appeal authorities in *Roqara & Ors. v. Noel Takau & Ors.* [2005] VUCA 5 and *Naflak Teufi v. Kalsakau* [2005] VUCA 15 emphasise that section 100 imposes a causal requirement: the claimed mistake must lead to or cause the impugned registration to be made.
53. This causal requirement is established on the evidence here because there would have been no registration of this transfer had the mistake not been made. It is clear from the Director's own evidence that if this application had come across his desk he would have refused to register it because there was no proof that only one of the transferors was entitled to transfer it. Either the document had to be signed by both of them or there needed to proof that one had died. Neither requirement was met. Accordingly, the error lay in MacLean's not providing proof of John's death with the transfer or in Mr Willie's not insisting that he did so; this led directly to the impugned registration. The registration ought not to have been made without this; in short it was a mistake for the department in these circumstances to have completed the registration.
54. Finally, there were alterations made to the transfer which were initialed by MacLean but not by the application of Bessie's thumb print. These related to the deletion of paragraphs 4 (b), 5 (c), 6 (d) and the first and second schedules of the transfer. The deleted paragraphs related to the rights and easements set out in the second schedule being included in the transfer and the provision for the value of the interest transferred to be declared was also omitted.
55. I accept that these changes do not directly affect the essential bargain recorded in the transfer. Given that there were no rights and easements set out in the second schedule the deletion of clause 4 (b) can have had no effect. Also it appears to me that the declaration as to the value of the interest transferred is not essential to the essence of the transaction. It is most unlikely that, if the transfer had been willingly and knowingly signed by Bessie, she would have had any difficulty in initialing those alterations. I would therefore not be prepared in isolation to

determine that the transfer was registered by mistake on this basis alone, particularly bearing in mind the causal requirement emphasised by the Court of Appeal authorities.

56. In passing though, I see that in the notes to the transfer there is express reference to alterations in the following terms: *“Do not rub out or write over any words, if you have made a mistake draw one line through it (so that it can still be read) and write on type clearly above it the new words. Everyone who signs the instrument should also sign again at the side near to the alteration.”*

57. This is not merely good advice but reflects, as Ms Roberts submits, the importance of complete accuracy in documents being filed at the Land Registry and of the Torrens system itself. Leaving aside the relative insignificance of the alterations in this case, the fact remains that on the face of the transfer Bessie agreed to a different bargain from what MacLean did. Either the alterations were present when she signed by affixing her thumbprint, in which case she has not agreed to the alterations to the document she signed on one of the latter pages *or* the document was changed after she had signed it, in which case again it does not indicate her assent to the transfer on the terms as they appear in the altered document.

58. In these circumstances, the document ought not to have been accepted for registration by the Department. Mr Willie, who witnessed Bessie’s and MacLean’s signatures should have ensured that all alterations were initialed by both of them. When the document arrived at the Land Records Office for registration that should have been declined until the problem was rectified.

### **Summary and Conclusions**

59. I uphold Bessie’s claim both on the ground of fraud by way of undue influence and on the alternative ground of mistake relating to the absence of proof of John’s death.

60. I make an order pursuant to section 100 of the Act rectifying the register by cancelling the transfer from Bessie and John to MacLean which was registered on 12 May 2011. Ms Robert is to file a draft order for signing.

61. Bessie is entitled to costs against the first defendant on a standard basis which may be fixed if they cannot be agreed.
62. Given the contribution to the improper registration which the Department made, the Republic must bear its own costs in this proceeding. If Bessie seeks costs from the Republic, and it is not possible to settle these, she may file a memorandum by 23 January. I note though that the primary ground for rectification was fraud by undue influence, for which the Republic was in no way responsible.
63. I reiterate that I was not called on to make any finding as to whether the actions of the department's officers were carried out in good faith or otherwise. I expressly decline to do so. The assertion was made by the Republic in its statement of defence that they acted in good faith but ultimately it properly abided the decision of the Court because Bessie did not seek relief against the Republic on that basis: she only sued the Republic because it was necessary for her to do so in order to obtain the rectification relief she sought.
64. I express the hope that the Lope family members will be mature and responsible enough to ensure that the unpleasantness associated with this case does not ultimately affect the relationship between them. This judgment effectively puts Bessie back in the position she was in between John's death on 5 December 2008 and the registration of the transfer on 12 May 2011. She is the sole lessee and it is entirely up to her, after such consultation as she thinks fit with her family - including the administrators of MacLean's estate - to decide who is to benefit from the lease, which runs to 30 July 2030.
65. Finally, I thank both Ms Robert and Mrs Vire for the quality of the presentation of their respective cases, in particular their closing submissions.

**BY THE COURT**