

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Civil Case No. 141 of 2009

BETWEEN: **FRANCO ZUCCHETTO**
Claimant

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

AND: **BLUE MIRAGE LIMITED**
Second Defendant

AND: **JOSHUA KALSAKAU**
Third Defendant

AND: **BLUE QUEST LIMITED**
Fourth Defendant

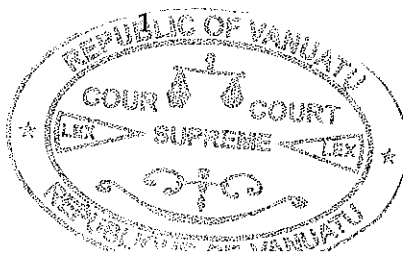
Coram: *Justice D. V. Fatiaki*

Counsel: *Felix Laumae for the Claimant
Christine Lahua for the First Defendant
John Malcolm for the Second Defendant
Joshua Kalsakau in person
Kiel Loughman for the Fourth Defendant*

Date of Judgment: 13 June 2014

JUDGMENT

1. In these proceedings the claimant seeks orders under **Section 100(1)** of the **Land Leases Act [CAP. 163]** ("*the LLA*") to rectify the Land Leases Register by cancelling the registration of leases in favour of **Blue Mirage Ltd** ("*Blue Mirage*") and **Blue Quest Ltd** ("*Blue Quest*"), and directing the Director of Lands, Survey and Records ("*the Director*") to register in their place an instrument of lease granted to the claimant by the Minister of Lands, **Hon. Maxime Carlot Korman** ("*Minister Korman*"), dated **12 September 2008** ("*the claimant's lease*"). In the alternative, the claimant seeks damages against the Republic for breach of the terms of the claimant's lease.
2. The background facts are not in dispute, though not all of them are recognized in the claimant's Further Amended Statement of Claim No. 2.
3. The land the subject of the competing leases and this dispute overlooks the Port Vila waterfront and is commonly referred to as the "*Ex Marina Motel*". Although the relevant lease number in respect of this land has changed from **11/OC24/015** ("*015*")

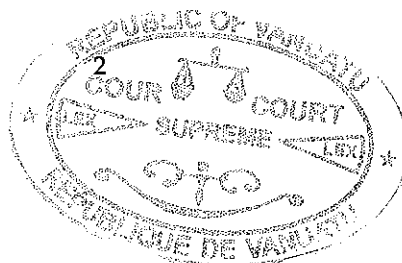


to **11/OC24/049** ("049") in the course of the transactions mentioned in the following summary, both leases cover the same land.

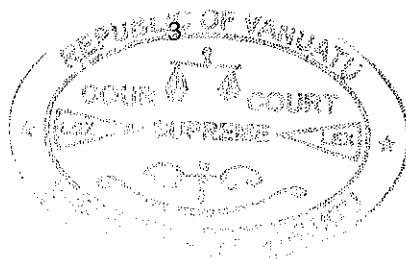
4. The history relevantly begins back in 1989.

- On 6 September 1989 – lease "015" was transferred by the then lessee to **Mr and Mrs Hamagushi** ("*Hamagushi*") as transferee. It is common ground that in the years prior to 2008 Hamagushi had let the ex-Marina Motel building fall into a serious state of disrepair;
- On 19 August 2008 – the then Minister of Lands issued a Notice before forfeiture containing the information required by **Section 45** of the LLA. The Notice specified non-payment of rent and a failure to insure. The Notice required the lessee to remedy the breach by 8 September 2008. There was no response to this notice by Hamagushi and the arrears of rent remained unpaid;
- On 10 September 2008 – a "*negotiator certificate*" was issued to the claimant under the **Land Reform Act** [CAP. 123];
- On 12 September 2008 – the claimant's lease was signed by Minister Korman and the claimant. The terms provided for a 75 year lease, the payment of a premium of **VT6,137,000** and an annual rent commencing at **VT167,000**;
- On 15 September 2008 – the claimant paid stamp duty of **VT126,140** and registration fees of **VT167,000**. The claimant's lease was lodged with the Department of Lands for registration;
- On 21 August 2009 – the Valuer-General in exercise of his powers under the LLA made a determination forfeiting lease "015" (see: **Section 43 (2)(b)** of the LLA);
- On 26 August 2009 – an application to forfeit the lease made by the Department of Lands was registered on the title.
- On 31 August 2009, a new lease "049" between the late **Hon. Iauko Harry Iaris** ("*Minister Iauko*"), the then Minister as lessor and **Joshua Kalsakau** and **Blue Mirage** as lessees ("*the 049 lessees*") was registered in respect of the ex-Marina Motel land;

5. Endorsements on the instrument of lease show it was prepared in the Department of Lands between 24th and 27th August 2009, and was approved by the Minister on 28th August 2009. The lease was for a term of 75 years on payment of a premium of **VT5,579,000** and an annual rent commencing at **VT153,000**. Stamp duty was paid on 31st August when application was made to register the lease;



- On 29 September 2009 – a transfer by **Joshua Kalsakau** of his interest in lease “049” to Blue Mirage was registered, and Blue Mirage became the sole registered lessee;
 - On 30 September 2009 – a deed of caution was lodged on title “049” by the Director pursuant to **Section 95** of the LLA. This section empowers the Director to take this course if it appears that an error has been made in the register or in any instrument, or to prevent any fraud or improper dealing;
 - On 14 October 2009 – on the application of the Acting Director of the Lands, Survey and Records, the caution was withdrawn;
 - On 29 October 2010 – an application for registration of a transfer of lease “049” was lodged. The transfer was from **Blue Mirage** to the fourth defendant, **Blue Quest Ltd** (“*Blue Quest*”). The transfer is dated 6 April 2010 and stamp duty was paid on 14 April 2010;
 - On 9 November 2010 – the transfer of lease “049” to **Blue Quest** was registered;
 - On 29 June 2011 – **Blue Quest** made an application to register a surrender of lease “049”. The application was lodged by **Daniel Agius**, and at the date of trial was yet to be registered.
6. The claimant contends that lease “015” to Hamagushi was forfeited pursuant to the Notice given on 19th August 2008 and that the leasehold interest reverted to the lessor at the expiration of the notice period, namely, on 8 September 2008. The Ex Marina Motel land is within the Municipality of Port Vila and as such is State (Public) land. The claimant contends that upon the forfeiture of the Hamagushi leasehold interest, the responsible Minister could lawfully lease the land to a new lessee, which he did to the claimant, at a proper commercial rate as to premium and annual rental.
7. The lease had been regularly stamped and lodged for registration. Under LLA **Section 27 (1)** that lease (if valid) had priority over later instruments of lease lodged thereafter for registration.
8. The claimant alleges that the registration of lease “049” was obtained “*by fraud*”. The evidence of the “*fraud*” is said to arise by implication from a combination of matters including:
- that lease “049” was lodged for registration well after lease “015”;
 - that the process of registration of lease “049” took place with unusual speed and at the direction of **Minister Iauko**;
 - that **Joshua Kalsakau** was a friend and fellow member of Parliament;

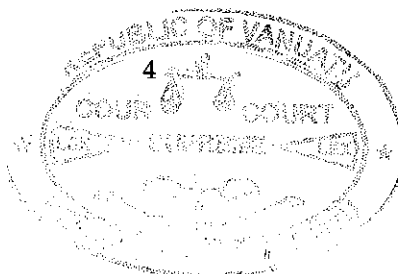


- that the premium and annual rental stated in lease "049" was less than that in lease "015" despite the fact that the lease was over prime land in the main street of Port Vila town; and
- that because no "negotiator certificate" had been issued to the "049 lessees" in advance of the grant of the lease.

9. The claimant pleads that the subsequent transfer of lease "049" first to **Blue Mirage** solely, and then to **Blue Quest** were deliberate fraudulent attempts by the "049 lessees" to defeat the claimant's rights under LLA **Section 100(1)**.
10. In the alternative, the claimant pleads that **Minister Iauko** issued lease "049" by mistake, and it was subsequently registered by mistake, as neither the Minister nor the Department of Lands realized that lease "015" had been granted by **Minister Korman** and had been lodged for registration ahead of lease "049".
11. The claimant further pleads that the Director's "caution" registered on 30th September 2009 occurred following:

"wide media publicity of irregularities/fraud involved in the issuance of the lease title 11/OC24/049 (ex marina motel) by the then Minister of Lands Hon. Harry Iauko to (Joseph Kalsakau) and (Blue Mirage) in the following Daily Post issues:- Issue No. 2738 of September 25, 2009."

12. The claimant goes on to plead that neither **Blue Mirage** nor **Blue Quest** are "bona fide purchasers for value" as Blue Mirage was a party to the fraud leading to the registration of lease "049" before the claimant's lease "015", and Blue Quest was aware through the media publicity, of the irregularities/fraud relating to the issuance of lease "049".
13. Finally, (as an alternative claim) the claimant contends that, at the very least, the claimant's lease instrument "015" is enforceable as a contract as recognized in LLA **Section 22(5)**, and in breach of that contract, the claimant has been deprived of his enjoyment of the Ex Marina Motel site. He quantifies his damages at **VT48,095,640**.
14. As the Ex Marina Motel is State Land, no party seeking to negotiate a lease over it from the Minister required a negotiator certificate. A "negotiator certificate" is only required under **Section 6** of the **Land Reform Act** [CAP. 123] when the land in question is held by "custom owners". Therefore the fact, that the claimant obtained a "negotiator certificate" (in error), and Blue Mirage and Mr Kalsakau did not, is not relevant to the issues in this case.
15. I agree with the submissions of counsel for the Republic that the first and central issue that should be determined is: whether the claimant's "015" lease granted by Minister Korman constituted an enforceable contract in the circumstances of this case?



16. It is common ground that Hamagushi had been the lawful lessees of the land from 1989. When the claimant expressed interest in acquiring the lease, he became aware of the existing leasehold interest of Hamagushi. He knew that he could not become a lessee whilst their lease subsisted and that their interest must first be forfeited. It can be assumed that the Minister was similarly aware.
17. When the Minister and the claimant entered into the claimant's lease, both wrongly believed that the leasehold interest of Hamagushi had been forfeited on 8 September 2008, and therefore the Minister could create a new leasehold interest in the claimant's favour. As a matter of law, both were mistaken in this respect.
18. **Sections 43 to 46** of the LLA deal with the forfeiture of leases. **Section 45** provides that no lessor shall be entitled to exercise a right of forfeiture for breach of any agreement or condition in the lease until the lessor has given notice specifying a breach, and given an opportunity to the defaulting lessee to remedy the breach within a reasonable time. The Notice given in this instance on 19th August 2008 meets the requirements of the section and required compliance by 8 September 2008. The lessee did not respond to the Notice or take steps to comply with the notified breaches.
19. The claimant's case proceeds on the basis that upon non-compliance with the Notice by the lessees, the Minister could thereupon, without more, forfeit the lease. However the LLA requires further steps. **Section 43** which enacts the lessor's right of forfeiture qualifies the exercise of that right in **subsection (2)** which provides:-

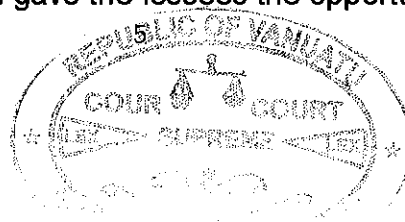
"(2) The right of forfeiture may be –

(a) exercised where neither the lessee nor any person claiming through or under him is in occupation of the land, by entering upon and remaining in possession of the land; or

(b) enforced by a reference to the Valuer-General"

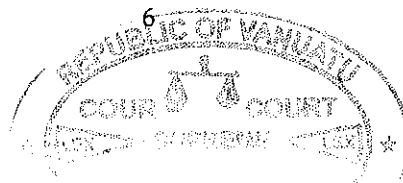
(my emphasis)

20. The process of forfeiture therefore requires first the preliminary notice under **Section 45**, and then, on non-compliance by the given date, action by the lessor under **Section 43 (2)(a) or (b)**.
21. In his final address counsel for the claimant sought to fall back on **Section 43 (2)(a)** but that section is not referred to in the pleadings and was not addressed in evidence. There is nothing in the evidence to suggest that the Republic through one of its officers "entered upon (the premises) and remained in possession of the land" at any stage, and certainly not in the critical period between 8th and 12th September 2008.
22. In my opinion after 8th September 2008, Hamagushi remained the lessee and continued as such until almost a year later when the **Valuer-General** by his determination on 21st August 2009 proceeded to enforce the forfeiture. It is to be noted that the **Valuer-General** gave the lessees the opportunity to be heard before he



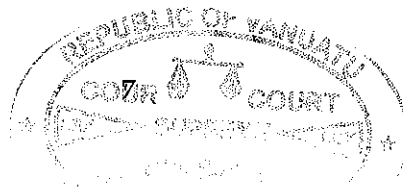
made his determination, and informed them of their right to seek relief against forfeiture under **LLA Section 46**. At no time has any action been taken by Hamagushi to oppose forfeiture.

23. As there was an existing unforfeited lease in force over the land on 12 September 2008 Minister Korman had no capacity to grant a lease to the claimant. The Republic contends that in consequence "*the contract (unregistered instrument) is void ab initio and therefore of no legal effect*". This conclusion is asserted without authority or legal reasoning.
24. Both Minister Korman and the claimant were plainly under a "*mutual mistake*" on 12 September 2008 that, as a matter of law, the leasehold interest of Hamagushi had been forfeited and the Minister could create a new lease in favour of the claimant over the land comprised in the forfeited lease.
25. The law has developed to the point where it no longer recognizes a distinction between a "*mistake of law*" and a "*mistake of fact*" as material when considering the legal effect of a "*mistake*" on the legal rights and liabilities of the mistaken parties. It is the "*mistake*" that is important: see **David Securities Pty Ltd v. Commonwealth Bank of Australia** [1992] 175 CLR 353. In this case I think the proper enquiry that must be made is as to the effect which the mistake had on the intended operation of the contract embodied in the terms of the claimant's lease.
26. The terms of the claimant's lease are silent as to the intended commencement date of the term. The relevant space in the printed document for this information to be entered is left blank. In the circumstances, the parties are to be presumed to have intended the lease to operate immediately, so that the claimant would gain an immediate right to possession and occupancy.
27. The mistake of the parties was as to their belief that this was legally possible. It was not. The Minister had no right to convey a leasehold title to the claimant at that time and the contract could never have been performed for that reason. The law therefore treats the agreement of the parties as of no effect. In this sense the lease is void.
28. Analogous situations were discussed by the Court of Appeal in **Cochrane v. Willis** [1865] 1 Ch App 58 and by Lord Atkin in the leading case of **Bell v. Lever Brothers Ltd** [1932] AC 161 at 218.
29. **Cochrane v. Willis** concerned a contract made between the parties concerning rights held by a life tenant on the mutually mistaken assumption that the life tenant was alive. Unbeknown to the parties to the contract, the life tenant was at that time dead. Knight-Bruce LJ observed: "*there was substantially an absence of consideration and substantially a mistake and it would be contrary to both equity and the common law to give effect to the agreement*". Turner LJ concurred and said that the contract was entered into on the assumption that the life tenant was alive and the agreement was only intended to take effect on that assumption.
30. In similar vein in discussing the effect of mistake as to the existence of the subject matter of a contract, Lord Atkin in **Bell v. Lever Brothers Ltd** said:-



*“Corresponding to mistake as to the existence of the subject-matter is mistake as to title in cases where, unknown to the parties, the buyer is already the owner of that which the seller purports to sell to him. The parties intended to effectuate a transfer of ownership: such a transfer is impossible: the stipulation is *naturali ratione inutilis*. This is the case of *Copper v. Phibbs* L. R. 2 H. L. 149, where A. agreed to take a lease of a fishery from B., though contrary to the belief of both parties at the time, A. was tenant for life of the fishery and B. appears to have had no title at all. To such a case Lord Westbury applied the principle that if parties contract under a mutual mistake and misapprehension as to their relative and respective rights the result is that the agreement is liable to be set aside as having proceeded upon a common mistake. Applied to the context the statement is only subject to the criticism that the agreement would appear to be void rather than voidable.”*


31. I therefore hold that the claimant's unregistered lease "015" on which he bases this claim is void and of no effect. It follows that both his claim for registration of his lease "015", and his alternative claim, for contractual damages brought in reliance on **LLA Section 22 (5)** must fail. However as the lease was of no effect from the outset, the claimant is entitled to recover the stamp duty and other fees paid by him, and a refund of these monies has been offered by the Republic.
32. The conclusion that the lease is of no effect effectively deprives the claimant of any status to proceed with the balance of the issues raised in his pleadings and argued at trial. However in deference to counsel's submissions, I propose briefly to deal with them.
33. The evidence led by the claimant to establish that the registration of lease "049" was obtained "*by fraud*" does not sustain his case. The procedures followed leading to the forfeiture of the Hamagushi lease on 21 and 26 August 2009 were correct. **Blue Mirage** and **Joshua Kalsakau** did not require a "*negotiator's certificate*". The lease to them was registered surprisingly quickly after it was signed, and the fact that **Joshua Kalsakau** was a member of Parliament may well have contributed to that unusual efficiency on the part of the Department of Lands. Ideally, all applications for registration should be promptly dealt with. The speed in this case is suggestive of outside influence to effect the registration of lease "049", but, without more, that does not establish that the registration was "*obtained by fraud*".
34. I accept that lease "049" appears to have been drafted and approved as to its terms by the Department of Lands. The claimant's evidence fails however, to establish that Minister Iauko knew that Minister Korman had signed a similar lease over the same land a year before. It is reasonable to assume that Minister Iauko was advised by the Department of Lands officers that the previously registered lease on the land had been forfeited as recently as 19th August 2009, and that this opened the way for him to issue a new lease. The 4 day separation between the two events is unsuspecting and would give no cause for further enquiry about past transactions concerning the land.



35. The premium and annual rental for lease "049" were slightly lower than had been negotiated with the claimant, but the difference is not of a magnitude as to suggest some irregularity, let alone "*fraud*", occurred in the issuance of the lease. Besides, these monetary amounts had been calculated and approved by officers of the Department of Lands. The "*particulars of fraud*" are not established.
36. The plea that the registration of the lease to **Blue Mirage** and **Joshua Kalsakau** was obtained "*by mistake*" also fails. The mistake pleaded is that Minister Iauko and the Department of Lands mistakenly failed to give priority to the claimant's lease. But that lease as the Court has found is of no effect, and in reality, no mistake has occurred.
37. The later transfer of **Joshua Kalsakau's** leasehold interest to **Blue Mirage** at a nominal consideration of **VT100,000** was explained by him, but as the claimant had no interest capable of protection under his (the claimant's) lease, the transfer could not defeat his interest. So too, with later transfers.
38. Be that as it may, I record that **Mr Agius**, the proprietor of **Blue Quest**, gave evidence which I accept, that the purchase of lease "049" from Blue Mirage was "*a bona fide purchase for full value*". Needless to say I accept that he had no notice of alleged irregularities/fraud in any dealings further up the chain of title. Any inference that might at first sight appear to arise from the use of the word "*Blue*" both in the name "**Blue Mirage**" and in the name "**Blue Quest**" is likely due simply to the action of the solicitor involved in the conveyancing work choosing the name "*Blue Quest*" when utilizing a shelf company to implement instructions he had received from **Mr Agius** to effect a transfer of the lease into a company which **Mr Agius** controlled.
39. The claimant's plea that the transfer from Blue Mirage to Blue Quest was done despite a "*caution*" being lodged is also without substance. The claimant himself never lodged a caution. The caution lodged by the Director on 30th September 2009 was withdrawn on 14th October 2009, more than a year before the transfer from Blue Mirage to Blue Quest was registered.
40. For these reasons the action is dismissed. The claimant must pay the costs of each of the defendants on a standard basis.

Dated at Port Vila, this 13th day of June, 2014

BY THE COURT


D. V. FATIAKI
Judge.

