

BETWEEN : MARINETTE MAHIT and THE ESTATE OF
ALLAN JIMMY MAHIT
Claimants

AND: IFIRA LAND CORPORATION LIMITED
First Defendant

AND: REPUBLIC OF VANUATU
Second Defendant

Coram: Justice Aru

Counsel: Mr. J. Tari for the Claimants
Mr. M. Hurley First Defendant
Mr. S. Kalsakau for the Second Defendant

JUDGMENT

Introduction

1. Mr. Allan Jimmy Mahit (deceased) and Mrs. Marinette Mahit were the registered proprietors of leasehold title No 12/0922/001 (the 001 lease) prior to the transfer to the first defendant which is the subject of these proceedings. As Mr. Allan Mahit is now deceased, the transfer of lease is being challenged by Mrs. Marinette Mahit and the Estate of Allan Jimmy Mahit as claimants under section 100 of the Land Leases Act [CAP 163].

Background

2. The following background facts are not in dispute:-



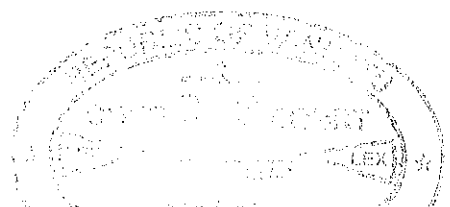
- On 15 June 1995 – the 001 lease was transferred from Copravi Limited to Mr. Allan Jimmy Mahit and Mrs. Marinette Mahit;
- On 29 May 2012 – the Minister of Lands signed a consent for the transfer of the 001 lease from Mr. Allan Jimmy Mahit and Mrs. Marinette Mahit to the first defendant;
- On 4 June 2012 – the transfer of the 001 lease was registered to the first defendant as the registered proprietor.
- 30 June 2012- Mr Allan Jimmy Mahit died.

The claim

3. The claimants allege in their claim that the transfer of the 001 lease to the first defendant was obtained by fraud and mistake and are therefore seeking rectification of the land leases register. The orders they are seeking are as follows:-
 - (1) An order that the register kept in respect of registered leasehold title 12/0922/001 be amended by removing the name of the first defendant and replacing it with the name of the claimants;
 - (2) Alternatively an order that the register kept in respect of the registered lease title 12/0922/001 owned by the first defendant be cancelled by the second defendant;
 - (3) An order directing the second defendant to effect such amendment or cancellation;
 - (4) Costs;
 - (5) Such further orders as the court sees fit.

Defence

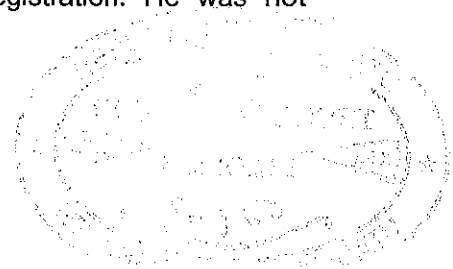
4. The second defendant says in its defence that it accepted the 001 lease transfer documents and registered the transfer in good faith. The first defendant on the other hand denies any fraud or mistake on its part and counterclaims for the sum of



VT 7 million. It alleges that it paid Mr. and Mrs. Mahit this amount for the transfer of the 001 lease pursuant to an Agreement for sale. The relief it seeks on the counterclaim is an order that prior to any rectification, cancellation or amendment of the register for the 001 lease that the claimants pay to the second defendant the sum of VT 7 million.

Evidence

5. A number of sworn statements were filed by the parties as evidence in this matter. The claimants rely on two sworn statements filed by Mrs. Marinette Mahit on 3 February 2015 and 1 February 2016 which were tendered as [Exhibit CL1] and [Exhibit C L 2] respectively. Her evidence which will be referred to in detail later is that she is a joint proprietor of the 001 lease. Furthermore she says that she did not sign the transfer document to transfer the 001 lease to the first defendant and she knew nothing of the negotiations with the first defendant about the transfer. She was cross examined on her evidence.
6. The first defendant filed two sworn statements. The first was filed by Mr. Tari Kalterikia on 13 October 2015 and tendered as [Exhibit D1 A]. His evidence is to the effect that Mr. Mahit (deceased) approached him about the sale of the 001 lease to the first defendant at the agreed purchase price of VT 7 million. He prepared the transfer documents and witnessed the signing of both the transfer documents as well as the Agreement for sale. He was required for cross examination but at the date of the trial he was in Santo. The second sworn statement was filed by Mr. Bernard Rolland on 31 March 2016 and tendered as [Exhibit D1B]. He was not required for cross examination. His evidence is to the effect that Mr. Mahit (deceased) was an employee of his with Surata Tamaso and was in charge of the Santo office. That Mr. Mahit (deceased) admitted misappropriating monies paid by customers of Surata Tamaso and as a result he (Mr. Rolland) filed a complaint with the Police. He says that Mr. Mahit (deceased) offered to repay the monies by instalments from the proceeds of the sale of his land at Teuma to the first defendant.
7. The second defendant relies on the sworn statement filed by Mr. Jean Marc Pierre, the Director of lands which was tendered as [Exhibit D2 A]. His evidence is to the effect that registration of the 001 lease was done in good faith based on the information supplied to the department of lands for registration. He was not required for cross examination.



Issues

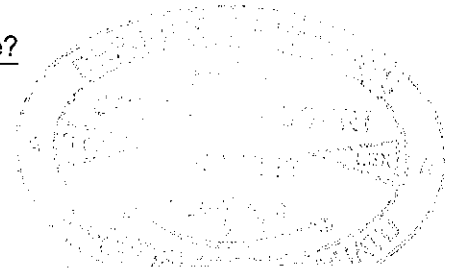
8. Three main issues which arise for determination in this case are as follows:-
- i) Did Mrs. Marinette Mahit sign the transfer of the 001 lease;
 - ii) If the answer is no, are the claimants entitled to the relief sought in their claim; and
 - iii) If the answer is yes, should such relief be made subject to the orders sought in the counterclaim.

Submissions

9. The gist of the claimants' submission is that they were not notified when the minister signed the consent to transfer the 001 lease. Secondly it was submitted that Mrs. Marinette Mahit being a joint proprietor of the 001 lease knew nothing of the transfer of lease and was not given any transfer of lease documents to sign and did not sign any transfer of lease documents.
10. It was further submitted that when witnessing the transfer, Mr. Tari Kalterekia knew that those he was witnessing for were not before him yet he signed as a witness to the signatures on the transfer document.
11. On the other hand, for the first defendant, the thrust of their submissions in summary is that if the court were to find that there is evidence to justify an order for rectification of the register then it would be unconscionable for the claimants to retain the purchase price of VT 7million paid by the first defendant to the claimants for the transfer of the 001 lease. It was further submitted that the relief claimed by the claimants should be subject to the relief the first defendant seeks in its counterclaim that prior to any rectification, the claimants must pay the first defendant the sum of VT 7million.
12. The second defendant's submissions are that the registration of the transfer of the 001 lease was done in good faith in accordance with the documents that were filed for registration.

Discussions

Issue i) Did Mrs. Marinette Mahit sign the transfer of the 001 lease?



13. In their submissions at the end of the trial, the claimants informed the court that they were no longer pursuing the second relief which is an alternative order but will only seek orders sought in the first relief that the register be amended by removing the name of the first defendant and substituting it with the claimants' name as the registered proprietors of the 001 lease.
14. Regarding the first issue, the claimants evidence is that the transfer to the first defendant was registered on 4 June 2012. When Mrs. Marinette Mahit became aware of the transfer she wrote a letter to the Director of Lands on 31 January 2013 seeking a cancellation of the transfer which is **annexure 'MM5' to Exhibit CL1**. She wrote:-

*"Director
Mr Jean Marc Pierre
Lands Department, Vanuatu Government
Port Vila*

Dear Mr Pierre

I wish to raise my ultimate concern about the abnormalities that occur over my property at Teouma Title Number :12/0922/001.

This land is the property of Allan Mahit and Marinette Mahit. It is a concern that this land was transferred to Ifira Land Corporation Limited without my consent nor my late husband's consent . But our property was transferred bearing the signatures of other people whom do not own the land.

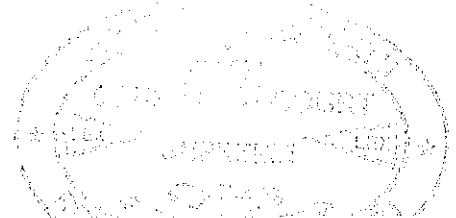
On the above incorrect and fraudulent actions , I seek your office to cancel the transfer with immediate effect. Thus giving seven (7) days to carry out the cancellation of this transfer . further steps will be pursued should this incorrect transfer is not reversed .

I thank you for your prompt action on the matter.

*Yours sincerely
Marinette Kanegai Mahit*

*Cc Director General for lands
Director Lands Records and Surveys
Manager Ifira Land Corportaiion*

15. The Director's response to her was to seek rectification through the courts. In her further sworn statement **Exhibit CL2** she says that her husband died on 30 June 2012. That before his death he had never informed her of his dealings with the first defendant. She says that she is a joint proprietor of the 001 lease but was never part of the negotiations with the first defendant nor did she sign any agreement



dealing with the 001 lease. She says that she never signed the transfer of lease and never intended to transfer the title and it was done without her consent as a joint proprietor.

16. Under cross examination, Mrs. Marinette Mahit was referred to the signature page on the transfer document and asked questions to which she answered as follows or answered with words to the following effect:-

"Q. Can you see the transfer of lease signature page signed by the transferors signature and initials, see that

A. Yes

Q. The first initial is AM

A. Yes, not sure about the other one

Q. Next to it is some writing

A. Yes

Q. Is it your writing

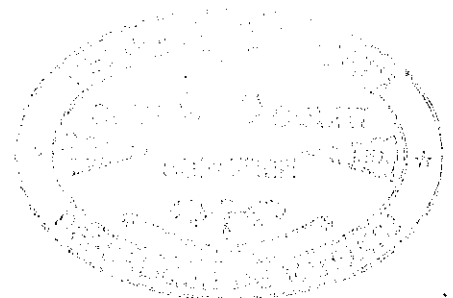
A. No

Q. When did you first see this

A. I went to the Lands Department

17. She maintained her evidence that she did not sign the transfer document and further that she was not aware that Mr. Mahit (deceased) owed Mr. Rolland money or that Mr. Rolland had filed a complaint against her husband with the Police.
18. Mrs. Marinette Mahit's evidence was unchallenged and there was no other evidence to rebut what she told the court. Although Mr. Kalterekia was not available for cross examination, based on his sworn statement **Exhibit D1A** it was conceded by Counsel that Mr. Kalterekia did not see Mrs. Marinette Mahit sign the lease transfer document.
19. In view of the concession and the unchallenged evidence of Mrs. Marinette Mahit I find that she did not sign the transfer of lease document.

Issue ii) If the answer is no, are the claimants entitled to the relief sought in their claim?



20. A lease may be rectified by the court under section 100 of the Land Leases Act where it is satisfied that any registration has been obtained made or omitted by fraud or mistake. The relevant provision states that:-

"100. Rectification by the Court

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

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the interest for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."

21. Mr. Katterikia at paragraph 9,10 and 11 of his sworn statement **Exhibit D1A** says that:

"...

9. At that time I asked AM (Allan Mahit) to return the signed Transfer of Lease instrument to me within two weeks. My request followed his statement that he was flying to Luganville Santo to obtain MM's (Marinette Mahit) signature , as she had been posted there by her employer.

10. After approximately two weeks AM came back to see me at my office with the transfer of lease and told me that MM had signed it .He had not signed it but he then proceeded to sign it before me and my colleague Losa Kaltabang . I then arranged for it to be signed by the paramount chief and I witnessed it.

11. I then proceeded to lodge the signed transfer of lease for stamping and registration , given that I had already received the Ministers consent to transfer.

...."

22. Of the two registered proprietors Mr. and Mrs. Mahit, only Mr. Mahit (deceased) signed the transfer of lease. Someone else also signed the transfer of lease but not the other registered proprietor Mrs. Marinette Mahit which in my view amounts to a fraud .Furthermore, there is no evidence that in the preparation of the transfer of lease documents, the following provisions of the land Leases Act were complied with or observed before the documents were submitted for registration and registered by the Department of Land Records: sections 60 - Transfers, 77- Execution of Instruments and 78 – Verification of Execution.



23. I am satisfied that the claim for rectification under section 100 is made out and the claimants are entitled to the relief sought.

Issue iii) If the answer is yes, should such relief be made subject to the orders sought in the counterclaim?

24. The counterclaim is pleaded at paragraph 4 and 5 as follows:-

“ ...

4. In the event that this honourable court grants relief sought by the claimants in the claim then it would be unconscionable for the claimants to retain the purchase price for the lease of VT 7million paid by the defendant to Mr Mahit (and /or at his direction)and the claimants are precluded from doing so .

5. Further and or in the alternative to paragraph 4 of this counterclaim , the claimants would be unjustly enriched if the relief sought by them in the claim was granted and if they were permitted to retain the benefit of the sum of VT 7million paid by the defendant.

....”

25. In support of the counterclaim, the first defendant relies on the evidence of Mr. Kalterikia Exhibit D1A. At paragraph 5 of his sworn statement he says that:

“....

5. My recollection of the chronological steps that I was personally involved in concerning the transfer of lease is as follows:

- i) AM (Allan Mahit) approached me and said to me words to the effect that he had a lease property on offer to sell to Ifira Trustees Limited (ITL) that led to the signed Agreement dated 15 July 2009 (the Agreement);*
- ii) At pages 1 and 2 of TK1 is a true copy of the Agreement which I recall was executed by AM in my presence and by the chairman of ITL (who is also the chairman of the first defendant) Paramount chief Teriki Paunimanu Mantoj Kalsakau III. I signed the Agreement as the witness to both Mr Mahit's and the paramount chief's signatures.*
- iii) The purchase sum in the Agreement being the total sum of VT 7million to acquire the lease was agreed to be paid by:*
 - VT 2,000,000 upon the signing of the Agreement (clause 1). At pages 3 and 4 of TK1 are true copies of the internal approval of the sum of VT 2,000,000 together with a the record of AM's receipt of the cheque for the sum on 15 July 2009; and*
 - balance by monthly instalments of VT 500, 000 over 10 months (clause 2)*



- iv) Upon the final instalment payment , the vendor shall submit to AM and MM (Marinette Mahit) the consent to transfer of the lease signed by the Minister of Lands (clause3)
 - v) At page 5of TK1 is a true copy of the Bill Transactions records held by the First Defendant that shows the payments that were made by the First Defendant to the deceased claimant , AM pursuant to the Agreement .
 - vi) The final payment under the Agreement was made on 22 June 2010.
-”

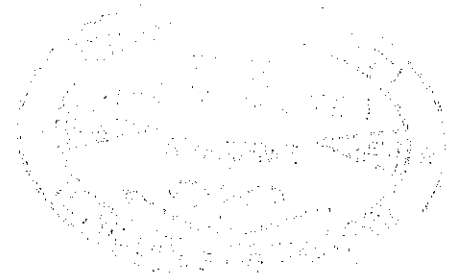
26. The first defendant submits that if the court was of the view that the evidence supports an order for rectification to be made under section 100 then it would be unconscionable for the claimants to retain the purchase price of VT 7million paid by the first defendant to Mr. Mahit. In support of their submissions ,they rely on what the Court of Appeal said in **Colmar v Rose Vanuatu Ltd** [2011] VUCA 20 where the court stated at paragraph 86 of its judgement that :

“....
 [86] The principle is that Aljan should not be entitled to retain the fruits of its (imputed) fraud against Valele Trust . Aljan will receive reimbursement for any outgoings it has incurred in obtaining and maintaining the 003 lease but Valele Trust is entitled to take its benefit.
”

27. The claimants on the other hand submit that the counterclaim should be dismissed as the evidence filed by the first defendant was for allegations against the other claimant who is now deceased. Furthermore it was submitted that the counterclaim can only be successful if it is brought against the estate of Allan Mahit (deceased).

28. The claimants submissions ignore the fact that the claim is brought by Mrs. Marinette Mahit and the estate of Allan Jimmy Mahit. Furthermore at paragraph 4 of their defence to the counterclaim they plead and say that:-

“...
 4. the claimant Marinette Mahit denies the allegations made at paragraph 4 of the counterclaim and says:
a) if the court finds in favour of the claimants , the VT 7 million which Marinette Mahit denies must be paid by the estate of her late husband Allan Mahit ; and
 b) she is not responsible for the payment of VT 7million because she denies receiving and benefitting from the money.
 ...”
 (emphasis added)



29. The claimants conceded in their defence to the counterclaim that if the court finds in favour of the claimants, the VT 7million must be paid by the estate of her husband Mr. Allan Mahit (deceased). As I said above, the estate of Mr. Mahit is also a party in this matter
30. Furthermore, where the lease is owned by two persons as joint proprietors and one of them dies as in this case, the requirements of section 92 of the Land Leases Act cannot be ignored. It states:-

“... ”

92. Transmission on death of a joint proprietor

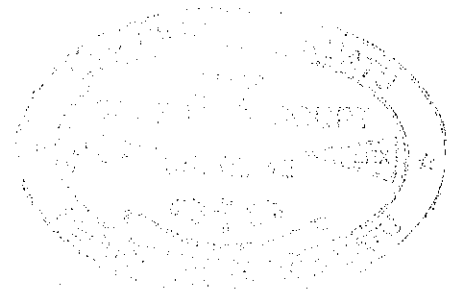
On proof of the death of any person registered as the joint proprietor of a registered interest, the Director shall register the survivor or survivors as proprietor or proprietors of the interest and he or they shall thereupon become the transferee or transferees of such interest.

...”

31. I am firmly of the view that by virtue of section 92 Mrs. Marinette Mahit will have the benefit of the transmission of the 001 lease into her name. It would therefore be unconscionable or she would be unjustly enriched if she is allowed to take the benefit of VT 7million paid by the first defendant without being ordered to pay that sum to the first defendant prior to any amendment of the lease register.
32. The unchallenged evidence before the court is that the whole transaction and negotiation to sell the 001 lease was begun and initiated by Mr. Allan Mahit (deceased) with the clear intention to offset certain debts he owed to Mr. Bernard Rolland for which a criminal complaint was also lodged with the Police.
33. My answer therefore on the third and final issue is in the affirmative.

Conclusion

34. Having made the above observations I hereby make the following orders:

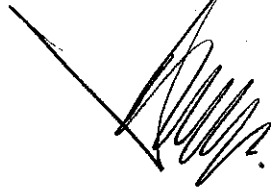


ORDER

- (1) Subject to order (2) the register kept in respect of registered leasehold title 12/0922/001 shall be amended by removing the name of the first defendant and replacing it with the name of the claimants.
- (2) Prior to making the amendment to the register, the claimants must first pay the first defendant the sum of VT 7 million.
- (3) No order as to costs.

DATED at Port Vila this 13 day of January 2017

BY THE COURT



.....
D. Aru
Judge

