

BETWEEN: Kalo Sandy
Claimant

AND: The Republic of Vanuatu
Defendant

Date of HEARING: 9th June 2020
Date of Judgment: 4th July 2020
Before: Justice Oliver. A. Saksak
In Attendance: Mr Justin Ngwele for Claimant
Mrs Florence Williams Samuel (SLO) for the Defendant

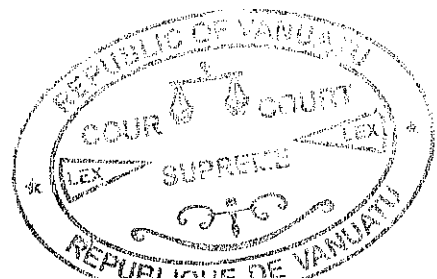
JUDGMENT

Introduction of Claim

1. The claimant asserts he is entitled to an indemnity under section 101 of the Land Leases Act [CAP.163] (the Act). He asserts he has suffered damages as a result of the rectification of the register when the Minister of Lands had by mistake approved the payment of a premium for VT 500.000 instead of VT 15.400.000.
2. The defendant denies the claimant is entitled to any indemnity damages.

Facts

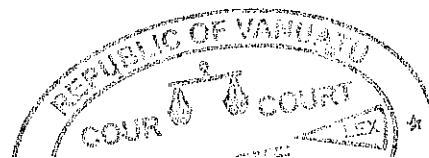
3. On 20th November 2012 the then Minister of Lands Mr Steven Kalsakau granted a lease over Lease Title 11/0D41/064 (the Lease) to Sandy Pakoa Kalo and Kalo Sandy. The Lease was signed on 27th February 2013.
4. The Market value of the Lease was VT 35.000.000 and the calculated premium was VT 15.400.000.



5. On 22nd October 2012 the Minister had instructed the then Acting Director to reduce the premium to VT 500.000.
6. In accordance with the instructions the premium was reduced and the claimant paid VT 500.000.
7. A Judicial Review claim was filed by the Vanuatu Rowing Association (Inc) in 2013 as JR 16 of 2013 to review the Minister's decision. The Court allowed the application and quashed the Minister's decision, holding it to be ultra vires section 32D (2) and (3) of the Act.
8. The claimant appealed that decision to the Court of Appeal in Sandy v Vanuatu Rowing Association (Inc), Civil Appeal Case 30 of 2015. The Court of Appeal upheld the decision of the Supreme Court Judge that the Lease had been registered by mistake.
9. The Claimant therefore bases his claim on section 101 and section 32D of the Act.

Submissions

10. The claimant submitted that he has suffered damages as a result of that mistake or omission resulting in the eventual rectification of the land register. He submitted further that he has lost the benefit of the value of the Lease which was VT 32.000.000. He further submitted that had he been advised by any appropriate persons within the Ministry or Department of Lands at the time, he would have paid the correct premium of VT 15.400.000 as he had money in his bank account at the time. He submitted that he was misguided by the Minister at the time.
11. The defendant argued and submitted the claimant had prior knowledge in 2012 when the Director had advised him the Lease was occupied by the Vanuatu Rowing Association, yet he chose to and took the risk and proceeded to negotiate with the Minister. As such it is submitted the claimant had caused or substantially contributed to the damage, fraud or negligence and therefore pursuant to section 101 (2) (a) of the Act no indemnity could be available to him. Further it is submitted the claimant must show to the satisfaction of the Court that he suffered as required by section 101 (1).
12. The Defendant relied on the sworn statement of Paul Gambetta filed on 28th July 2017 and the case law of Dinh v Samuel [2014] VUSC 143 in support of those arguments and submissions.



13. Further the defendant submitted the claimant was not a bona fide purchaser for value to claim protection under section 100 (1) and (2) of the Act. To invoke section 100 of the Act the claimant has to show (a) he is in possession, (b) he acquired interest for valuable consideration and (c) he had no knowledge of the omission, fraud or mistake and that he has not substantially contributed to them by his act, negligent action or default. The defendant relied on Mr Gambetta's statement of 28th July 2017 and the case authority of Etmat Bay Estate Limited v Magna Limited & others CC 101 of 2010 and Turquoise v Kalsuak [2008] VUCA 22 in support of those submissions.
14. Finally the defendant claimed immunity under section 9 of the Act, submitting the Director of Lands and the officers of the Lands Department acted in good faith in the process of issuing the Lease and rectifying it, pursuant to the orders of the Court.

The Issues

15. The issues for determination are-
- (a) Was the claimant a bona fide purchaser for value?
 - (b) Is he entitled to indemnity under section 101 of the Act?
 - (c) If so, by or for how much?
 - (d) Are the agents of the State immuned on the basis they acted with good faith?

The Relevant Legal Provisions

16.1. Section 32D of the Act (as amended by Act No. 5 of 2007) states:

" 3 Subsection 32D(2)

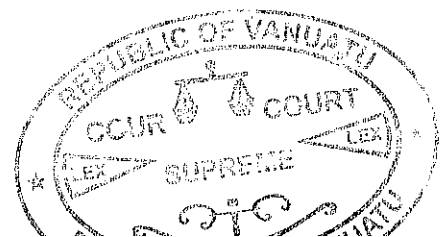
"(2) A new lease is not to be issued unless the lessee or the registered proprietor pays to the lessor a premium based on the full rental value of the unimproved value of the land as determined by the Minister from time to time and the contract rent as agreed to by the lessor and the lessee."

(3) A lessee must pay to the Minister the premium referred to in subsection (2) before the lease is issued to the lessee."

16.2. Section 100 of the Act States:

"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.*

16.3. Section 101 of the Act States:

"101. Indemnity

(1) *Subject to the provisions of this Act and of any law relating to the limitation of actions any person suffering damage by reasons of –*

- (a) *any rectification of the register under this Act;*
- (b) *any mistake or omission in the register which cannot be rectified under this Act; or*
- (c) *.....*

Shall be entitled to be indemnified by the Government."

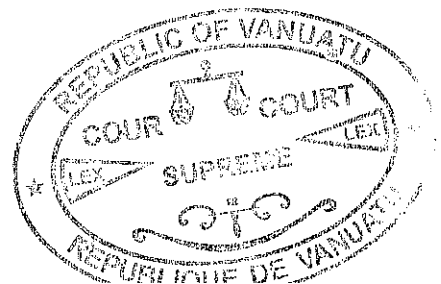
Discussion

17. The facts are not in dispute. The issues raised are legal issues. The first issue is whether or not the claimant was a bona fide purchaser for valuable consideration? It is common ground the market value of the Lease was VT 35,000,000 and that the claimant only paid a premium of VT 500,000 instead of VT 15,400,000.

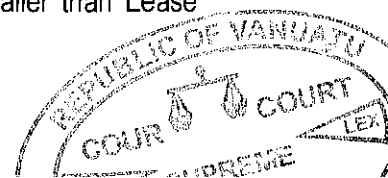
18. Section 100 (2) of the Act protects a proprietor (a) who is in possession, (b) who has acquired the interest in the lease for valuable consideration, and (c) who has no knowledge of the omission, fraud or mistake in the sequence of which rectification is sought or (d) who has not caused such omission, fraud or mistake or has not substantially contributed to it by his acts, neglect or default. "Possession" means not only a legal right to possession but it means actual physical possession as held by the Court of Appeal in *Turquoise v Kalsuak* [2008] VUCA 22.

19. The evidence which was unchallenged was that the lease was in the actual physical possession of the Vanuatu Rowing Association (Inc) and not the Claimant.

20. Further section 32D (2) of the Act (as amended) prohibits a new lease from being issued "unless the lessee or the registered proprietor pays to the lessor a premium based on the full value of the unimproved value of the land....." (My emphasis).

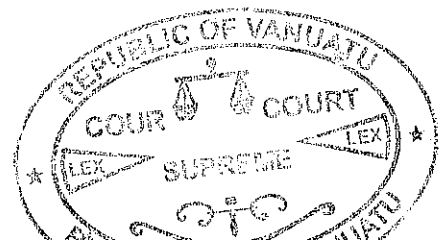


21. From the evidence the assessed premium of the Lease was VT 15.400.000 but the claimant paid only VT 500.000. In the case of Vanuatu Rowing Association (Inc) v Minister of Lands [2015] VUSC 96, JR 16/2013 Sey J said at page 22, paragraph 58:
" In this case however, the premium paid by Mr Kalo is by far less the assessed premium amount of VT 15.400.000..... (My Emphasis).
22. When the case went on appeal as Civil Appeal Case 30 of 2015: Sandy v Vanuatu Rowing Association (Inc) the Court of Appeal said:
" On its face Mr Kalsakau failed entirely in his duty as a Minister. He did not act according to law or in the interest of the Republic. No reasonable Minister would have contemplated a lease at such an extra ordinary undervalue." (My emphasis).
23. Applying the legal provisions to the facts, it is so obvious the claimant paid VT 500.000 as premium which both this Court and the Court of Appeal have held to be an undervalue. As such it was not a purchase for valuable consideration. And it is clear also that the claimant was not in actual physical possession of the Lease.
24. Mr Ngwele argued that Section 32D (2) of the Act requires that there should first be a determination of the unimproved value of the land so that its full rental value of the unimproved land could be determined by the Minister. This argument is untenable. Sey J acknowledged in her decision as quoted in paragraph 21 said :
" the premium paid by Mr Kalo is by far less than the assessed premium amount of VT 15.400.000". This decision was upheld by the Court of Appeal.
25. Next, whether or not the claimant had knowledge of the mistake and whether he substantially contributed to it by his act, negligent act or default? The evidence of Paul Gambetta at paragraph 6 show the claimant negotiated directly with the Minister and failed to follow the proper processes to register the lease. Further the Director said the Claimant's lease plan was never approved by any officer of the Survey section due to lack or absence of any Valuation Certificate for the Lease. Those evidence are unchallenged by the claimant.
26. The Claimant made confirmation in his sworn statement filed on 8th August 2018 that he knew about Leases 11/0D41/064 and 11/0D41/065 and that he knew the value of 11/0D41/065 was VT 12, 351, 000 was for an area of 3,529 square meters. It is slightly smaller than Lease



11/0D41/064 which covers an area of 3,544 square meters which is the subject of this proceeding.

27. In paragraph 5 of his statement the claimant says that if the lease, which I presume to be 01/0D41/065 is, registered the Government would be deprived of VT 10,000,000. The actual amount would be VT 10,551,000.
28. Then paragraph 7 of his statement the claimant says that the leases are located at Tassariki which is a high residential zone and that the Market value of the leases there are very high. From those statements and being in possession of a Certificate of Registered Negotiator dated 11th October 2012 annexed as part of " PG 2" to the statement of Paul Gambetta, with an area of 3544m² he must have known his premium to be higher than the VT 1,800,000 for Lease 11/0D41 /065 with a value of VT 12,351,000. The value was VT 15,400,000 but he deliberately accepted to pay a premium of VT 500,000 knowing it was grossly undervalued. Having done so, he denied the Government VT 14,900,000.
29. Indeed the Court of Appeal in paragraph 24 of its Judgment dated 20th November 2015 said:
" No question arises of the invocation of the doctrine of indefeasibility and the protection of purchasers, given that Mr Kalo was complicit in the mistake and must be taken to have known (given his subsequent demand) that he was acquiring the land at an outrageous and unjustified price." (My emphasis).
30. Further in paragraph 33 of Sey J's judgment in Judicial Review Case No. 16 of 2013 it is recorded that the claimant was questioned about the Valuer General's premium value of VT 15 million and whether it was a fair value, the claimant accepted by saying "yes". Further it is recorded that even then he negotiated with the Minister to pay only VT 500,000 because the Minister was only acting on behalf of the custom-owners and that he purported to be a custom-owner of some land in Port Vila.
31. It is very clear to me from those assertions made by the claimant in the witness box, he deliberately and substantially contributed to the actions and decision of the Minister. As such that section 100 (2) cannot give him any protection so as to be entitled to any indemnity under section 101 (1) (a) and (b) of the Act.



32. Finally to the issue of immunity raised by the Defendant since the claimant did not specifically plead bad faith in his claim, it is not necessary for the Court to decide on it as it is a non-issue.

Summary

33. In summary-

- (a) The claimant was not a bona fide purchaser for valuable consideration.
- (b) He is not entitled to indemnity as claimed.

Damages

34. The Claimant claims the value of interest in the lease at VT 32 million pursuant to section 102 of the Act. However he has not produced any valuation showing the real value of the lease. Furthermore he has no evidence showing the actual losses he suffered as a result of the mistake made and the resultant rectification. Indeed he had been repaid, the VT 500,000 and VT 81,250 he paid as shown by annexure marked "PG 9" to Mr Gambetta's sworn statement. And he cannot and is not entitled to any more money.

The Result

- 35. The claimant fails in his claim and the claim is dismissed in its entirety with costs.
- 36. The claimant will pay the defendant's costs of and incidental to the proceeding on the standard basis to be agreed, if not be taxed by the Master.

DATED at Port Vila this 4th day of July 2020

BY THE COURT


OLIVER.A.SAKSAK

Judge

