IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU	**Civil**
(Civil Jurisdiction)	**Case No. 23/3118 SC/CIVL**

BETWEEN: JONATHON TOOMEY
Claimant

AND: PASCALLE RUSSET
First Defendant

AND: THE REPUBLIC OF VANUATU
Second Defendant

Date of Hearing: *3 September 2024*

Date of Decision: *6 September 2024*

Before: *Justice M A MacKenzie*

Counsel: *Claimant – Mr R Sugden*

First Defendant – Mr J Malcom

Second Defendant – Ms N Robert

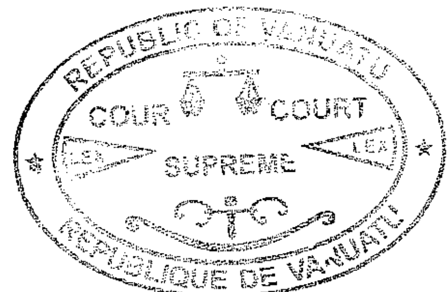
DECISION ON APPLICATION FOR SUMMARY JUDGMENT

The application

1. This is an application for summary judgment. It is opposed by the First Defendant, Ms Pascalle Russet ("Ms Russet"). The Second Defendant abides by the decision of the Court.

Result

2. After hearing oral argument, I advised counsel that I would let them know the result at the conference scheduled for 5 September 2024 to progress the de facto property claim between Mr Toomey and Karen Russet.



3. On 5 September 2024, I advised counsel that the summary judgment application was refused.

4. As detailed in the Minute of 5 September 2024, I made directions about costs, as Mr Sugden indicated he wished to be heard on the issue of costs.

Relevant background

5. In 2020, Ms Russet's mother, Karen Russet, transferred leasehold title 12/0633/1248 ("lease title 1248") to Ms Russet and her partner, Ryan Schick. The parties refer to this as the property at Blacksands.

6. There is an agreement between the three parties dated 15 February 2020 detailing the arrangements, which included that;

   a. There was to be a sale and transfer of lease title 12/0633/1248 from Karen Russet to Ms Russet and Mr Schick.

   b. The agreed value of the land and assets was VT 15 million.

   c. There was to be a monthly rent to own payment of VT 125,000 per month payable over a 10 year period, with payments commencing as from 1 September 2020.

   d. Additional payments could be made without penalty.

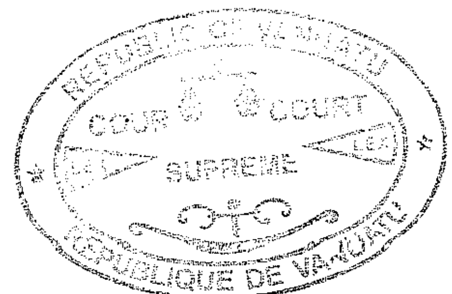
   e. There was to be a 3 month grace period to allow for the cleaning of land and set up, with the first payment due on 1 September 2024.

7. Ms Russet says the rationale for the transaction was to assist her mother, financially and practically[1]. The Blacksands property was falling apart, and a benefit of the agreement would be regular monthly payments to Karen Russet.

8. VT 3.5 million was paid by Ms Russet to Karen Russet as at 2023. As can be seen from the agreement, the VT 15 million was not payable up front, but rather over time.

9. The transfer of lease title 1248 was signed on 11 August 2020 and registered on 23 September 2020 by a Sylvie Lowen, who undertook the negotiations with the Department of Lands. It was registered as a family transaction with nil consideration. According to Ms Russet, she pointed out the total paid to Sylvie Lowen.

[1] *Refer paragraph 6 of Ms Russet's sworn statement of 22 July 2024*



10. The current registered proprietor is Ms Russet. On 30 June 2021, there was a transfer of the lease title from Ms Russet and Ryan Schick to Ms Russet solely, again for no consideration. This is because the relationship between Ms Russet and Mr Schick ended.

11. On 10 October 2023, Ms Russet entered into a contract to sell the property for VT 29 million. Settlement was to take place in November 2023.

12. In November 2023, the Claimant, Mr Toomey registered a caution against lease title 1248. The basis for the caution is a claimed interest under s93(1)(a) of the Land Leases Act. In correspondence to the proposed purchaser, Mr Sugden, the Claimant's counsel advised her that Mr Toomey claims an equitable interest in the title.

13. Karen Russet had previously been in a de facto relationship with Mr Toomey. They separated in April 2018. There are currently proceedings before the Court to determine the property issues between them[2]. ("the substantive proceeding"). While Mr Sugden submitted in the context of the summary judgment application that the substantive proceeding is not relevant to the claim for rectification of lease title 1248, the only basis Mr Toomey may have to invoke s100 of the Land leases Act is the de facto property dispute between he and Karen Russet- in particular, his claim that he is seeking recompense for contributions made to Karen Russet's lands and declarations of trusts for sale.

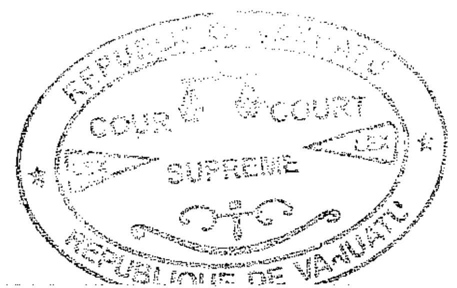
14. The main focus of the substantive proceeding relates to another leasehold title at Teouma, leasehold title 12/0923/689. Karen Russet is the registered proprietor of that title. Mr Toomey and Karen Russet refer to this property as Lot 13. A house was built on Lot 13 by Mr Toomey who asserts there was an agreement that Lot 13 would be transferred to him. Karen Russet has a differing view as to any agreement between them.

15. In relation to lease title 1248, Mr Toomey alleges that he made contributions to the Blacksands property, as detailed in the original claim and the 2 amended claims. Specifically, ***"repairing and renovating buildings on the Blacksands property".***

16. At paragraph 3B of the amended claim filed on 23 November 2023, Mr Toomey particularized the claim in so far as it relates to lease title 1248 as follows;

> *" Repairing and renovating buildings on the First defendant's registered leasehold property at Blacksands, repairing and restoring staff housing and appurtenances for Ground Force, and constructing water wells, supplying and installing associated fixtures for ground Force on the First*

[2] *Civil case 1699/2018. A trial date has been allocated in consultation with all counsel. It is due to commence on 20 November 2024.*



Defendant's lots 3 and 4 at the Teouma Subdivision that are occupied by ground force"

Total VT 4,270,000 "

17. Whether or not Mr Toomey made any contributions to lease title 1248 is disputed. In her defence, Karen Russet alleges that Mr Toomey embarked on projects on her property against her will. In 2023, Ms Russet was joined as a party to the substantive proceedings. In her defence, she disputes that Mr Toomey performed any work at the Blacksands property.

The claim

18. The claim seeking rectification of lease title 1248 was filed on 14 November 2023. The basis of the claim is as follows;

    a. Mr Toomey and Karen Russet were in a de facto relationship. During the relationship, Mr Toomey alleges that he carried out work and supplied materials improving her lands.

    b. When the relationship ended in April 2018, Mr Toomey sought recompense from Karen Russet for the improvements he had made to her lands. In the circumstances, Karen Russet held the titles to her lands that Mr Toomey had contributed to, subject to trusts for sale to provide out of the sale proceeds the recompense that the claimant was entitled to.

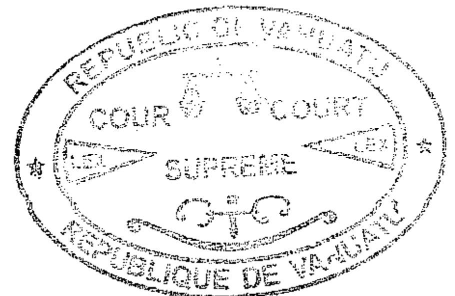
    c. Lease title 1248 was one of the titles in respect of which a trust for sale had arisen and a declaration to that effect was sought in civil case 1699/2018 ("the substantive proceeding").

    d. By a written Agreement dated 15 February 2020, Karen Russet sold the title to the First Defendant and Mr Schick for VT 15 million.

    e. On 11 August 2020, a transfer of the lease title as a family transaction for nil consideration was signed and registered and entered on the Register of Land Leases on 23 September 2020.

    f. The registration was obtained by fraud on the part of Karen Russet, the first defendant and Ryan Schick in that;

        (i)They falsely stated that the consideration for the transfer was nil thereby defrauding the Republic of Vanuatu of the proper sum for stamp duty and registration fees.



(ii)The transfer of the lease titles was for the purpose of secretly removing part of the subject matter of the claim its claim in civil case once 699/2018 against Karen Russet.

g. On 30 June 2021 a transfer as a family transaction for nil consideration of the lease from the first defendant and Ryan Schick to the first defendant was registered and entered onto the Land Leases Register.

h. The registration was obtained by the fraud of the First Defendant in that she knew of and contributed to the fraud by which she and her partner became registered as proprietors of the title and then with her partner, furthered and continued that fraud by using that fraudulent registration to obtain the registration of a transfer of the title to herself for nil consideration.

i. The registrations were obtained by mistake on the part of the second defendant in that the director of land records mistakenly believed that the consideration for the first transfer was nil and that the First Defendant and her partner were entitled to transfer the title to the first defendant.

19. The relief sought is to delete the two registrations in question and reinstate Karen Russet as the registered proprietor. Notably, this is not something that either Karen Russet or the Second Defendant seek.

The defence - First Defendant

20. The First Defendant disputes;

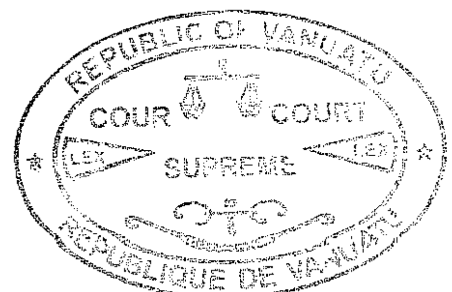
a. That the transactions were mistaken or fraudulent or designed to remove property so as to thwart Mr Toney's de facto property claim.

b. That Mr Toomey has standing "*locus standi*" to make a claim for relief as sought.

The defence - Second Defendant

21. The Second Defendant confirms that the Department registered the first transfer of lease title 1248 from Karen Russet to Ms Russet and Mr Schick for nil consideration as it was a family transaction.

22. That the Department registered the transfer of lease title 1248 and the subsequent transfer based on the information supplied and acted in good faith.



Summary Judgment

23. Rule 9.6 of the Civil Procedure Rules 2002 addresses the summary judgment procedure. It is one of the ways provided for in Part 9 of the Civil procedure Rules for ending a proceeding early.

> *23 Rules 9.6 (7) and 9.6 (9) are applicable and say: -*
>
> *"(7) If a Court is satisfied: -*
>
> *(a) The defendant has not real prospect of defending the claimant's claim or part of the claim; and*
>
> *(b). There is no need for a trial of the claim or that part of the claim, the Court may:*
>
> *(c) Give judgment of the claim or part of the claim; and*
> *(d) Make any other orders the Court thinks appropriate.*
> *...........*
>
> *(9). The Court must not give judgment against the defendant under this rule if it is satisfied that there is a dispute between the parties about a substantial question of fact, or a difficult question of law."*

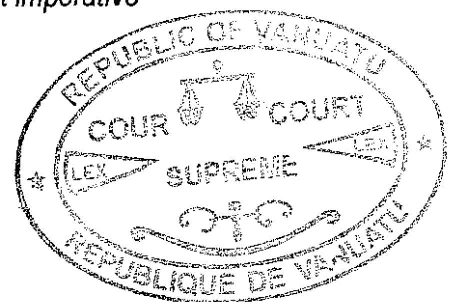
24. Relevant principles include;

    1. The onus is on the Claimant to establish the grounds set out in Rule 9.6(7)(a) and (b); *Sugden v Rolland* [2022] VUSC 145 at 22.

    2. A real prospect means one which is realistic not fanciful; *Swain v Hillman* [2001] 1 All ER 91, approved by the Court of Appeal in *Bokissa Investments Ltd v RACE Services Pty Ltd* (In Liquidation) [2003] VUCA 22.

    3. The need for caution when considering an application for summary judgment was emphasized in *ANZ Bank (Vanuatu) Ltd v Traverso* [2012]. Sey J said that it is judicially settled that the summary judgment procedure is designed to enable a claimant to obtain swift judgment against a defendant who has no real prospect of defending the claimant's claim. Sey J also sounded a note of caution when Her Ladyship said;

       > *"By its characteristic features, summary judgment as generally viewed is literally shutting the door of justice in the face of a defendant and that it permits a judgment to be given without trial. It is this stringent nature of summary judgment that makes it imperative*



for the Courts to approach this remedy with the greatest caution in order to prevent turning it into a dangerous weapon of injustice".

Submissions

Claimant's submissions

25. Mr Sugden submits that there is no dispute about a substantial question of a fact. Further, there is no difficult question of law.

26. He submits that the undisputed facts detailed at paragraph 5(a)-(h) of his submissions establish that there were mistakes with both transfers. In relation to the first transfer, the consideration for the transfer was VT 15 million and was wrongly stamped and so in registering the transfer as a transfer for nil consideration the Director made a mistake.

27. In relation to the second transfer, Mr Sugden made two submissions. First, that it was affected by the first mistake and second, that it was defective as it was a transfer from Ms Russet and Mr Schick to Ms Russet when the title was held as tenants in common in equal shares.

28. It is also asserted that there is a fraud on the register because there was consideration for the transfer yet the consideration in the transfer document was nil. Therefore;

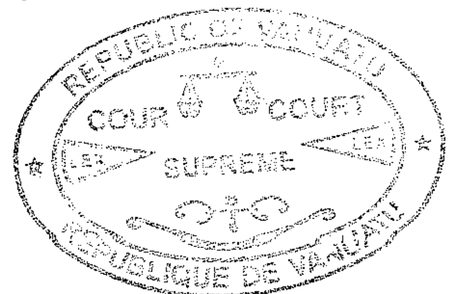
    a. Ms Russet knew the nil consideration in the transfer document was wrong or she shut her eyes to the obvious.

    b. The understatement of the consideration was clearly fraud for the purposes of s100(1) by defrauding the Republic of the correct stamp duty and registration fees. The fact that the consideration was understated on the advice of the agent, Sylvie Lowen, as she claims, does not assist her, having regard to *Monvoisin v Mormor* [2019] VUCA 6.

29. Mr Sugden did not address the standing issue raised in the defence in his written submissions. When the Court invited him to address this in advancing his oral submissions, Mr Sugden made a number of points, including;

    a. That Mr Toomey claims an interest pursuant to a trust as set out at paragraph 3 of the claim.

    b. That it is well recognised by the Court of Appeal that custom claimants have a right to take s100 proceedings. In the interests of parity, a claim relating to a trust for sale must be the same.



c. The issue of standing cannot affect the summary judgment application. There should have been a strike out application made. Whether or not there is a right to bring the claim has nothing to do with the merits of the claim. Rather it is a preliminary or jurisdictional issue.

First Defendant's submissions

30. There is a dispute as to any legal mistake or fraud in relation to either Karen Russet or the Republic. There are also factual disputes.

31. That the claim and the substantive proceeding are inter dependent.

32. The First Defendant disputes Mr Toomey's standing to seek rectification under s100(1).

33. Mr Malcolm submits that Mr Toomey seeks that the title is reverted to Karen Russet so he can enforce any judgment. Mr Malcolm submits that there is no right or ability for him to enforce against lease title 1248. Karen Russet does not seek rectification.

34. Summary judgment should be refused.

Second Defendant's position

35. The second defendant did not file any submissions or seek to be heard at the summary judgment hearing.

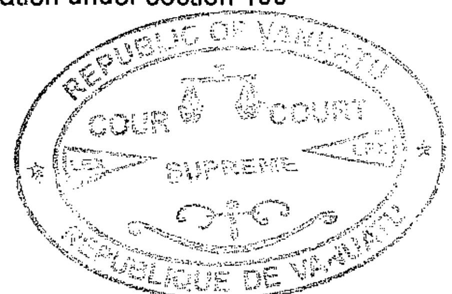
Discussion

36. Under rule 9.6(9), if the Court satisfied that there is a dispute between the parties about a substantial question of fact or a difficult question of law, the Court must not give judgment against the Defendants.

Standing under section 100 of the Land Leases Act

37. There is a difficult question of law. The difficult question of law is Mr Toomey's standing to seek rectification under S 100 of the Land Leases Act.

38. On the one hand, Mr Sugden submits that either the standing issue cannot prevent a summary judgment or that Mr Toomey has standing. On the other hand, Mr Malcolm submits that Mr Toomey does not have standing to seek rectification under section 100 of the Land Leases Act.



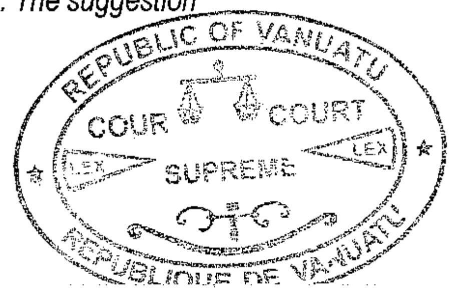
39. Section 100 of the Land Leases Act is silent as to who may apply for rectification of the lease title. The issue has been considered by the Court of Appeal in a number of cases, starting with *Naflak Teufi Limited v Kalsakau and the Republic of Vanuatu* [2005] VUCA *15*.

40. In *Naflak Teufi v Kalsakau*, the Court of Appeal noted that section 100 is an empowering section for the Supreme Court, and that a person seeking to invoke section 100 must include a person who has an interest in the register entries to be rectified. The Court said;

> *"The particular aspect of section 100 that requires clarification in this appeal, is the question of who may make the application or who may invoke section 100 of the Land Leases Act?*
>
> *The answer to the question is not immediately apparent as the section itself does not speak about Applicants or Claimants; it is purely an empowering section for the Supreme Court. That is not to say that no one may apply to invoke section 100 outside the Court itself.*
>
> *We are satisfied on a consideration of the object and purpose of the section that, at the very least, a person seeking to invoke section 100 must include a person who has an interest in the register entry sought to be rectified and which it is claimed was registered through a mistake or fraud. Not only must there be proof of mistake or fraud but also that such mistake or fraud caused the entry to be registered. Furthermore, it has to be proved that the mistake or fraud was known to the registered proprietor of the interest sought to be challenged or was of such a nature and quality that it would have been obvious to the registered proprietor had he not shut his eyes to the obvious or, where the registered proprietor himself caused such omission, fraud or mistake or substantially contributed to it by his own act, neglect or default. We use the word* ***'interest'*** *in the widest possible sense although accepting it may have in appropriate circumstances be distinguished from a mere busy body".*

41. The Court of Appeal went on to say;

> *"In light of the foregoing and our interpretation of section 100 of the Land Leases Act, we are satisfied that an Applicant for rectification of a register does not have to be able to show a right to be registered by way of substitution. In other words, a successful application pursuant to section 100 of the Land Leases Act can lead to rectification by way of cancellation or amendment of an entry in the register* ***not*** *necessarily in the registration of the person who initiates the challenge. The suggestion*



in our view that an Applicant for rectification must have a personal or legal right to be registered in place of the interest being challenged places an unwarranted gloss on the plain words of section 100".

42. *Naflak Teufi v Kalsakau* involved a dispute about a lease title. It was alleged that the First respondents obtained the lease in priority to the Appellants by fraud or mistake. The Appellants held a registered negotiator's certificate in respect of the disputed land and were also the first applicant in time to seek a lease over the disputed land. They were a competing applicant for the land in question, and "*on any sensible test, have a sufficient interest to seek rectification of the First Respondent's registration*".

43. Since *Naflak Teufi v Kalsakau,* the Court of Appeal has considered the question of standing in relation to s100 of the Land Leases Act in various cases.

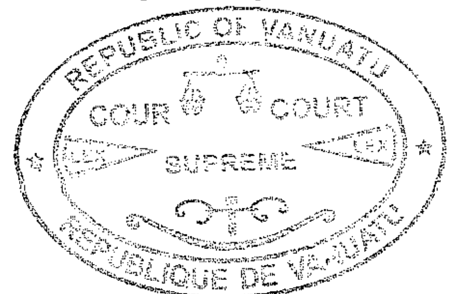
44. In *Toara and Worwor v Kaltatak and Republic of Vanuatu and Chiko Farm Products Ltd* [2016] VUCA *53,* the Court of Appeal upheld the primary judge's finding that the Appellants had not established sufficient or any interest in the register entry sought to be rectified.

45. The claim involved a dispute over land in the Teouma area. The Appellants sought an order cancelling 2 leases on the grounds of mistake or fraud. As there was no suggestion in the Supreme Court that they had any right to be registered in place of the interest being challenged, the issue was whether it could be said that the Claimants had an interest "*in the register entry sought to be rectified*". While the Claimants were occupying the land they did not have the express consent of the custom owners. When they first occupied the land, they were aware that custom ownership of the land was disputed. They paid rent to occupy the land but had not done so since 2006.

46. As to the issue of custom claimants and standing to seek rectification under section 100, there are 3 relevant cases; *Ishmael v Kalsev* [2014] VUCA, *Mataskelekele v Bakokoto* [2020] VUCA, and *Johnny v Molbarav*[2024]VUCA .

47. In *Ishmael v Kalsev,* the Appellant sought rectification of a lease title under s100 of the Land Leases Act. The Court of Appeal upheld the primary judge's finding that being merely a claimed custom owner, he did not have the requisite legitimate interest or standing to apply for rectification under section 100.

48. In *Mataskelekele v Bakokoto*, the Appellant also sought rectification of a lease title under section 100. The Court of Appeal upheld the primary judge's finding that he did not have standing. This was because he needed to establish his customary ownership in the correct form- simply making the bald assertion is insufficient. The Court of Appeal said the judge was correct in recording that the Appellant had no standing as there was no declaration of custom ownership of land comprised in the lease being challenged made in the Appellant's favour.



49. In *Johnny v Molbarav*, the Court of Appeal also upheld the primary judge's finding that the Appellant did not have standing. The Court of Appeal said (at 18 and 19);

> *18. The Supreme Court based its decision on standing on Ishmael v Kalsev [2014] VUCA at [14] and Mataskelekele v Bakotoko [2020] VUCA 31 at [26]. Both cases hold that a person merely claiming as a customer owner does not have the required legitimate interest or standing to apply for rectification. The Mataskelekele decision is indistinguishable from the present case. It concerned a situation where there was a dispute as to custom ownership, and one of the claimants for custom ownership sought to have a lease over the land rectified on the ground that it was registered as the result of fraud or mistake. At [26] the Court of Appeal said:*
>
> > *"In the appellant's case it was a case of challenging the validity of a lease under section 100 of the Land Leases Act. The appellant was neither the lessor nor the lessee. And neither had he nor his family been declared custom-owners by any Court or tribunal of competent jurisdiction. In this case the appellant had no standing."*
>
> *19.The authorities relied in the Supreme Court were binding on it and were correctly applied. Those decisions of the Court of Appeal are not now challenged, and inevitably lead to the result that this appeal must be dismissed.*

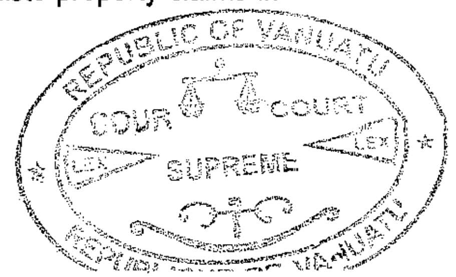
50. In the context of a person merely claiming as a custom owner, the Court of Appeal has said that there is not the required legitimate interest or standing to apply for rectification.

51. I make two preliminary points.

52. First, whether or not the issue of standing is a preliminary or jurisdictional issue is of no moment. It is a legal issue. If a Claimant does not have standing to invoke section 100, the claim cannot succeed. A strike out application is one means to address the issue but is not required. In *Naflak Teufi*, there was a strike out application. However, in *Toara v Kaltaktak*, the issue of standing was dealt with in the context of the hearing of the claim, and after the primary judge made factual findings.

53. Second, Mr Sugden has not pointed to any caselaw, either Supreme Court or Court of Appeal, which establishes that a Claimant in a de facto property dispute is a person who has an interest in the register entry sought to be rectified, and therefore standing to invoke section 100. I have not found any cases which assist with this issue either.

54. The question is whether a ***claimed*** equitable interest in property in the context of a de facto relationship is a sufficient interest in the register entry sought to be rectified? Relevant to the issue of standing then, is the approach to de facto property claims in

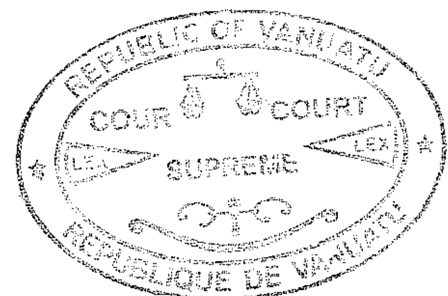


Vanuatu. There is no statutory guidance in Vanuatu to assist in the resolution of de facto property claims. As such, it is necessary to fall back on Article 95(2) of the Constitution and base any decision on the common law of England prior to independence.

55. The leading case is *Mariango v Nalau* [2007] VUCA 15. The Court of Appeal held that equitable principles are to be applied to de facto relationships in Vanuatu and that the principles and approach taken by the New Zealand Court of Appeal in *Gillies v Keogh* [1989] 2 NZLR 327 should govern the approach to de facto relationship property disputes in Vanuatu.

56. The Court of Appeal endorsed that the primary judge's summary of the approach of the Court in Gillies v Keogh, which was;[3]

> "In ***Gillies -v- Keogh*** *itself, there were, if not a plethora of judgments, separate ones from each of the four appeal judges. In deference to Cooke P and TS Eliot but at the risk of over-simplification, this Court has extracted the following principles from the judgments:*
>
> • *although the Courts have used different legal concepts to address de facto property cases (constructive trusts, unjust enrichment, common intention, estoppel), ultimately the same factors must be taken into account.*
>
> • *the essential issue is the reasonable expectations of persons in the shoes of the parties taking into account contemporary social attitudes. In assessing that, several factors have to be taken into account.*
>
> • *the first factor is the degree of sacrifice by the claimant, the extent to which he or she has given up other opportunities.*
>
> • *the second factor is the value of the contributions made to an asset by comparison to the benefits he or she has received. These contributions may be direct or indirect.*
>
> • *even if sacrifices and contributions have been made, a claimant cannot succeed if a reasonable person in his or her shoes would have understood that the other party had beforehand positively declined to agree to any sharing of the property or payment of compensation.*
>
> • *a simple monetary award, rather than the recognition of any interest in property, may be the appropriate way of giving effect to reasonable expectations.*



---

[3] *Nalau v Mariango [2007] VUSC 64 at 23*

- *a careful analysis of the facts is always important".*

57. The substantive claim primarily relates to leasehold title 12/0923/689. Mr Toomey also says that he contributed (by making improvements) to lease title 1248. This is disputed. The dispute can only be resolved once there has been a trial and the Court is in a position to make factual findings about the contested issue of whether Mr Toomey made contributions to lease title 1248.

58. Mr Sugden submits that the basis for his interest, as detailed above, is that Mr Toomey has commenced de facto property proceedings against Karen Russet seeking declarations of trust for sale and orders that would provide the recompense he sought. Lease title1248 is one of the titles in respect of which a trust for sale had arisen and a declaration to that effect was sought.

59. The primary basis for standing then appears to be that he has made a claim for resolution of the property dispute and is seeking declarations of "*trusts for sale*".

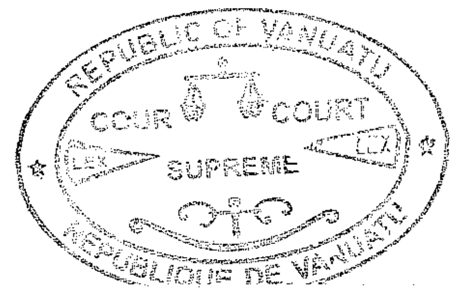
60. It is yet to be determined whether Mr Toomey has an equitable interest in Karen Russet's property, including lease title 1248. At present, it is merely a *claimed* equitable interest.

61. Factual findings will be required to determine if Mr Toomey has an equitable interest, and the extent of his interest, taking into account the factors detailed in *Mariango v Nalau*. Whether Mr Toomey did or did not make contributions to lease title 1248 will require factual findings.

62. The key issue is whether the mere fact of a claimed equitable interest in either (or both) Karen Russet's property or lease title 1248 means that Mr Toomey has standing to invoke section 100 in relation to lease title 1248? Does the mere fact that Mr Toomey claims that he made contributions to lease title 1248 give him standing?

63. If the Court of Appeal's approach to standing under section 100 in relation to claimed custom owners is applied by analogy to a claimed equitable interest in a lease title in a de facto property dispute, then it is arguable that a mere *claimed* equitable interest is not a legitimate or sufficient interest in the register, notwithstanding that in *Naflak Teufi v Kalsakau*, the Court of Appeal used the word '**interest**' in the widest possible sense.

64. Any claimed equitable interest in Karen Russet's property and lease title1248 has not been determined. Mr Toomey may be on more solid ground if the outcome of the substantive claim is that he did make contributions to lease title 1248 or that he has an equitable interest in lease title 1248. It is not though, as straightforward as the Court simply finding there were contributions made to lease title 1248. As recognised in *Mariango v Nalau*, even if sacrifices and contributions have been made, a Claimant cannot succeed if a reasonable person in their shoes would have understood that the



other party had beforehand positively declined to agree to any sharing of the property or payment of compensation.

65. This is a difficult question of law. It does not appear to have been considered by either the Supreme Court or the Court of Appeal in the context of a claimed equitable interest in a de facto property dispute. As the cases I have referred to demonstrate, whether there is a sufficient interest is fact specific. Also, the object of section 100 as articulated in *Naflak Teufi v Kalsakau* needs to be borne in mind. Its purpose is to secure the integrity of the register and the internal processes culminating in registration. The object is not to make it easier for a Claimant to enforce a judgment made in their favour.

66. As there is a difficult question of law, the Court must not grant summary judgment.

Fraud or mistake?

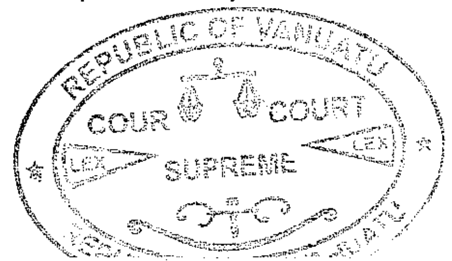
67. As the Court of Appeal said in *Roqara v Takau* [2005] VUCA 5;

> *"For a party seeking rectification under s.100 of the* <u>*Land Leases Act*</u>*, it is not sufficient to prove that a mistake occurred in the course of a transaction which ultimately concluded in registration of the interest which it is sought to have removed from the register. In terms of s.100, the Court must be satisfied that the "registration has been obtained, made or omitted by fraud or mistake". The section imposes a causal requirement. The mistake must lead to the impugned registration being made. The onus is on the party seeking rectification not only to establish a mistake, but also to satisfy the Court that it caused the registration to occur".*

68. Another issue is that a key plank of the argument relating to mistake or fraud is the nil consideration for the transfer of lease title 1248 from Karen Russet to Ms Russet and Mr Schick in circumstances where there was agreement that Ms Russet and Mr Schick would pay Karen Russet VT 15 million over a 10 year period for the transfer of the title.

69. Mr Sugden's submissions as to mistake or fraud are premised on the fact that there was consideration (the purchase price of VT 15 million) yet the transfer records nil consideration. But what is the effect of the family transaction? It is not in dispute that the transfer was registered on the basis of a family transaction for nil consideration or that there was an agreement for the sale and purchase of lease title 1248 for VT 15 million. While *Monvoison* v *Mormor* confirms that undervaluing consideration is fraud, it did not involve a family transaction, as is the case here.

70. There is limited evidence currently before the Court about the process of registration of the transfer from Karen Russet to Ms Russet and Mr Schick. In his sworn statement, Mr Willie acknowledges the transfer was a family transaction but does not explain what a family transaction is, what is required for registration and what enquiries, if any are



made. Registration as a family transaction for nil consideration appears to have been accepted as legitimate. There is no evidence by or on behalf of the Director of the Department of Lands, Survey and Records as to family transactions, the criteria for registration, and importantly, whether payment of consideration would or would not have any effect on registration as a family transaction.

71. Neither counsel cited any cases on the effect of registration as a family transaction and I cannot find any cases to assist. It cannot be a mistake or fraud per se to transfer a registered lease without consideration. That is because section 60 of the Land Leases Act provides that a proprietor may transfer a registered lease "*with or without consideration*".

72. Family transactions are clearly permissible under the Land Leases Act. I say that because under section 48C of the Land Leases Act there is an exemption to pay a lessor the amount payable under section 48B if the transfer is to a member of their nuclear or extended family.[4]

73. Section 48C (1) says –

> *48C Exemption from payment for transfer of lease*
>
> *(1) Section 48B does not apply if the proprietor transfers the lease to a member of his or her nuclear family or extended family.*

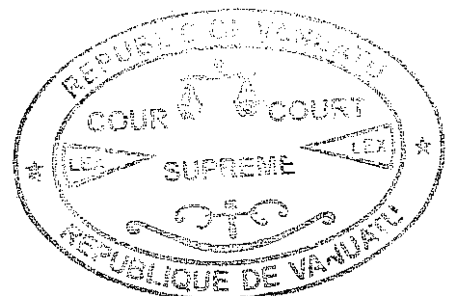
74. The irony is that if there was no purchase price at all, it is likely Mr Toomey would have doubled down on assertions of fraud in relation to the transfer of lease title 1248. The issue is whether an undervaluing of consideration when there is a lease transfer registered as a family transaction for nil consideration constitutes a mistake or fraud?

75. I do not consider that *Monvoisin v Mormor assists* because it involved an arm's length, as opposed to a family transaction. It is clear that under the Land Leases Act itself, different considerations apply to family transactions, given section 48C. It is also a difficult question of law. In addition, Mr Toomey has the onus to establish a mistake or fraud and also satisfy the Court that it caused the registration to occur. The Court does not have sufficient evidence to consider the issue, as discussed above.

The second transfer

76. One final matter is that I do not share Mr Sugden's view about the defective nature of the second transfer to Ms Russet solely. Mr Sugden is critical of the fact the transfer was a transfer from Ms Russet and Mr Schick to Ms Russet on the basis they were registered as tenants in common in equal shares, so that the transfer should have been form Mr Schick solely to Ms Russet. I accept that Ms Russet and Mr Schick were

[4] *Nuclear and extended family is defined in section48C (4) of the Land leases Act.*



registered as proprietors in common. Section 74 of the Land Leases Act is the applicable provision and says;

> *74. Proprietorship in common*
>
> *(1) Where a registered interest is vested in proprietors in common, the proprietors shall be entitled to undivided shares in the interest in such proportion as may be registered and on the death of any of the proprietors in common his share shall be administered as part of his estate.*
>
> *(2) No proprietor in common of a registered interest shall dispose of his undivided share in favour of any person other than another proprietor in common of the same interest except with the consent in writing of the remaining proprietor or proprietors of the interest, but such consent shall not be unreasonably withheld.*

77. There is no evidence by or on behalf of the Director of Lands, Surveys and Records that the registration of the transfer in this manner was a mistake. Notably, Ms Russet was required to consent in writing to the transfer of M Schick's undivided share.

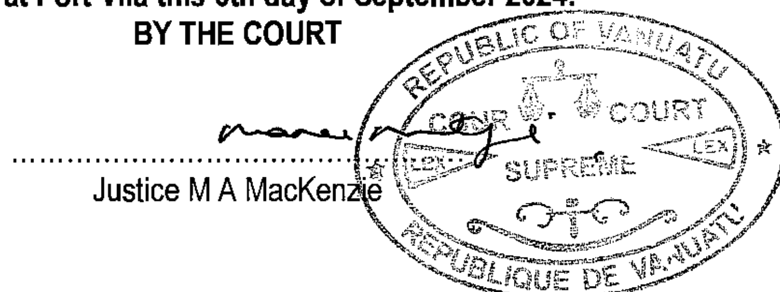
Summary

78. I do not intend to address every point raised by Mr Sugden. The issue of standing is a difficult question of law, which requires full consideration for the reasons explained. Therefore, the Court must not grant summary judgment. I also consider that there is a difficult question of law and an evidential lacuna in relation to the issue of mistake or fraud.

Outcome

79. The application for summary judgment is refused.

DATED at Port Vila this 6th day of September 2024.
BY THE COURT



....
Justice M A MacKenzie