

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Civil Appellate Jurisdiction)

CIVIL APPEAL NO. 34 OF 2013

BETWEEN: **CHEN WEI HONG**
Appellant

AND: **NTM FAMILY WORSHIP CENTER LIMITED**
First Respondent

AND: **EMMA MOLISINGI**
Second Respondent

AND: **MINISTER OF LANDS**
Third Respondent

AND: **DIRECTOR OF LANDS, SURVEY AND RECORDS**
Fourth Respondent

Coram: Hon. Chief Justice Vincent Lunabek
 Hon. Justice Bruce Robertson
 Hon. Justice Oliver Saksak
 Hon. Justice John Mansfield
 Hon. Justice Robert Spear
 Hon. Justice Dudley Aru
 Hon. Justice Mary Sey

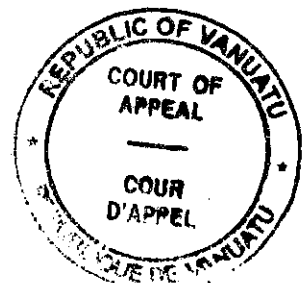
Counsel: Justin Ngwele for the Appellant
 Marie Noelle Patterson for the First Respondent
 Jerry Boe for the Second Respondent
 Florence Williams for the Third and Fourth Respondents

Date of Hearing: Friday 15 November, 2013

Date of Judgment: Friday 22 November, 2013

JUDGMENT

1. This Appeal is from a Judgment and Orders of Justice Fatiaki made on 18 June 2013.



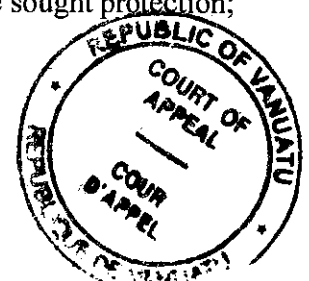
2. His Lordship was asked to decide between two competing claimants to leasehold title No. 03/0172/038 situated in Luganville, Santo. At the time of the hearing, Mr Hong was the existing registered proprietor of the lease, and NTM Family Worship Center Ltd, (NTM) was seeking rectification of the registered title of Mr Hong in accordance with S. 100 of the Land Leases Act [Cap 163].
3. NTM had signed an agreement with the custom owner Emma Molisingi to take a transfer of the lease on 27 October 2003 for Vt 9 million. That price was to be paid progressively, and had not been fully paid by the time of the disputed hearing. NTM had taken possession of the land, and was clearly occupying it at the material times.
4. On 13 October 2008, Mr Hong agreed to buy the lease from Mrs Molisingi (through her son and attorney Jansen Molisingi). The price was Vt 5 million. Because there was no earlier registered transfer of the lease to the first respondent, that transfer of the lease was registered. Mrs Molisingi has no right to sell the land twice.
5. The transaction was the subject of the claim for rectification, alleging fraud or mistake under s. 100 which relevantly provides:

“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.”

6. There was no challenge made to the determination by Fatiaki J that the registration of the transfer to Mr Hong was occasioned either by fraud or mistake. Certainly, there was no suggestion of such a challenge in the presentation to us. It is clear that Mrs Molisingi through her son had acted fraudulently. That left the appeal focused upon whether Fatiaki J was correct in determining that Mr Hong was not entitled to the protection against rectification under s. 100 (2).
7. In order for Mr Hong to obtain protection under s.100(2) against rectification in these circumstances, it must be established:-
 - a) That Mr Hong was in possession of the land at the time that he sought protection;



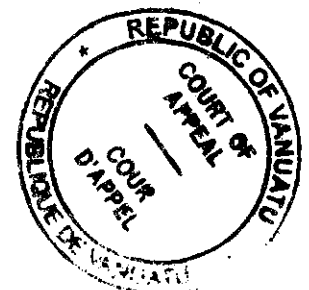
- b) That he had acquired his interest in the land for valuable consideration; and
- c) That he did not have “*knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or cause such omission, fraud or mistake will substantially contributed to it by his act, neglect or default*”.

8. At the trial, NTM succeeded with an order that the land leases register be rectified by removing the registered transfer of the lease to Mr Hong pursuant to s.100. The trial Judge found first that Mr Hong was not in possession of the land in question (*Turquoise v. Kalsuak*¹) and that he had not made any attempt to gain vacant possession of the leased property even after registration. Secondly, the trial Judge concluded that Mr Hong and Mrs Molisingi (through her son) were deliberately dishonest in their dealings in relation to NTM, and that Mr Hong was aware of, or deliberately chose to ignore, the probability of the interest of NTM in the leased property so as to support a finding that the register should be rectified. In effect, the finding was that the lease had been procured by fraud or mistake on the part of Mr Hong.
9. That is a strong finding but it was made in unequivocal terms by the Judge at the first instance. In particular, his Lordship was not impressed by the evidence of Mr Hong (and of the son of Mrs Molisingi) and did not accept their evidence that they were unaware of the interest or potential interest of NTM in the land. It is not necessary to set out in detail the reasons for that assessment of their credibility. The judgment finds that they:-

“were deliberately dishonest in their dealings with (NTM) both before and after the sale and subsequent transfer of the property to (Mr Hong). Such dealings were intentionally kept secret from (NTM) even to the extent, on (Mrs Molisingi’s part) of dishonestly continuing to receive and accept payments from (NTM) for the purchase price for the property for six months even after the property had been sold and transferred to (Mr Hong). Furthermore, if (Mr Hong) is to be believed, then he was receiving and photocopying (NTM’s) documents evidencing its purchase of the property in April 2009 after the transfer of the property to him had been registered”.

10. The critical finding against Mr Hong was in reliance in particular on one of the witnesses, David Archie, whom the trial Judge found to be frank and impressive. On the basis of his evidence, the trial Judge accepted that Mr Archie had shown Mr Hong documents evidencing the earlier transfer of the lease to NTM. This disclosure took place at Mr Hong’s shop in or about July 2009; some four months prior to the transfer to Mr Hong. In addition, there was undisputable evidence that the appellant was aware of the existence of NTM, that NTM was in occupation of the premises, at least as a tenant, and despite Mr


¹ *Turquoise v Kalsuak* [2008] VUCA 22; Civil Appeal Case 21 of 2008 (4 December 2008)



Hong's professed caution about entering into the transaction, he had proceeded without making any enquiries as to the term of that tenancy (although he accepted that he would have to honour it and respect such rights as it goes) and knowing that he was getting a "*bargain*" price.

11. On the appeal, counsel for Mr Hong accepted that, to succeed, he would need to satisfy the Court of Appeal that the critical findings of fact made by the primary Judge were wrong and that they should not have been made. Counsel said everything that could have been said in support of that proposition. However, it is clear that the findings of the primary Judge were reasonably available to be made, and have not been shown to be wrong. Moreover, as a court of appeal, this Court should be very slow to disturb findings of fact involving the assessment of the credit of witnesses when the Court has not had the benefit of hearing and seeing those witnesses. There are many authorities to support the view that a trial Judge is in a peculiarly advantageous position in making findings of facts which do require the assessment of such evidence.
12. As Mr Hong has been unable to disturb those primary findings of fact, the appeal must fail and it is dismissed. Mr Hong is to pay the costs of both NTM and the third and fourth respondents (to be treated as one) on the standard basis to be agreed or taxed. Mrs Molisingi is to bear her own costs.
13. That means that the orders of the primary Judge stand including that the land leases register be rectified by the removal the interest of Mr Hong and to enable the registration of the interest of NTM as the transferee of the leasehold property.

FOR THE COURT


Chief Justice Vincent Lunabek

