

BETWEEN: ALJAN (VANUATU) LIMITED
First Appellant

**AND: JOSEPH SAVA
ROY MOLIVALELE
JOSEPH WARI
BEN MATA**
Second Appellants

**AND: JOHN TARI MOLBARAV
LOWETT MORRIS**
Third Appellants

AND: PETER COLMAR
First Respondent

AND JAMES RAD
Second Respondent

AND: SAMSON LIVO
Third Respondent

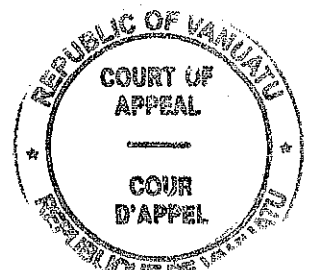
AND: THE REPUBLIC OF VANUATU
Fourth Respondent

Coram: *Chief Justice Vincent Lunabek
Justice von Doussa
Justice Ronald Young
Justice Oliver Saksak
Justice Daniel Fatiaki
Justice Dudley Aru
Justice Mary Sey
Justice Stephen Harrop*

Counsel: *Mark Hurley for the 1st Appellant
John Malcolm for the 2nd Appellant
Felix Laumae for the 3rd Appellant
Nigel Morrison for the 1st Respondent
No appearance by or for the 2nd and 3rd Respondents
Viran Trief for the 4th Respondent*

Date of Hearing: 28th March 2014
Date of Decision: 4th April 2014

JUDGMENT

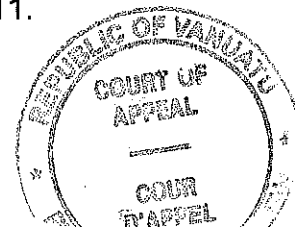


Introduction

1. On 22 July 2011 this Court (Colmar v. Rose(Vanuatu) Ltd [2011] VUCA 20) held that:
 - a. Aljan (Vanuatu) Ltd (Aljan) obtained title, as leasee, of lease 04/2624/001 by fraud;
 - b. That at all times it held lease 001 as constructive trustee for Peter Colmar as trustee of the Valele Trust;
 - c. When lease 003 replaced lease 001 Aljan also held lease 003 as constructive trustee for Peter Colmar as the trustee of the Valele Trust.
2. This Court said that in such circumstances the Valele Trust was “entitled to treat with the existing custom owners being those who have already consented to the Aljan 003 lease..... to obtain their consent to the transfer of the 003 lease to Valele Trust.”
3. Further orders were made to give effect to these conclusions. Aljan was forbidden from dealing with 003 lease and forbidden from “interfering with any part of the process whereby Valele Trust seeks custom owners consents....”
4. There are eight custom owners of the land the subject of the 003 lease. Six of the eight lessors have refused to consent to the transfer to Peter Colmar as the trustee of the Valele Trust. The Valele Trust and Mr Colmar then issued proceedings in the Supreme Court based on the proposition that s41 (h) of the Land Leases Act [CAP 163] applied to the transfer and the consent of the six lessors had been unreasonably withheld.
5. The Judge in the Supreme Court found that s41 (h) applied to the proposed transfer to the Valele Trust and that the lessors had unreasonably refused their consent. He directed the second and third appellants to provide consents to the transfer to the Valele Trust.
6. Aljan and the six custom owners appeal the Supreme Court decision. They say:
 - a. The provisions of s41 (h) do not apply to this transfer. The 003 lease is a new lease and the customary owners are free to lease their land to any lessee free from any restrictions in s41(h);
 - b. If they are wrong in (a) then their consent was reasonably withheld by them.

Should ALJAN be involved in this appeal?

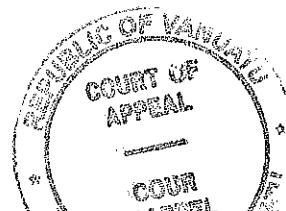
7. Counsel for Aljan took the primary burden of this litigation (from the appellants perspective) both in the Supreme Court and in this Court. A question arose as to whether this conduct breached the order of this Court of 22 July 2011.



8. As we have noted at [3] Aljan was prohibited from interfering in “any part of the process” of the Valele Trust in obtaining consent to the transfer of the 003 lease. Aljan’s submission was that once the six customary owners said they did not consent to the transfer the restrictions of the orders in this Court relating to Aljan ended. It was then entitled to pursue its own interests as far as the lease was concerned.
9. We disagree. The proceedings in the Supreme Court and in this Court were part of Valele Trust’s effort to obtain the consent of the customary owners. Aljan’s conduct in the Supreme Court and in this Court to oppose such effort was in direct contravention of declaration (c) (at [90], 2011 VUCA 20) forbidding interference in Valele Trust’s attempts to obtain consent. Aljan should not have participated in the Supreme Court or in this Court by opposing Valele’s application and appeal. However, in the circumstances, nothing further is required of this Court. Counsel for the second and third appellants adopted Aljan’s submissions and those submissions are considered in that context, as submissions of the appellants.
10. We note neither the second or third respondents, customary owners who had consented to the transfer to Valele Trust, appeared at the appeal. The Republic of Vanuatu abided the decision of the Court.

Does S41 (h) apply to the transfer of the 003 lease to Valele?

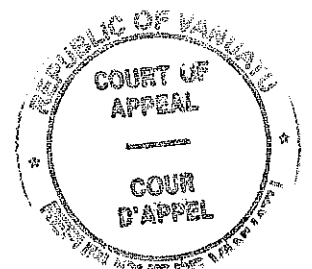
11. The appellants argued that the 003 lease was a new lease and that what was intended by the Court of Appeal (in [2011] VUCA 20) was to give Valele Trust a chance to negotiate a new lease (the 003) with the customary owners. Customary owners are free to negotiate and contract with anyone they chose as lessee. A new lease is not subject to the reasonableness provisions relating to consent in the Land Leases Act, the appellants argued.
12. In referring to the need for Valele Trust to obtain consent of the customary owners this Court was focused on the transfer of the leasehold interest from Aljan to Valele Trust. By the time of the Court of Appeal hearing in July 2011 the 003 lease was not a new lease. It had been entered into between Aljan and the customary owners in 2008. This Court concluded that Aljan held the lease as constructive trustee for Valele Trust. A transfer from Aljan to Valele Trust was required to perfect this arrangement.
13. Section 36 of the Land Leases Act provides as relevant, as follows:
“ ... any disposition of any land leased under a registered lease.... shall not be registered until written consent of the lessor for such disposition verified in accordance with section 78 has been produced to the Director.”



14. 'Disposition' is defined in Section 1 of the Land Leases Act. It
"means any act inter vivos by a proprietor whereby his rights in or over his registered lease, sublease or mortgage are affected but does not include an agreement to transfer sublease or mortgage."
15. A proprietor is the lessee of a lease (Section 1, Land Lease Act).
16. The effect of s36 is that where a lessee does any act which affects his rights (a disposition) under the lease he requires the consent of the lessor.
17. The Court-ordered transfer between Aljan and Valele Trust is we consider a 'disposition'. It involves an act, the transfer of Aljan's interest as trustee to Peter Colmar as trustee of the Valele Trust which affects Aljan's "rights" over the 003 lease. The lessor's consent is therefore required.
18. We are satisfied that s41 (h) of the Land Leases Act applies to the 'disposition' from Aljan to Valele Trust. Section 41 is concerned with statutorily -implied conditions in every land lease. The section prohibits dispositions of leasehold interests without lessor consent. The consent however cannot be unreasonably withheld. Such a condition is therefore implied by law into the lease between the customary owners (as lessors) and Aljan. And in turn Aljan may not dispose of its interest in the lease to Valele Trust without the lessors consent. The lessor's obligation in turn is not to unreasonably withhold their consent.
19. **In summary**
- (a) Lease 003 is not a new lease. The current proceedings concern a transfer of lease 003 from Aljan to Valele Trust.
 - (b) By s. 36 all dispositions of land leases (if registration is sought) are subject to lessor consent.
 - (c) The transfer from Aljan to Valele Trust is a disposition of a land lease.
 - (d) Section 41(h) implies in all leases that there can be no disposition unless there is lessor consent which cannot be unreasonably withheld. This applies to the disposition between Aljan and Valele Trust.
20. We are therefore satisfied the consent procedures in s41(h) of the Land Lease Act apply to the disposition of Aljan's interest in the 003 Lease to Valele Trust.

Was consent unreasonably withheld?

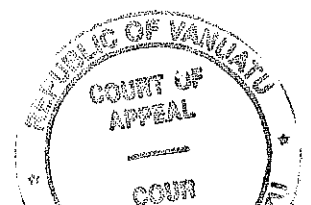
21. As we have noted six of the eight lessors have refused to consent to the disposition from Aljan to Valele Trust.



22. In the Supreme Court the Judge found that “none of the reasons raised by the defendants who oppose consent being provided to Mr Colmar for the assignment of the 003 lease to him to be reasonable”.
23. The Judge took the view that while a number of lessors were antipathetic toward Mr Colmar there was no evidence that Mr Colmar would not comply with the terms of the lease. The Judge considered that the primary reason for refusal of consent was the lessors’ concern about the circumstances of Mr Colmar’s recent separation from his wife Madeleine Valele.
24. The Judge accepted evidence from others who had leased land to Mr Colmar that he had been a reliable and trustworthy tenant.
25. The appellants challenge the Judge’s conclusions as to the validity of their reasons for opposing consent and his conclusions relating to Mr Colmar.
26. In International Drillings Fluid Ltd v Louisville Investments (Uxbridge) Ltd [1986] Ch513 the English Court of Appeal summarised the law relating to unreasonably withholding consent to the transfer of leasehold interests in land. Their approach has been widely accepted throughout the Commonwealth.
27. The conclusions relevant to this case can be summarised in this way
 - (a) The purpose of such a provision from a lessor’s perspective is to protect his property from undesirable occupation.
 - (b) And so the lessor may not refuse consent to assignment for reasons not related to the lessor/lessee relationship.
 - (c) The lessee must prove unreasonable refusal.
 - (d) The reasons for refusal are those a reasonable man could reach in the circumstances.
 - (e) Ultimately an assessment of unreasonable withholding of consent will depend upon all relevant facts.
28. The appellants argued that in Vanuatu given the special position of land for Ni-Vanuatu a liberal approach to assessing reasonableness of refusal by a customary owner was appropriate.
29. We are satisfied that the relevant factors set out at [26] of this judgment adequately take into account the special place of land with Ni-Vanuatu. We also keep in mind however in this case the customary owners did agree to lease this land for 75 years to Aljan. In doing so they accepted that Aljan could itself sell the lease subject to consent and reasonableness issues.
30. In his affidavit of October 2007 Mr John Molbarav (one of the third appellants) identified ten reasons why he did not wish to consent to the transfer. Additional

grounds were identified by some other lessors. We consider all grounds of objection.

31. We keep in mind that the beneficial owner of the proposed lessee is the Valele Trust and not Mr Colmar. We accept however that Mr Colmar is the trust's trustee and has a pivotal role in the trust's business.
32. We agree with the submission that the circumstances surrounding the breakup of Mr Colmar's marriage cannot be a ground to refuse consent.
33. Nor can vague allegations of mistrust as to dealings with Mr Colmar and Valele Trust constitute reasonable grounds for refusal. For example Mr Molbarav complained that Mr Colmar did not have a good history of dealing with Ni Vanuatu custom owners. Mr Colmar called general evidence of his reputation in such dealings. The allegation by Mr Molbarav was so general that nothing further could be expected in reply.
34. There were complaints that Mr Colmar may not develop the land. The 003 lease is a commercial lease. It anticipates development and increasing rent payments to the lessors with such developments. Valele Trust would be bound by the requirements of the lease.
35. Complaints by the lessors that they doubt Mr Colmar and the Valele Trust will comply with the provisions of the Lease without evidence (for example of past conduct) cannot be reasonable grounds to refuse consent.
36. The appellants focused on the following factors as the basis of their refusal to consent:
 - (a) Mr Sava said that Mr Colmar swore at him and did not respect him. He said that Mr Colmar had manipulated the custom law.
 - (b) Mr Mata said that "he has broken our custom rules and he has left our sister" (Madeleine Valele).
 - (c) Mr Molivalele emphasized that Mr Colmar was not a kind man who had left Madeleine Valele in breach of custom.
 - (d) Other customary owners claimed Mr Colmar had negotiated the original sale and purchase of the 001 lease behind the lessor's backs, had not paid land rentals and had tried to obtain the current consents by deceit.
 - (e) Mr Molbrav said that Mr Colmar had sued him in relation to another land lease but had not pursued the proceedings. Further he complained that in



another lease on Matevulu, Mr Colmar and Valele Trust (as leasees) have failed to develop the land.

- (f) The appellants said that the circumstances under which Mr Colmar claimed he had the consent of a number of lessors to the transfer of the 003 lease to Valele Trust was untrue and supported the lessors' claim that Mr Colmar and Valele Trust were unreliable.
 - (g) The appellants said the Judge placed too much weight on the evidence from two Ni-Vanuatu who had dealings with Mr Colmar.
 - (h) Finally the appellants say the use of the name "Valele" as in the "Valele Trust" is objectionable. The name Valele is a family name and should not be used for commercial purposes and not unless the Valele family agreed. Further the use of the name Valele was misleading as implying the whole Valele family benefited from the Trust when it did not.
37. We agree with the Supreme Court that some lessors' refusal to grant consent is primarily based on their disapproval of Mr Colmar's actions in relation to his marriage break up. We have already noted this is irrelevant to consent. This is also a situation where the fact the lessee is the Valele Trust is important.
38. The allegations that Mr Colmar did not respect Ni- Vanuatu had no detail to support it beyond a claim that Mr Colmar had sworn at one of the lessors. This by itself would not be sufficient to refuse consent. The allegation of breach of rules of custom contained no detail from the witnesses.
39. The lessors complained that Mr Colmar and Valele Trust did not comply with the current lease. This was in fact a complaint that Aljan had not kept to the terms of the 003 lease. This was not the responsibility of Mr Colmar and Valele Trust and could not be a basis to refuse consent to a transfer from Aljan to the Trust.
40. As to Mr Molborav's complaint of being sued by Mr Colmar/ Valele Trust as we understand the litigation Mr Colmar sued Mr Molborav's mother. The allegation was that land owned by Mr Molborav was sold twice, the second time to Mr Colmar. When Mr Colmar found he could not register the sale he sued Mr Molborav's mother who had sold the land to him. Mr Molborav claimed Mr Colmar had arranged the sale of the land with his mother because she was elderly and frail. These proceedings were not pursued to trial. It is not possible now to assess what happened in those proceedings. Each side was aggrieved by the action of the other. There is some reason for Mr Molborav to be concerned about Mr Colmar and Valele Trust's conduct in this case. On the other hand these events occurred at least eight years ago. There is other evidence relating to Mr Colmar and Valele Trust and their conduct which is



admirable. We do not consider that a reasonable man with all the relevant information would refuse consent on this ground.

41. A number of lessors said that Mr Colmar's claim in his affidavit of November 2011 that he had their consent to the transfer of the 003 lease was false. They said Mr Colmar had not sought their consent and in any event they would have not consented. In his affidavit of 11 November Mr Colmar said he believed he had the consent of at least five lessors. However no written consents (necessary for a transfer of lease 003) were exhibited. In cross examination at trial Mr Colmar accepted he did not have the written consent of these lessors. The appellants say this misleading evidence in Mr Colmar's affidavit supports their claim Mr Colmar is not an honest person and justifies refusal of consent.
42. In fact the claim that Mr Colmar was deceitful about consent was not a reason for why lessors refused their consent. The lessors who refused consent had decided to do so some time before consent to the 003 lease was sought. And so Mr Colmar's actions did not in fact influence the refusal to consent.
43. Further we think it possible Mr Colmar in his affidavit was referring to oral assurance by some lessors that they would consent to the transfer of the 001 lease some years before. Mr Peter Colmar expressed some frustration at having to obtain the consents again. Mr Christopher Colmar's evidence was that about 3-5 years ago he had seen written consents from some lessors.
44. We accept on one view that what Mr Colmar said about consents was misleading. However he readily accepted the true position when cross examined. He knew the only consent of value was a written consent and so falsely claiming he had oral consent was no value to him. We do not consider this evidence could justify a refusal to grant consent.
45. As to the use of the name "Valele", there is little evidence to establish that the Valele Trust's use of the name Valele was in fact culturally insensitive. It seems the Trust has operated commercial leases for many years without apparent objection. In this case none of the lessors has previously said that the use of the name is offensive and sought change. We do not consider this claim is a proper basis to refuse consent. In any event we imagine if this was the only sticking point to transfer, Mr Colmar as trustee would change the name of the Trust.
46. Some of the lessors expressed concern that in previous leases Mr Colmar/Valele Trust had failed to develop the land. No detail of the alleged failure was provided. We do not know what the terms of the other lease were. We do not know whether it was an agricultural or commercial lease or whether it required development. The 003 lease contains specific development provisions with increased lease payments. These provisions are enforceable in



law. We do not consider this complaint was a reasonable ground to refuse consent.

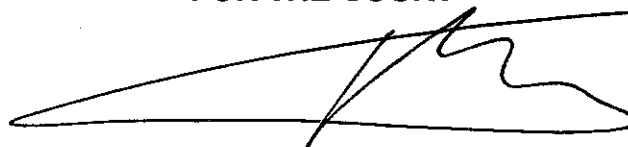
47. The appellants criticized the Judge's conclusion that the two "character" witness called by Mr Colmar/Valele Trust could be relied upon and were relevant to the "reasonableness" assessment. The criticism revolved around the issue of whether the two witnesses knew some of the lessors. The trial Judge was aware of the criticism of their evidence. He was entitled to reach an assessment of their credibility. He did so. He accepted their evidence that Mr Colmar was a well-regarded farmer and member of the Santo community. Mr Tangis was a customary owner who had dealt with Mr Colmar for over 30 years. He had found him reliable and honest. This was relevant evidence for the Judge.
48. As an appellate Court we do not consider we are in a position to overturn the Judge's clear finding of credibility of these two witnesses. We reject this ground of challenge.

Summary

49. We are satisfied the consent provisions of s41 (h) of the Land Lease Act apply to the transfer of lease 003 from Aljan to Peter Colmar as the trustee of the Valele Trust.
50. We agree with the trial Judge that the second and third appellants unreasonably refused to consent to the disposition of lease 003 from Aljan to Valele.
51. There was no particular challenge to the form of the orders in the Supreme Court however the dates nominated by the Judge are no longer applicable. The Judge gave Aljan and the second and third appellants approximately one month within which to provide the relevant consents to the transfer. Accordingly the orders in [47] and [48] of the Supreme Court judgment are amended so that the required date is 1 May 2014.
52. The appellants will pay the first respondent's and the fourth respondent's costs on a standard appeal basis for an appeal.

DATED at Port Vila this 4th day of April 2014

FOR THE COURT



Vincent Lunabek, Chief Justice

