

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(CIVIL JURISDICTION)

Civil Case No 189 of 2005

BETWEEN **THEOPHILE PIO**
Claimant
Trans-Melanesian Lawyers
Claimant's Lawyers

AND **MICHEL WORWOR**
First Defendant
Public Solicitor's Office
First Defendant's Lawyers

AND **DIRECTOR OF LAND RECORDS**
Second Defendant

AND **MINISTER OF LANDS**
Third Defendant
State Law Office
Second & Third Defendants' Lawyers

Coram: Justice J Clapham

Date of Hearing: 28 September 2009

29 September 2009

Date of Decision: ~~4 November 2009~~

12th April 2010

Counsel:

Claimant:

Mr J Tari

First Defendant:

Mr J Kausiama

Second Defendant:

Ms J Harders and Christine Lahua

DECISION

1. This is an interesting case and I am sure one that will trouble some as to the correct result. I use correct in the sense of being in accordance with the law. The central issue is the competing interests of the Claimant, Pio and the First Defendant, Worwor in respect of the same piece of land. Each obtained leases but Worwor registered his lease first. There were some difficulties in relation to mortgage discharge or adjustment in respect of the Claimant that he may not have understood in respect of registration. The very helpful Second and Third Defendants Outline of Submissions contains a chronological summary, and selected details as to the Claimant's and First Defendant's lease. Because of its chronology and content I set it out as follows:

"SECOND AND THIRD DEFENDANTS' OUTLINE OF SUBMISSIONS

Background

<i>Pre-Independence</i>	<i>The land the subject of this proceeding was previously land alienated by the Catholic Mission. The Catholic Mission permitted certain people to occupy parcels of that land, including the Claimant and the First Defendant. The blocks occupied by the Claimant (title 12/0912/318) and the First Defendant (plot 334 or title 12/0912/334) were separated by a small plot occupied by Charles Cyriaque (plot 332).</i>
<i>19 August 1998</i>	<i>Lease title 12/0912/318 was registered between Pio Theophile and Pio Marie Reneo and the Minister of Lands.</i>
<i>8 February 2001</i>	<i>Lease title 12/0912/334 was registered between Michael Worwor and the Minister of Lands.</i>
<i>28 January 2003</i>	<i>Michael Worwor surrendered lease title 12/0912/334.</i>
<i>12 November 2004</i>	<i>A mortgage was registered over title 12/0912/318 executed by Theophile Pio and Marie Reneo Pio and the National Bank of</i>



	Vanuatu.
21 December 2004	A Negotiator's Certificate in respect of title 10/0912/509 was issued to Michael Worwor.
6 June 2005	The Minister of Lands approved a lease in respect of title 12/0912/509 with the Claimant and Marie Reneo Pio as lessees. The lease covers land that is subject to title 12/0912/318 and plot 332.
23 June 2005	Theophile Pio and Marie Reneo Pio lodged for registration the surrender of title 12/0912/318. The surrender was not registered because the title was subject to a mortgage and consent to the surrender by the mortgagee was not provided.
30 August 2005	Lease title 12/0912/509 (covering Michael Worwor's previous lease 12/0912/334 and plot 332) was registered between Michael Worwor and the Minister of Lands.
22 September 2005	Theophile Pio and Marie Reneo Pio lodged a caution over title 12/0912/509.

The Claimant's lease

1. After independence, the land the subject of this proceeding reverted to the custom owners and ownership is disputed. Accordingly, consent to grant a lease in respect of plot 332 or to surrender lease titles 12/0912/318 or 12/0912/334 was given by the Minister of Lands.

Section 8(2)(b) Land Reform Act

2. The Claimant's proposed lease in respect of title 12/0912/509 was effectively a combination of title 12/0912/318 and plot 332 and could not be registered until title 12/0912/318 was surrendered.

Section 12 Land Leases Act [Cap 163]

3. The Claimant's surrender of title 12/0912/318 could not be registered because the title was subject to an existing mortgage and consent to the surrender by the mortgagee, the National Bank of Vanuatu, was not provided.

Sections 22 and 57 Land Leases Act [Cap 163]

4. The unregistered lease instrument in respect of title 12/0912/509 does not convey to the Claimant an interest as lessee.

Section 22 Land Leases Act [Cap 163]

5. *The lease instrument was granted subject to the provisions of the Land Leases Act [Cap 163].*

Clause 4 of the lease

6. *Accordingly, the lease was granted subject to any existing registered leases over the land being surrendered.*
7. *Alternatively, it was an implied condition precedent to the grant of the lease that any existing registered leases over the land would be surrendered.*
8. *In the circumstances, the lease instrument is ineffective to confer rights at law or in equity.*

The First Defendant's lease

9. *The First Defendant's lease in respect of title 12/0921/509 covers the land the subject of title 12/0912/334 and plot 332.*

10. *As outlined above, the land the subject of the lease is disputed customary land. Accordingly, consent to grant the lease and to surrender lease title 12/0912/334 was given by the Minister of Lands.*

11. *Charles Cyriaque previously occupied plot 332 pursuant to a licensee granted by the alienator.*

12. *A proprietor of a registered lease holds such lease subject to the unregistered rights of a person in actual occupation of the land.*

Subsection 17(g) Land Leases Act [Cap 163]

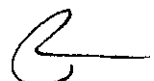
13. *Charles Cyriaque's consent to the combination of plot 332 and title 12/0912/334 as the First Defendant's lease title 12/0921/509 is relevant in this regard.*

14. *This lease was registered in accordance with the Land Leases Act [Cap 163]."*

2. There are some matters of immediate comment,
 - (a) there was no evidence to support Mr. Cyriaque as an occupier. Indeed the evidence was to the contrary
 - (b) S 22 (5) "*Nothing in this section shall be construed so as to prevent*

any unregistered instruction from operating as a contract."

Submission 8 seems to over look this subsection and the possible creation of an equitable interest



3. The claim by the claimant is captured in his solicitor's letter to the Minister of Lands of the 6th October, 2005 and it is set out as follows:

*"The Honorable Minister of Land
PMB 9007
Port-Vila
Vanuatu*

Attn: Director General.

Dear Honorable Minister

ERROR IN THE SURVEY PLANS FOR TITLES 12/0912/509.

We act for Mr. Theophile in this matter.

This letter serves to request that the officials from the Departments under the Ministry of lands dialogue with Mr. Michel Worwor to surrender his lease for title 12/0912/509. This is to enable the rectification on the survey plans on his lease as the plan on his demised land encroached into Mr. Theophile's lease.

Mr. Minister, we must be mindful of the fact that the lease that has been executed by the former Minister of Lands, Mr. Telukluk is a valid contract between the lessee (Mr. Theophile) and the former Minister of Lands as lessor. We presume that the execution of this title by yourself is a mistake due the fact that Officers who have processed the subject lease have failed to bring to your attention the existence of another lease which has be executed earlier.

In the event where the Mr. Worwor refuses to surrender the lease, another option is for the Director of Land Records to rectify the survey plans for Mr. Worwor's lease. The later option will be more economic and a practical option to adopt. We would further recommend that the Director of Land



Records undertakes this exercise to ensure that the lease executed by Mr. Theophile is not affected by the lease which Mr. Michel Worwor has signed and regularized on the later date.

Mr. Minister, it is rather unfortunate that the Survey Department have not detected this error in the first place. However, the Director of Land Records has the Authority to rectify leases with minor defect of this nature. We are mindful that execution and the regularization of Mr. Worwor's lease has come about due to a mistaken belief that lease title 12/0912/509 has not yet been signed by the former Minister of Lands, Paul B. Telukluk and the lessee Mr. Theophile.

Failing to comply with either of the above option will leave us with not much option but to to seek the determination of the Court regarding our client's interest in this property that he has executed a lease on. I thrust that this can be sorted out by the officials of our Departments without much difficulty.

Please not that Mr. Worwor must be issued with another title number with minor alteration to the existing title which he signed. Also note that we have lodge a caution on this title to ensure the rights of Mr. Theophile regarding this land is not violated.

Thank you

Respectfully,

TRANS-MELANESIAN LAWYER

STEVEN TAHI

cc. Director General-Ministry of Lands

Director of Land Survey

Director of Land

Director of Land Record



4. The certificate issued by the Minister is in the following terms.

"DEPARTMENT OF LANDS

George Pompidou Building Complex

PRIVATE MAIL BAG 090, Port Vila Vanuatu

Telephone: (678) 22892

Fax: (678)227708

Our Ref:
V/Ref:
Our Ref: 12/0912/332/MM/mm
Date: 4/6/05

TO WHOM IT MAY CONCERN

This is to inform you that PIO THEOPHILE had followed all the DepartmentS requirements to secure this land. Also, to take note that a consent from the Erakor Village was granted for Mr. THEOPHIL to lease this land.

For any further information and or clarification, please contact Director of Lands.

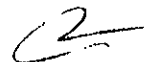
Michael Mangawai

DIRECTOR OF LAND"

It is important to note the reference to the Erakor situations.



5. The claim by the Defendant in essence is that he proceeded in accordance with the correct procedures, had the property surveyed and took the necessary steps to achieve registration. He says that having achieved registration in accordance with the act he is entitled to retain his lease.
6. The procedure in respect of the First Defendant, Worwor obtaining the lease was the subject of scrutiny and I will turn to it later. From the above it can be seen that there is little dispute about the factual situation with one exception. On the evidence adduced before me, Mr. Cyriaqu was not on the evidence established to be an occupier.
7. The produced document showing the Catholic Church involvement is of historical interest and of course essential background to this case. It is shown as CC 1 that is it is attached to the Sworn Statement Exhibit 1 sworn by Charles Cyriaque on 17th April, 2009. I briefly set out the relevant extract, "*List of persons authorized by the Catholic church to occupy parcels of land along the lagon*" on the Montmartre property. After Mrs. Collardeau, No. 8 is Michael Worwor, No. 9 Charles Cyriaqu and No. 10 Theophile Pio. In addition to that exhibit is a letter from Mr. Cyriaqu of 17th April from the French Ambassadors office relating to his relationship with Worwor.
8. The Claimant, Pio is his evidence indicated that he had spoken to Mrs. Cyriaqu and he understood they had no further interest in the land. I noted she was not called as witness to refute the suggestion. Little if any weight attaches to it in any event.
9. In the evidence I put to Mr. Cyriaqu as to whether or not he had come to some accommodation with Worwor and he denied this. Mr. Worwor for his part was open and considered that he had come to an arrangement with Cyriaqu which would be processed in due course. The reason for the



enquiry is that the portion of land allocated to Cyriaqu is not large enough to be used for any particular purpose.

10. Of interest in respect of the authority given by the Catholic church for occupation is:
 - 1) Whether they had the authority;
 - 2) Who gave the authority in respect of the Catholic Church; and
 - 3) Was there an acceptance by any of the persons named in that document.

It could easily be argued that occupation is a sufficient acceptance of the allocation. In this instance that argument does not avail Mr. Cyriaqu because he, on the evidence adduced before me was never an occupier.

Discussion

5. Having briefly dealt with the background and the factual situation I now consider the competing interests. On the assumption that Pio, the Claimant, has been correct in his dealings with the customs owners of the land, there should be little challenge to his position. The law applicable here and which binds me, may lead to a claimed occupier (who in fact has never occupied, Mr. Cyriaque) of the land being given greater rights than the land owner or genuine occupier. When I enquired of Mr. Cyriaque the quick movements of his eyes and demeanor in respect of his answer to my question as to whether he has reached an agreement or money had changed hands with Mr. Worwor, lead me not to believe him on this point. As I have previously stated, Worwor readily acknowledged he had reached an arrangement. If the present lessee, that is Worwor, continues to be the registered lessee of the land with the terms of the lease as set out, the effect of this is that despite the consent of Erakor people the Minister of Land, granting a lease to the Claimant it means that in his life time he will never occupy the land. Of the greatest importance in this case is the Sworn Statement of Tim Theo Kalmet. His Sworn Statement is brief.

I set it out as follows:



- 1- *"I am the Secretary and Advisor to the paramount chief of Erakor Village, South Efate in the Republic of Vanuatu and I have the Authority to swear in this sworn statement in support of the claim.*
- 2- *On or about the year 2002, the Erakor Chief and Counsel acting as Erakor Land Committee discussed the issue of land belonging to the claimant and First Defendant and has decided to consent to the transfer of the Land of the Claimant. Annexed hereto and marked "TK1" and "TK2" are true copies of correspondence outlining the decision of the Erakor land Committee.*
- 3- *The reason why the Erakor Chief and Council acting as Land Committee consent to the transfer of the Land to the Claimant is because of the action of somebody by the name of Charles Cyriaque who is from the Island of Ambrym and claiming to be custom owner of the Land where the subject of the claim is located.*
- 4- *Charles Cyriaque as purported custom owner consent for the transfer to be effected to the first Defendant. Annexed hereto and marked "TK3" is a true copy of the letter from Charle Cyriaque.*
- 5- *I believe the process leading up to the registration of land lease title 12/0912/509 was not done according to law. That is no custom owner consent from the transfer and the very person who gave consent for the transfer is from Ambrym and not Efate, particularly from Erakor".*
- 6- *The Sworn Statement of all the deponents which I accept (except for Mr. Cyriaque) sets out an unacceptable state of affairs. These are people of substance and their evidence is worthy of consideration and weight*



The reason for my earlier comment balancing the competing interest is highlighted by this "Sworn Statement" and also the sworn statement of Alfred Carlot. Particularly ak1 which provides as follows:

"This is to inform you that PIO THEOPHILE had followed all the department requirements to secure this Land. Also, tack note that a consent from Erakor Village was granted for Mr. THEOPHILE to lease this land."

7. The position at law as interpreted by the Court of Appeal is set out in the decision, Appeal Case 05 of 2003 Bouchaud v. Director of Land and Ors. The Court of Appeal dismissed the appeal and the appeal sought to overturn the orders of Coventry J. At page 4 it is recorded that Coventry J held that the plaintiff's lease was not "a properly acquired lease". This then needs to be added to the exceptions contained within the Act as to mistake or fraud. The relevant section in respect of rectification is as follows:

Section 100 Land Lease Act "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 or substantially contributed to it by his act, neglect or default."

8. The evidence highlights in my view both mistake and procedural error. I rely on the following
 - (a) The mis description of the number
 - (b) The execution of two leases by the Minister of lands over the same portions of land.

(c) The prior right of the claimant to registration. His lease at least creating a contract and I find creating an equitable interest.

(d) His lease is in registrable form and if registered would have given good title. Nothing was wrong with the documentation, the delay occurred from a failure to deal adequately with his bank.

e. In addition there is evidence that Cyriaqu was not an occupier thus affecting whether or not Worwor had "a properly acquired lease". It is on this basis that I uphold the Claimant's claim and will make orders.. There are a number of peripheral matters that I wished to include in my decision but because of the requirement for brevity I have endeavored to convey the thrust and principled approach that I have adopted.

9. There are competing interests here. I balance those in the following way. Through mistake and procedural error Worwor is the registered lessee.

Pio the claimant even at the date of hearing produced no evidence that he was able if give the opportunity to convert what must at least be an equitable lease into a registrable one. There are no other competing interests.

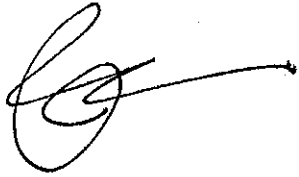
To balance the historical interests and, acknowledge the opportunity for occupancy offered by the church. I wrongly thought an accommodation between the three groups could resolve it. The parties did not achieve resolution.

I now made the following orders bearing in mind the failure of the claimant to provide evidence that he is able to perfect his title.

- 1- I direct the Director upon the production of such documentation as he requires which I understand to be
 - 1- Surrender of the lease.
 - 2- Discharge of mortgage or the consent of the mortgagee whichever is appropriate over the land
 - 3- Lease to the claimant.
- 2- To register the claimants lease and cancel registration of the prior lease to Worwor.
- 3- That such registration is to be effected within 6 month of this decision.



10. Costs are to follow the event and if not agreed to be fixed by the Master.



12th day of April

Dated at Port Vila, this 10th day of November, ~~2009~~ 2010

BY THE COURT



J. Clapham

Judge