

(Civil Jurisdiction)

BETWEEN: NITCHIKU (VANUATU) LIMITED

Claimant

**AND: THE GOVERNMENT OF THE REPUBLIC OF
VANUATU**

First Defendant

AND: BOETARA TRUSTEES LIMITED

Second Defendant

Mr Justice Oliver A. Saksak
Mrs Anita Vinabit – Clerk

Mr D. Thornburg for the Claimant
Ms F. Williams for the First Defendant
Mr F. Laumae for the Second Defendant

Date of Hearing: 24th August 2011
Date of Judgment: 30th January 2012

JUDGMENT

Background Facts

1. The following facts gave rise to the Claimant's claims –
 - (a) On 6th November 1986 the Santo Land Council leased on behalf of the custom-owners the land known as Maritime Zone Palekula IV previously under Title 04/1324/001 to Societe D'Investment Du Pacifique (the SIDP).



- (b) On 4th February 1987 the SIDP lodged an application for registration of lease Title 04/2643/007.
- (c) On 2nd April 1987 the Claimant lodged an application for registration of transfer of lease from SIDP to Nitchiku (Vanuatu) Ltd (Claimant). The transfer was registered on the same day.
- (d) On 23rd February 1988 the Santo Land Council transferred administration and payment in relation to lease Title 04/2643/007 to the declared custom-owners namely: Solomon Amali, Peter Natu, James Tamata, Timothy Molbarav and Rukon Perei.
- (e) On 5th November 2007, the named custom-owners requested the Director of Land Surveys and Lands Records to correct the survey plan of the lease to exclude the Maritime Zone located within the pre-independence title No. 486.
- (f) On 20th December 2007, the Director of Lands, Surveys and Records gave written notice to the Claimant of his intention to correct the error in the survey plan in respect of lease title 04/2643/007.
- (g) On 3rd February 2009 a proper application for correction of survey plan was lodged in accordance with section 11 of the Land Leases Act Cap 163 (the Act).
- (h) On 9th February 2009, the Director instructed the Principal Registration Officer to correct the survey plan in respect the lease title 04/2643/007 pursuant to Section 11 of the Act and the correction was accordingly effected.



2. Complaints of the Claimant

The Claimant alleges that in causing the rectification of the survey plan to remove the Maritime Zone from the lease, the Director had acted in breach of the Act in that (a) no notice was given to the Claimant and (b) that no opportunity to be heard was afforded to them. Additionally, the Claimant alleges that the rectification had materially affected them and further alleges that the actions of the First and Second Defendants constituted fraud. In the alternative, the Claimant alleges that the de-registration of the Claimant's Land was a mistake. Further and in the alternative, the Claimant alleges that the First Defendant is estopped from transferring or dealing with the Claimant's title.

3. Reliefs Sought

The Claimant seeks the following reliefs –

- (a) An order for rectification of the lease to return the land to its original boundary;
- (b) Damages against the Second Defendant as just;
- (c) Alternatively an order for indemnity costs pursuant to section 101 of the Act;
- (d) A declaration that the First Defendant is estopped from dealing with the title in any manner;
- (e) Damages for the loss of the use of the title as just;
- (f) Interests; and
- (g) Costs.



4. The Evidence

The Claimant relied on the evidence of two witnesses namely Mr Toru Mochizuki and Ms Sandra Andrews. Both witnesses were cross-examined on their sworn statements by defence counsel.

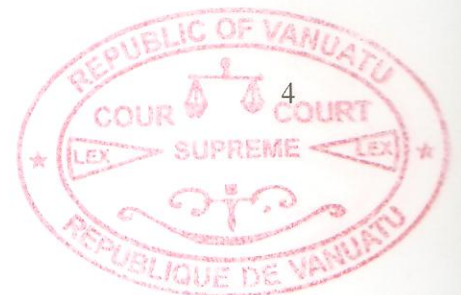
The First Defendant relied on the evidence of the Director, Mr Jean Marc Pierre and the Second Defendants relied on the evidence of Mr Steven Tahī, Mr John Tari Molbarav and Mr Lauren Solomon. All the defendants witnesses were cross-examined by Mr Thornburgh.

5.1. Issues

The Second Defendant raised one preliminary issue of whether the claims of fraud and mistake by the Claimant are “claims in foot” in the absence of facts which give rise to them? They also raised two main issues as follows

–

- (a) Whether the action of the First and Second Defendants constitute fraud and mistake?; and
- (b) Whether section 11 of the Act is the relevant provision to correct the survey plan in respect to lease title 04/2643/007? Four sub-issues arose from this general issue:-
 - (i) Whether there was any error in the survey plan as required by section 11 of the Act to warrant the Director to exercise his powers there-under?
 - (ii) Whether the Director issued the appropriate notice of intention required by section 11?
 - (iii) Whether the Director gave the Claimant an opportunity to be heard as required by Section 11?
 - (iv) Whether the steps taken by the Director were reasonable steps as required by Section 11?



- 5.2. Counsel for the First Defendant raised two issues –
- (a) Whether the Director breached the provisions of the Act when he rectified the survey plan in respect to lease title 04/2643/007?; and
 - (b) Whether the First Defendant was estopped from transferring or dealing with the title on the basis of the representation contained in the memorandum dated 28th March 2006.

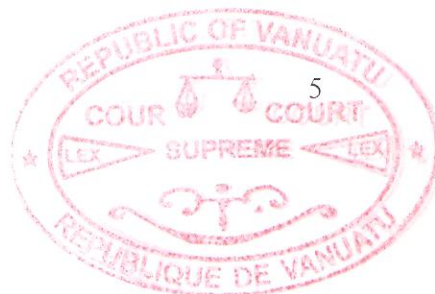
6.1. Discussions

The issues raised are considered in light of the evidence adduced from all the witnesses for the parties and also in light of the final written submissions made by Counsel.

- 6.2. I set out the relevant legal provisions. Firstly, Section 11 of the Act states-
- “If it appears to the Director that there is any error in a survey plan he may, after taking such steps as he thinks fit to bring the notice of any person shown by the register to be interested his intention so to do and giving every such person an opportunity to be heard, require the Director of Land Surveys to correct the error.*

Provided that the Director may without such notice, require the Director of Land Survey to correct the survey plan whenever such correction does not materially affect the interest of any person”.

- 6.3. The evidence of the Director Mr Jean Marc Pierre was that he issued a notice to the claimant on 20th December 2007. Mr Mochizuki acknowledged in his evidence that he received the letter and passed it on to his lawyer. Despite that notice, the claimant did not respond then or at any time thereafter. Nothing further transpired until 03rd February 2009



any time thereafter. Nothing further transpired until 03rd February 2009 (More than 12 months later) that a proper application for correction of survey plan was lodged. Some six days later on 09th February 2009 the Director instructed the Principal registration Officer to correct the survey plan.

6.4. From those facts as shown by the evidence, the Court answers the following issues:-

(a) Whether there was any error in the survey plan? The answer is "Yes".

(b) Whether the Director issued appropriate notice as required? The answer is "Yes".

(c) Whether the Director gave the claimant an opportunity to be heard as required? The answer is "Yes".

(d) Whether the Director acted reasonably in the circumstances?
The answer is "Yes".

(e) Whether the Director correctly used Section 11 to correct the plan?
The answer is "Yes".

The general issue of whether the Director breached Section 11 of the Act is therefore answered in the negative.

6.5 There remain the issues of fraud and mistake.

The relevant legal provision is section 100 of the Act. It states –

(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”.

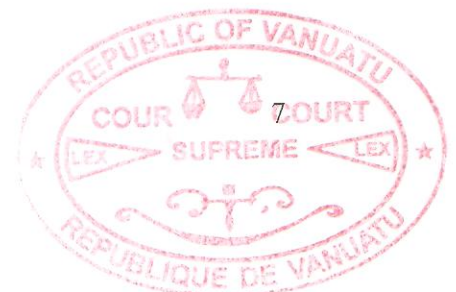
(2) *The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the interests for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake as substantially contributed to it by his act, neglect or default”.*

6.6. The claimant alleges fraud and mistake. They have the burden to prove there was fraud or mistake by the Defendants. They pleaded fraud in paragraph 13 of their amended claims but failed or omitted to particularize the facts that show fraud.

In paragraph 14 they plead mistake but failed or omitted to particularize the facts that show mistake on the parts of the defendants jointly or severally.

Mr Laumae for the second Defendants submitted on the authorities of the Solomon Island cases of Patty v. Tikani [2002] HC-CC 197 of 2002 and Hebala v. Segu [2011] SBHC 89 and the English case of Blay v. Pollard [1993] KB 628, 634 -1-2 that the claimant’s claim in relation to fraud and mistake is not a “*claim in foot*”.

The Court accepts those submissions on the basis of the authorities cited and rule that the claimant’s claim in relation to fraud and mistake is not a claim in foot. That is enough to dispose of the claimant’s claim without the need to consider section 100 of the Act, but for the issue of estoppel raised by the claimant.



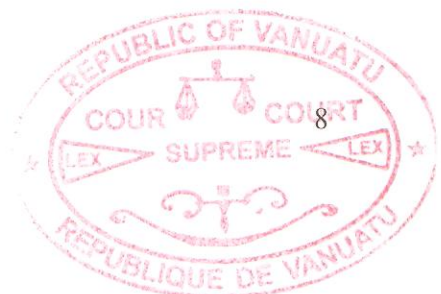
6.7. In evidence is a memorandum dated 28th March 2006. The claimant submits that on the basis of representation made in that memorandum, the first Defendant was estopped in transferring the title or dealing with it in the way he has done.

It is not ascertained who the writer of that memorandum was but all that person was doing is certifying the status of the leases named therein as they stood at that time. The issue of the correction of survey plan only arose on 05th November 2007 when the declared custom owners requested correction to the Director. They had the transfer of lease to them from the Santo Land Council on 23rd February 1988. Unfortunately the error was not discovered in 1988. It appears the reason was that a Maritime Zone was included in the lease which should not have been. The Director gave evidence showing the Maritime zone (Annexure JMP 7). It appears there is no challenge to the Maritime Zone. The claimant has not pleaded it in their claims. They have adduced some evidence to show that there has not been any declaration to indicate the area included in the Maritime Zone has ceased to be state land. Be that as it may but the reality is that on 23rd February 1988 all that land comprised in title 04/2643/007 reverted back to the custom owners. The register clearly shows that. (See annexure 3. Mr Moshizuki's statement)

6.8. The claimant's lease a rural agricultural lease. By common knowledge one does not need a maritime Zone for agricultural purposes.

The claimant has not shown any change of status of their current lease and therefore any attempt by them to develop the lease other than for agricultural purposes must be deemed to be unlawful.

6.9. Therefore should the claimant be allowed to do that which is unlawful? The answer must be in the negative. The Director acted in the exercise of his duties under section 11 of the Act in correcting the survey plan.



As such I accept the States submission on the issue of estoppel on the basis of Maritime Electric Co. Ltd v. General Diaries Ltd. [1937] 1 All ER 748 that the First Defendant was not estopped from transferring or dealing with the claimant's title in the way they did as they were performing their public statutory function.

7. Finally the claimant pleaded in paragraph 11 that the rectification had materially affected the claimant. Again they have failed or omitted to particularize the facts showing how they have been materially affected.

Conclusion

8. For the foregoing reasons I order that the claims of the claimant's be hereby dismissed in its entirety. All orders and relief's sought be refused.
The claimants be hereby ordered to pay the First and Defendants costs of and incidental to the action as agreed or taxed.

DATED at Luganville this 30th day of January 2012

BY THE COURT


OLIVER A SAKSAK

Judge

