IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction) **Civil Case No. 31 of 2011/ 30 of 2011/ 234 of 2011 and 229 of 2012**

BETWEEN: ABONG MARCELLIN representing Family Abong
First Claimant

AND: LITOUNG LUCIEN representing Family Tiosah Damian
Second Claimant

AND: BLAISE TOKTOK representing Family Toktok
Third Claimant

AND: KOUBAK MARTIN, KOUBAK MARCEL AND KOUBAK RONO representing Family Koubak
First Defendants

AND: FIDEL VANUSOKSOK representing Family Vanusoksok
Second Defendant

AND: ALEX MELEUN AND AIME MELEUN
Third Defendants

AND: REPUBLIC OF VANUATU
Fourth Defendant

Hearing: ***29 July 2014***
Date of Judgment: ***27 November 2014***
Before: ***Justice Stephen Harrop***

Appearances

- ***Claimants:*** ***Evelyne Robert***
- ***First Defendants:*** ***No appearance (but for distribution to John Timakata, instructed post-hearing)***
- ***Second Defendant:*** ***No appearance (Colin Leo)***
- ***Third Defendant:*** ***George Boar***
- ***Fourth Defendant:*** ***Florence Williams (SLO)***

JUDGMENT OF JUSTICE SM HARROP

Introduction

1. The claimants apply under section 100 of the Land Leases Act [Cap. 163] ("the Act") for cancellation of the registration of lease number 09/1542/005 which relates to land near Lamap, South Malekula, which they say was obtained by fraud or alternatively mistake.

2. The 75-year residential/rural lease was registered on 14 February 2011. The lessors are "Koubak Martin and Koubak Marcel (representing Family Koubak of Libebe)" and the lessee is " Koubak Rono (representing Family Koubak of Libebe)". Koubak Rono is an elder brother of the lessors. The rent was one vatu, though it was not specified if this was payable yearly, quarterly or monthly. I doubt the tenant minded which was correct.

3. The claimants claim that they are the custom owners of parts of the leased land. They acknowledge that the first defendants are the custom owners of a small portion of it, Libebe, but say they had no right to grant a lease over all the land. They say that their contentions about custom ownership have been upheld by the decision of the Pelongk Sorsambi Custom Land Tribunal ("PSCLT") dated 7 July 2010 and, on appeal, by the South Malekula Area Land Tribunal ("SMALT") by its decision dated 12 July 2011.

4. The first defendants oppose the claim but it is supported by the second and third defendants and not opposed by the fourth defendant.

The history of this proceeding and the nature of the hearing on 29 July 2014

5. This case has a long and regrettable procedural history following the filing of the claim on 7 March 2011, especially over the last year or so. Ultimately the hearing on 29 July 2014 proceeded on a formal proof basis in the sense that there was no appearance for or involvement of the primary defendants, the first defendants, who include both the lessor and the lessee of the registered lease. It is necessary to recount in detail the procedural history leading up to, and following, the hearing.

6. Initially, Mr Kiel Loughman acted for the lessee Koubak Rono who was listed at the outset as the second defendant. In December 2011, he commenced judicial review proceedings, CC 234/2011, challenging the decision of the SMALT. As a result Justice Spear stayed this proceeding and a related one (CC 30/2011) pending determination of the judicial review application. The latter became of no effect because it was not progressed by the applicants: it was not served on the appropriate respondents within the requisite three months or at all.

7. There seems not to have been material progress until August 2013 when Justice Spear noted in a Minute that Ms Thyna was now acting for the Koubaks. Mr Loughman was granted leave to withdraw.

8. On 11 October 2013, Justice Spear consolidated all of the claims within the one proceeding namely this claim (CC 31/2011), CC 30/2011, CC 234/2011 (though this was the judicial review case which was of no effect) and CC 229/2012. The other cases were all stayed pending determination of the current proceeding which counsel agreed would be determinative of the outcome of all of them.

9. As directed the claimants filed an amended claim but no defence was filed for the Koubaks. At the conference on 6 December Justice Spear rejected their explanation for this failure and awarded costs against them. He directed that any defence by them was to be filed and served no later than 17 January 2014 and if that did not happen they would not be permitted to file a defence without special leave of the Court. Further, the claimants would be entitled to have the case set down for formal proof on the basis that the first defendants had not filed a defence, the second and third defendants admitted the claim and the fourth defendants did not oppose it.

10. Justice Spear set the matter down for a further conference before me at 3:30 pm on Monday 3 February 2014. At that conference the only counsel who appeared was Ms Robert for the claimants. I duly set the matter down for a formal proof hearing on Monday 10 February 2014 at 9:30 am.

11. On 10 February 2014, about 90 minutes before the scheduled hearing time Ms Thyna filed a notice of ceasing to act for the Koubaks but also she filed a defence to the amended claim. She explained that the reason for her ceasing to act was because her legal advice to her clients conflicted with their instructions to her and as a result she was not comfortable to continue as counsel. However Ms Thyna did not attend the conference as she ought to have because she had not been given leave to withdraw (and would not have been until the representation and the interests of the Koubaks were confirmed and protected).

12. I suggested to Ms Robert that a slightly amended claim would be appropriate and directed that this be filed by 17 February. I further directed that the first defendants file a detailed defence to that claim by 14 March because the one they had filed on 10 February did not adequately respond to the particulars of the existing claim.

13. I noted that in view of their defaults and delays to date no further time would be allowed to the first defendants to file a defence and the case would proceed to a formal proof hearing without reference to them if that were not done by 14 March. I emphasised that Ms Thyna was to note the urgency of this and to ensure her clients were aware of it.

14. I noted that the costs orders had not been complied with and that unless the costs were paid then the first defendant's defence would be liable to be struck out on that ground alone if they were not paid by 14 March. Again I noted that Ms Thyna was responsible for ensuring her clients were aware of this. The case was set down for a further conference on 15 April to determine the future course of the proceeding in light of situation as it then stood.

15. April 15 was an unscheduled public holiday and the next conference held was on 26 June 2014. Again, despite my insistence that Ms Thyna appear to apply to withdraw as counsel, she had done nothing and did not appear. That was despite her having been expressly reminded shortly before the conference by my Associate of the importance of her attendance. In the meantime Ms Robert had filed the further amended claim on 12 February 2014 and it had been served on Ms Thyna's office which remained the first defendants' address for service.

16. I was concerned that the first defendants personally i.e. the Koubaks may not have been made aware of the stringent obligations which I imposed on them in my Minute of 10 February 2014. Given Ms Thyna's failure to attend the conference that day and on 26 June I recorded my concern that she may not have discharged her obligation to inform her clients of what was happening with their case. I said that I would arrange to see Ms Thyna in my chambers urgently to clarify the position and that the case would be set down for trial or formal proof hearing depending on developments on 29 July. I emphasised that unless the first defendants engaged another lawyer, filed a proper defence to the amended claim, a detailed statement of sworn evidence in support and paid the outstanding costs by 25 July, then the case would proceed by formal proof hearing on 29 July.

17. I duly spoke to Ms Thyna on the afternoon of 26 June and my fears about the first defendants' ignorance of what was happening were confirmed. Ms Thyna told me that she had not even *seen* the Minute of 10 February, let alone passed it on to her clients. I gave her another copy. I recorded that the unacceptable situation had developed where the first defendants as a result of Ms Thyna not fulfilling her duty as counsel to tell them about the orders made against them were unaware of the orders made against them. That should not be held against them personally. However, it was also unfair to the other parties to be held up any more than necessary because of Ms Thyna's serial defaults. I emphasised to Ms Thyna that the case would proceed on 29 July and that she was urgently to contact her clients to ensure they were aware of the orders of 10 February and, assuming she was not to be acting, that they urgently instructed another lawyer because otherwise the case would proceed in their absence on 29 July.

18. At the hearing on 29 July, again Ms Thyna was not present and nor was any other counsel for the first defendants. As a result of my earlier discussion with her I remained uncomfortable about entering judgment immediately on a formal proof basis because I was not satisfied that the first defendants were aware of orders made against them. Because Ms Thyna had told me that she understood Mr Eric Molbaleh was now acting I arranged to see him in chambers to clarify the position. It emerged that he had not properly been engaged and that was why he had not filed a notice of beginning to act.

19. Through an excess of caution perhaps, but being conscious this was an important land case where fraud was alleged, I directed that the claimants were to serve on each of the first defendants personally a detailed notice I drafted dated 8 August. This explained the procedural failures on their part, of which they may or may not have been aware. It informed them that judgment would be entered against them without further notice i.e. an order would be made cancelling the registration of lease number 09/1542/005 if they failed by 12 September 2014 to file a defence to the second amended claim, to file any evidence they wished to file, to pay the costs earlier ordered by Justice Spear and to file submissions explaining why the present view of the Court outlined in the notice was not correct.

20. I further explained that it appeared to me the claimant's claim was unanswerable and I noted it was supported by the second and third defendants and not opposed by the fourth defendant. This was because the lease to the Koubak family related to an area of land which had subsequently been confirmed by the SMALT whose decision had not been appealed (or otherwise challenged, except for the ineffective judicial review claim) as containing 36 nasara. The Koubak family was certainly one of the 36 custom owners but the area of land relating to their family, Libebe, was but a small part of the land contained in the lease.

21. The matters raised in the earlier defence about the processes applied by the PSCLT were now a matter of history given the SMALT decision. I noted that the Koubaks had proceeded with the registration of the lease claiming the whole of the area was theirs despite knowing (because they had appealed to the SMALT) that there was dispute about that. The State itself had confirmed that despite its officials' clear advice to the Minister of Lands against doing so he went off "on a frolic of his own" and approved the Koubak the lease, so that the State effectively agreed with the claimants that the lease should not have been registered because it was obtained at least through mistake if not fraud.

22. On 11 September 2014, the day before the deadline, Mr John Timakata filed a notice of beginning to act for the first defendants and sought an extension of time to comply with the directions until 3 October 2014. I decided this should be granted without reference to other counsel though it became clear subsequently that the claimants were strongly

opposed to any further delay. I said I would review the file on 7 October. On that day Mr Timakata requested a further extension which I also granted, as a final deferral of Mr Timakata's clients' deadline, until 4 pm on Friday 24 October. I said that no further time would be allowed to the first defendants and that if nothing was done I would then proceed to determine the case based on the information currently on file.

23. Nothing has been filed by Mr Timakata by 24 October or subsequently.

24. On 10 October, Mr Leo filed an application on behalf of Francois Batik for joinder as party but he subsequently by letter of 6 November noted that even if joined as a party Mr Batik supported the claimant's claim in its entirety and did not need to file any defence or other document. In the circumstances, I see no need to deal with Mr Batik's application.

25. As a result of all of the above, which I believe confirms that I have gone to extraordinary lengths to try to ensure that the first defendants' position was put fully before me, I now proceed to deal with the case on formal proof basis on the information on file, which includes the documents filed by them. I would have been justified in striking out the first defendants' defence but prefer to take into account the documents they have filed. Regardless of the first defendants' conduct, the claimants must still establish their claim; an untenable claim is not made tenable by the procedural defaults of a defendant.

Discussion and decision

26. Given that the claim is undefended in any material way it is not necessary to traverse the evidence in great detail but it is important to record the main facts as I find them to be.

27. The first defendants were in the process of registering the lease in early 2010 when the first claimant Mr Marcellin discovered this and interrupted the process by informing the then Minister of Lands, Paul Telukluk, of his interest in portions of land within the lease. The Minister replied that he would not consent to the registration of the lease because of the dispute over who were the owners of the land. This was a matter that needed to be determined by the Land Tribunal. Accordingly the first claimants filed a claim in the

PSCLT. Its decision on 7 July 2010 said that the first defendants' family was custom owner over a small area of land within the land under the lease but that 25 other tribes were also owners of their respective nasaras within the leased area.

28. In July 2010, the first defendants lodged an appeal to the SMALT. While that appeal was still pending there was a change in the Minister of Lands and the first defendants travelled to Port Vila to see the new Minister, Harry Iauko.

29. Despite the Minister knowing about the PSCLT decision, the pending appeal and despite both written and oral advice from his officials, Mr Iauko signed his consent to the lease on 9 February 2011 which resulted in its registration on 14 February 2011. As Mrs Trief put it in her submissions of 28 July 2014: *"The Minister was advised in writing twice by the State Law Office on 1 May* [I believe it was on 11 May] *and 9 August 2010 and verbally by Department of Lands and Lands Tribunal officers not to consent to nor approve the registration of the lease. The Minister ignored the advice given and proceeded to consent to and approve the registration of the lease"*.

30. Mrs Trief rightly says that once the lease was approved by the Minister, the Department had no power to investigate the customary ownership of the land or to decline registration and therefore the Republic does not accept it as vicariously liable for the Minister's actions which she describes as *"being a frolic of his own"*.

31. The appeal to the SMALT resulted in its decision on 12 July 2011. It held that there are not merely 25 but rather 36 nasaras/tribes including that of the Koubaks which have customary ownership of portions of the land under the lease.

32. The claimants assert that the registration was obtained fraudulently because the first defendants knew there was an issue about the customary ownership of the land and yet deliberately went to see the Minister to obtain his consent to a lease which if registered would deprive the other (then 25, now 36) custom owners of their rights. They further say that there was fraud on the part of the Minister in signing the lease in these circumstances.

33. I note that under the Customary Land Tribunal Act, a party dissatisfied with the decision of an area land tribunal may appeal to an island land tribunal but no such appeal has been lodged by the first defendants or anyone else against the decision of the SMALT. The time for appealing has of course long since expired. It follows that it is no longer arguable that the first defendants have – or had at any time - the right to grant a lease over the whole of the leased area.

34. The claimants plead in the alternative that the registration was obtained by mistake for the same reasons.

35. On 13 May 2011, the Koubaks filed a defence and counterclaim and a statement by Koubak Martin. Their primary point is that there was a discrepancy between an oral decision given by the PSCLT and its written decision. They add that the Minister had acted within his power to consent to the lease and it was accordingly properly registered. The counterclaim focused on the issues relating to the tribunal and sought by way of relief dismissal of the claim and cancellation of the tribunal's written decision of 2 July 2010 and an order that the tribunal release in writing its first (oral) decision, which was in favour of the Koubaks.

36. The other defendants, represented by Mr Leo, Mr Boar and by the State Law Office accept that the claimant's claim should be upheld or at least, in the case of the Republic, it is not opposed.

37. On the information before me, there is nothing put forward by the first defendants in their original defence and counterclaim in May 2011, in the supporting statement or in the defence filed on 10 February 2014 which provides a credible answer to the fraud claim. As Ms Robert has submitted, the dispute about the process by which the PSCLT reached or issued its written decision is now academic because that decision was appealed and the SMALT essentially confirmed the written decision, albeit increasing the number of nasaras from 25 to 36. Further, while the Minister undoubtedly had the power to grant consent that does not mean there was no fraud or mistake involved which led to the registration.

38. There is nothing else advanced on behalf of the first defendants challenging the claim to fraud and mistake.

39. I consider the circumstances give rise to at least a very strong inference that there was fraud on the part of the first defendants, probably in conjunction with Mr Iauko, to deprive the claimants of their rights as custom owners of parts of the land which is the subject of the lease and to secure for the first defendants' family a long-term benefit to which they knew they were not entitled.

40. A finding of fraud is never to be lightly reached, especially where there has been no cross-examination of the first defendants and where the other apparently fraudulent party involved, Mr Iauko, is deceased and unable to defend himself or otherwise to assist the Court. Further, the claimants are constrained to rely on inference because they were not privy to communications between the first defendants and Mr Iauko. There are certainly grounds for grave suspicion about what may have persuaded Mr Iauko to approve a lease which his officials repeatedly advised him not to approve.

41. In the end it is not necessary to determine whether there was fraud because registration by mistake is sufficient for the s.100 jurisdiction to be available and mistake there certainly was - whether associated with fraud or not. The mistake was in registering a lease purportedly granted over the whole area by the lessors when at the time of registration they owned only one of 25 nasaras contained within the custom land boundary in question. That was the position at date of registration by virtue of the PSCLT decision. While it was under appeal, the appeal was by the first defendants. By registering the lease they circumvented both the PSCLT decision and the risk of their appeal being unsuccessful, as it later proved to be.

42. I therefore make no finding that fraud was involved, but I emphasise that neither am I finding there was none.

43. Section 100(2) says that a bona fide proprietor in possession may not have his title affected if he did not know about or cause or contribute to the fraud or mistake which led to the impugned registration. That is not pleaded by the first defendants and obviously

cannot avail them here, since they were all knowingly involved in the mistaken registration.

44. I am entirely satisfied that this is a case where, because it was obtained by mistake, the registration of the lease must be cancelled and I order rectification of the register accordingly.

Costs

45. Although brief submissions were made as to costs at the end of the hearing, I propose at this stage not to make final orders but to reserve the opportunity for all parties to make further submissions if they wish. I urge the parties to try to reach agreement if possible but will make some observations here which may assist.

46. Undoubtedly the claimants, and the second and third defendants albeit at a modest level given their merely supporting positions, are entitled to costs against the first defendants. Arguably the Republic should bear its own costs because, despite the efforts of the Lands Department officials, the Republic has to accept responsibility, at least so far as costs are concerned, for the Minister's actions. I accept the Lands Department Officers acted in good faith and tried their best to avoid the improper registration to which the Minister despite their advice gave consent.

47. The question of whether there should be costs in favour of the claimants and the second and third defendants (albeit at a modest level given that the claimants have done the majority of the work) against the Republic is more nuanced. The primary perpetrators of the mistaken registration were undoubtedly the first defendants and they were the beneficiaries of it. They therefore ought to bear the primary burden of costs orders. However, the registration could not have been achieved without the Minister's critical involvement. There is no direct evidence as to what occurred between the first defendants and the Minister which persuaded him to consent to the registration despite clear official advice that he should not consent. One could certainly speculate with some degree of confidence.

48. The Republic is in the unusual position where it is entitled to credit for the officials' appropriate conduct but also has to bear responsibility for the Minister's improper conduct. In my view, *some* contribution to the costs, of the claimants at least, should be made by the Republic but it should be no more than a 20% contribution to the standard costs award in favour of the claimants against the first defendants. In this context it needs to be remembered that my preliminary view is that the Republic should not receive costs from the first defendants so in that way it is already paying a price for the Minister's conduct.

Conclusion

49. Being satisfied that the registration of lease 09/1542/005 was obtained by mistake, if not fraud, I order rectification of the register by cancellation of that registration on 14 February 2011. Ms Robert is to file a draft order for signing and sealing.

50. As to costs, if the parties cannot reach agreement memoranda may be filed by 19 December 2014.

51. As to the other proceedings, my understanding is that in light of this judgment Mr Boar will file a discontinuance in Civil Case 229/2012 and that Mr Leo will file one in Civil Case 30/2011. They are to do so within 14 days so as to complete those claims.

52. Finally, for the avoidance of any doubt, the counterclaim by the first defendants in this proceeding is dismissed.

BY THE COURT