

**IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU**  
(Civil Jurisdiction)

**CIVIL CASE NO. 67 OF 2014**

**BETWEEN:**

**WILLIE CASUELLY AND  
ROY TOBAL**

Supreme Court Appointed  
Administrators of the Estate of  
Henry George and Betty  
Casuely

Claimants

**AND:**

**SHANG SHAO MING**

First Defendant

**AND:**

**REPUBLIC OF VANUATU**

Second Defendant

**Date of Judgment: February 6<sup>th</sup> 2017**

**Before: Justice Mary Sey**

**Appearances: Mr. George Boar for the Claimants**

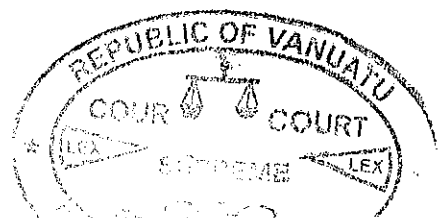
**Mr. Avock Godden for the First Defendant**

**Mr. Lennon Huri for the Second Defendant**

**RESERVED JUDGMENT**

**Introduction**

1. The Claimants are administrators of the estate of late Henry George and late Betty Casuely who passed away on 6 October 2006 and 17 May 2009 respectively. Administration of the estate of the deceased persons was granted to the Claimants on 15 February 2012. The estate comprised leasehold title 11/OA22/023 (lease 023) located along the main road opposite Au Bon Marche Fuel Station at No. 3 Area, Port Vila.
2. An agreement for sale and purchase dated 3 October 2008 was signed by Mrs. Casuely and the First Defendant for the transfer of lease 023 from Mrs. Casuely to the First Defendant.



3. The claimants seek rectification of lease 023 pursuant to section 100 (1) of the Land Leases Act (LLA) (Cap 163) on the grounds of fraud and mistake. They also seek indemnity under sections 101 and 102 of the LLA being damages for loss of the deceased's estate.
4. The First Defendant says he is a bona fide purchaser for value and that lease 023 does not form part of the deceased's estate since the lease had been transferred to his name before the Claimants obtained letters of administration of the deceased's estate on 15 February 2012.
5. The Second Defendant denies that it committed any fraud and or mistake under Section 100 (1) of the LLA and says lease 023 does not form part of the deceased's estate since it was three years later (after the lease was transferred to the First Defendant) that the Claimants obtained letters of administration.

#### **Brief background**

6. The **chronology** of events can be summarised as follows:

**12 April 1985:** lease 023 was registered in favor of Mr. Henry George and Mrs. Betty Casuelly as Joint proprietors and as lessees for a term of 50 years.

**6 October 2006:** Mr. George, the Claimants' father died.

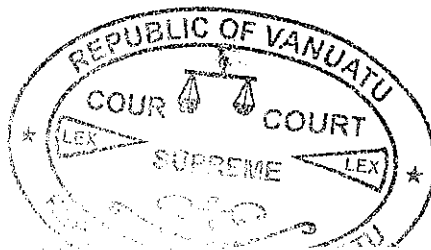
**3 October 2008:** an agreement for sale and purchase was signed by Mrs. Casuelly (the surviving proprietor of lease 023) and the First Defendant for the transfer of the lease from Mrs. Casuelly to the First Defendant.

**7 November 2008:** Mrs. Casuelly (as the transferor) and the First Defendant (as the transferee) signed a transfer of lease 023 in the presence of Mrs. Cynthia Thomas Csiba, but this transfer was not registered until 6 July 2009.

**2 March 2009:** Mr. Jack Kilu of Jack I Kilu Lawyers wrote a letter to the Director of the Department of Lands, informing the Director that the lease has been purchased in the sum of VT4,600,000 and was fully paid for. On that same date the First Defendant paid the fees for the application to transfer the lease.

**17 May 2009:** Mrs. Casuelly, the Claimants' mother died.

**6 July 2009:** the transfer of the lease was registered.



**22 April 2010:** the Minister of Lands provided consent to the registration of consent to transfer the lease from Mr. George and Mrs. Casually to the First Defendant.

**23 September 2010:** the First Defendant surrendered the lease to the Minister of Lands.

**15 October 2010:** the Minister consented to the registration of the surrender of the lease for the purpose of change of class of use from Residential to Commercial use.

**22 October 2010:** the First Defendant paid stamp duty for surrendering the lease.

**4 November 2010:** the advice of registration of dealing in relation to the surrender of lease was registered.

**15 January 2012:** the Supreme Court issued letters of administration to the Claimants.

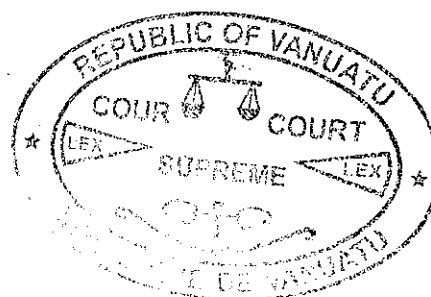
6. The following issues were framed for trial:-

1. Did the First Defendant commit fraud and/or mistake under Section 100 (1) of the Land Leases Act such that it would justify cancellation of lease title 11/OA22/023?
2. Was the First Defendant a bona fide purchaser for value?
3. Should the First and Second Defendants indemnify the Claimants under Section 101 and 102 of the Land Leases Act (Cap 163) for loss of the deceased's estate?

7. **Law**

**A. RECTIFICATION BY THE COURT**

*100. (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.*

## **INDEMNITY**

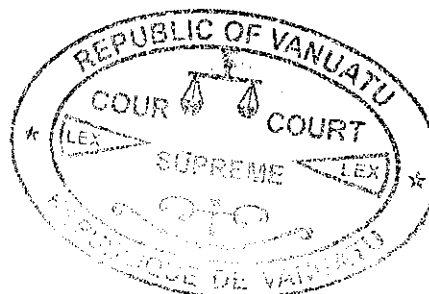
*101. (1) Subject to the provisions of this Act and of any law relating to the limitation of actions any person suffering damage by reasons of –*

- (a) any rectification of the register under this Act;*
- (b) any mistake or omission in the register which cannot be rectified under this Act; or*
- (c) any error in a copy of or extract from the register or any copy of or extract from any document or plan in each case certified under this Act;*

*shall be entitled to be indemnified by the Government.*

*(2) No indemnity shall be payable under this section -*

- (a) to any person who has himself caused or substantially contributed to the damage by his fraud or negligence or who derives title, otherwise than under a registered disposition made bona fide for valuable consideration, from a person who so caused or substantially contributed to the damage;*
- (a) in respect of any loss or damage occasioned by the breach of any trust; and*
- (c) in respect of any damage arising out of any matter into which the Director is exonerated from enquiry under section 24.*



## **AMOUNT OF INDEMNITY**

102. (1) *Where an indemnity is awarded in respect of the loss of any registered interest it shall not exceed -*

- (a) *where the register is not rectified, the value of the interest at the time when the mistake or omission which caused the damage was made; or*
  - (b) *where the register is rectified, the value of the interest immediately before the time of rectification.*
- (2) *Every award of indemnity shall include interest thereon at 5 per centum per annum from the date of the award up to the date of payment.*

## **Evidence**

8. The Claimants' evidence was essentially contained in the following documents which were admitted in evidence as follows:

**Exhibit C1** – sworn statement of Willie Casuely dated 29 July 2014 with annexures “WC1” “WC2” “WC3” “WC4” “WC5” “WC6” “WC7” “WC8” “WC9” “WC10” and “WC11”.

**Exhibit C2** – further sworn Statement of Willie Casuely dated 30 March 2015 with annexures “WC12” “WC13” and “WC14”.

**Exhibit C3** – sworn statement of Germaine Willie dated 30 March 2015.

**Exhibit C4** – sworn statement of Walter George dated 2 April 2015.

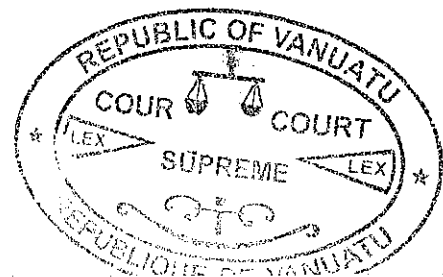
The evidence adduced by the First and Second Defendants was contained in the following documents:

**Exhibit D1 (1)** – sworn statement of Moses Kaswely dated 7 December 2015.

**Exhibit D1 (2)** – sworn statement of Shang Shao Ming dated 22 August 2014.

**Exhibit D1 (3)** – Photograph

**Exhibit D2** – sworn statement of Jean-Marc Pierre for the Second Defendant dated 7 November 2014 with annexures “JMP1” “JMP2” “JMP3” “JMP4” “JMP5” “JMP6” “JMP7” “JMP8” “JMP9” “JMP10” “JMP11” and “JMP12”.



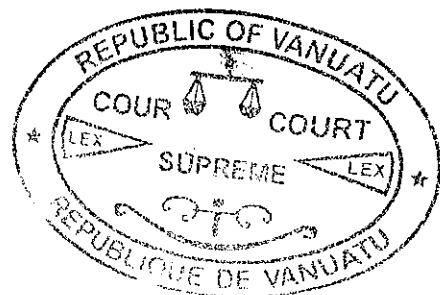
## Discussion

### Issue No.1:

#### **Did the First Defendant commit fraud and/or mistake under section 100 (1) of the Land Leases Act such that it would justify cancellation of lease title 11/OA22/023?**

9. The Claimants allege fraud on the part of the First and Second Defendants and they say that the deceased Betty Casually never signed the original Sale and Purchase Agreement agreeing to have lease 023 sold and transferred to the First Defendant because she was at that material time admitted at Port Vila Central Hospital. They further say that the evidence of fraud is made out from the evidence of Willie Casually and his witnesses.
10. The crux of the Claimants' evidence is to the effect that Mrs. Casually never signed the Sale Agreement and that, after her death, the First and Second Defendants' agents (including one Juliette Casually) forged the deceased's signature and transferred lease 023 to the First Defendant. At paragraphs 13 14 and 15 of his sworn statement in support of the claim (i.e. **Exhibit C1**) Mr. Willie Casually avers as follows:

- "13. Then on 16 May 2009, my deceased mother was admitted at Port Vila Central Hospital and I recalled on that day I went to see her and she handed me an Agreement which she said her brother wanted her to sign concerning the leased land so he could sell the leased land to a Chinese investor.*
- 14. I then enquired from her why couldn't she sign it and she said she will never sign it since she said I and my family looked after the leased land whilst she was in Noumea with Henry George and it's better that the land be transferred to my two sons since they continue to reside on the land. She then handed me the original Agreement which she never signed and I still kept it. I annex and marked (sic) "WC5" true copy of the original Agreement not signed by late Betty Casually.*
- 15. I confirm I have kept the original Agreement to this day because by then I came to realize that my mother's relatives really wanted to sell the leased land to the Chinese investor and this was the*

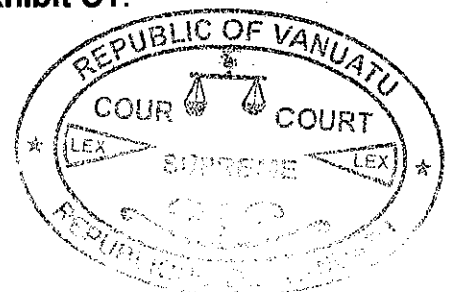


*reason they assaulted me in 2005 and chased me out of the leased land since."*

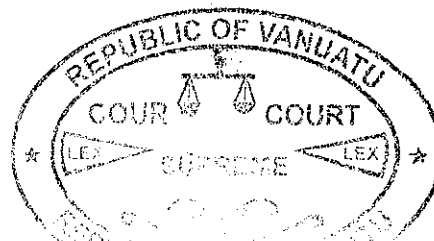
11. However, this piece of evidence changed dramatically when questions were put to Mr. Willie Casuely during cross examination by the First Defendant's counsel. He responded as follows:

*"In answer to my sworn statement at paragraph 14, I now say I did not say that to the lawyer. He only gave me the document and I signed. No my mother didn't give me the document as stated in paragraph 14. I saw the agreement a month later after my mother had died. It was Walter George who gave me the document. George took mama to hospital and then brought her back. Then mama spent 5 months at home before she died. After George dropped her off from the hospital mama forgot her bag/basket in the vehicle. But it was 1 month after mama died that George gave the document to my wife. I went to see Jack Kilu but he told me I had no right to see the document. No I did not go and check out the lease. Yes, I knew the lease had been registered. I took the document to my lawyer because I saw that Ming had not signed the original."* [Underlining mine for emphasis].

12. It seems clear to me that Mr. Willie Casuely is laying the blame for the glaring inconsistencies and untruths in his sworn statement on his counsel. He was adamant in his denial that he did not "say that to the lawyer." Perhaps more caution should be applied by counsel when obtaining instructions in the future to ensure that statements are read over to deponents and explained to them in the language they understand before getting them to sign.
13. Mr. Walter George also gave evidence on behalf of the Claimants and he relied on his sworn statement dated 2 April 2015. He confirmed that he was the one who drove late Mrs. Casuely home in his bus after she was released from the hospital sometime in February 2009. During cross-examination Mr. George said that Mrs. Casuely had forgotten her bag which contained the Sale Agreement in the vehicle and that he had held on to that bag until she passed away. He said: *"Yes, when I drove her back home she was carrying a bag. Yes, I held on to that bag until she died. Yes, after she passed away I kept that bag which had the Agreement for six Months. Yes, I gave the Agreement to Willie's wife."* I note that what Mr. Walter George gave to the Claimants is annexure "WC5" which is a copy of the Sale and Purchase Agreement attached to the sworn statement of Willie Casuely as **Exhibit C1**.



14. Indeed, as the Claimants contend, annexure "WC5" is not signed by the First Defendant Mr. Shang Shao Ming. However, it is noteworthy that the First and Second Defendants have exhibited signed copies of the same Sale and Purchase Agreement dated 3 October 2008. These documents are exhibited to the sworn statements of Mr. Shang Shao Ming as annexure "SSM1" attached to **Exhibit D1(2)** and that of Mr. Jean-Marc Pierre as annexure "JMP2" to **Exhibit D2** dated 7 November 2014. Moreover, not only did Mr. Shang Shao Ming conveniently identify his signature to the Court, he was also able to confirm that Mrs. Casuely was present in the lawyer's office and that she signed the Agreement on 3 October 2008. He denied the Claimants' allegation that he had never seen Betty in his life. He said he had seen her together with Moses when he had gone with Sandy Bae to see the land Betty was selling. Mr. Ming said late Betty was present at the time he went to see the land before agreeing to purchase it. Furthermore, he was able to identify her from a group of three persons in a photograph produced and tendered as **Exhibit D1(3)**.
15. The First Defendant's witness, Mr. Moses Kaswelly, was equally credible. He told the Court that he is 72 years old and that late Betty was his elder sister and that Willie Casuely is his nephew. He admitted that in 2005 he and some boys had assaulted Willie and beaten him up. When it was put to him by the Claimants' counsel that one of the reasons for assaulting Willie was because they did not want him to take over Betty's land, Mr. Moses Kaswelly said: "*I have no business with the land because it is Betty's but what I did with the boys was because Willie beat up his mother.*" He went on to explain that Betty had been beaten and kicked on her side by Willie and that from that day Betty had not been keeping well. He said that when Betty was dying she did not want her son Willie to get her money because he had beaten her up so she asked him to call Eni Nasse to come from Noumea to arrange with the bank to effect a transfer of the money to Eni. He confirmed that he had signed the Sale and Purchase Agreement in Mr. Jack Kilu's office and he identified his signature as well as that of Mr. Ming. Mr. Kaswelly also confirmed that Betty had received the purchase price of VT4.5 Million from the First Defendant. He also confirmed that he had received the sum of VT1 Million from Betty.
16. At paragraph 8 of the Amended Supreme Court Claim filed on 10 November 2014, the Claimants have pleaded that "*following the passing of the Claimants' father and mother but unknown to the Claimants, the First and the Second Defendants by way of fraud pursuant to section 100(1) of the Land Leases Act were able to transfer and register the deceased's estate into the First*





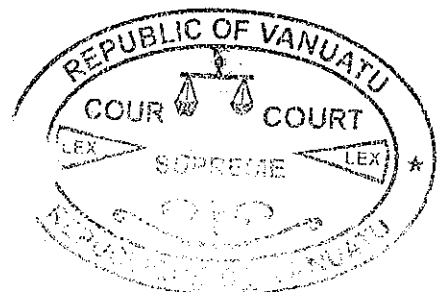
*Defendant's name.*" It is well established law that allegations of fraud must be strictly proved in terms pleaded and not inferred from the facts. Although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than mere balance of probabilities is required.

17. It is timely to consider the definition of fraud at this stage. Fraud is defined in **Black's Law Dictionary, 6th Edition, 1990** in the following terms:

*"Fraud: An intentional perversion of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing or to surrender a legal right; a false representation of a matter of fact, whether by words or conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal inquiry; anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or innuendo, by speech or silence, word of mouth, or look or gesture; fraud comprises all acts, omissions, and concealments involving a branch of legal or equitable duty and resulting in damage to another."*

In a nutshell, fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive and intentional.

18. To my mind, the evidence adduced by the First Defendant contradicts the Claimants' allegation of fraud as pleaded. In any event, the allegation that Mrs. Casually never signed the Sale Agreement and that, after her death, the First and Second Defendants' agents (including one Juliette Casually) forged the deceased's signature and transferred lease 023 to the First Defendant is a mere speculation based on assumption since it is not supported by any evidence. Rather, I find that there is overwhelming evidence that late Mrs. Betty Casually and Mr. Shang Shao Ming signed the Sale and Purchase Agreement together on 3 October 2008 in the office of lawyer Jack Kilu and the First Defendant paid the sum of VT4.6 Million as consideration and he is a *bona fide* purchaser for value. This Court is inclined to agree with the Defendants that lease property 023 was no longer owned by the deceased personally at the time of her death, and as such, cannot form part of her estate.

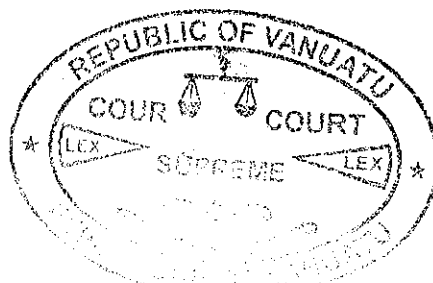


19. I equally reject the Claimants' contention that they are entitled to the property because they are the surviving children of Mrs. Casuely. This might have been the case had the property formed part of her estate. However, it is inexorably clear, from the evidence adduced before this Court, that the property comprised in lease 023 had been disposed of by Mrs. Casuely prior to her death. Having reached this conclusion, I need not deal with the Claimants' contention in paragraph 9 of their amended claim that "*as per Succession of Probate and Administration Regulation 1972,*" they "*ought to have participated and negotiated any considerations for any transfer of the deceased's estate to the First Defendant.*"
20. I must say that even though the First Defendant was speaking through a Chinese interpreter, he came across as a truthful witness and, having had the opportunity of seeing his demeanor and hearing him testify, I accept his evidence as credible and reliable. Besides, there is no evidence to indicate that the First Defendant had acted fraudulently to obtain lease 023. Therefore, the allegation of fraud is a mere speculation that has no basis and I so find. Accordingly, the answer to **issue 2** as to whether the First Defendant is a *bona fide* purchaser for value is in the affirmative.
21. The Claimants furthermore seek an order that the First Defendant's lease 023 be cancelled by the Director of Lands pursuant to s. 100(1) of the LLA on the ground of mistake and the Claimants' names be inserted therein.
22. At paragraphs 19 and 20 of the sworn statement of Willie Casuely dated 29 July 2014 (i.e. **Exhibit C1**) he states as follows:

*"19. I confirm this is what I found at the Land Record Office in reference to the leased land and these findings clearly showed me there was something fishy about the dealings on the leased land by the First and Second Defendants and their agents. These are:*

*a. On or about 6 July 2009, late Henry George and Betty Casuely leased land was cancelled. The lease was registered on Shang Shao Ming (First Defendant) name on 6 July 2009. I annex and marked (sic) "WC6" true copy of the First Lease Register.*

*b. On 23 September, 2010, the First Defendant, Shang Shao Ming surrendered this leased land back to the government. I annex and*



marked (sic) "WC7" true copy of the surrender signed by the Minister of Lands.

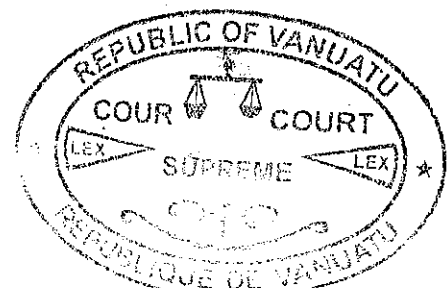
c. On 4 November, 2010 the First Defendant, Shang Shao Ming's surrender was registered.

d. On 23 May 2011, a new Commercial Lease was signed by the Minister granting the Commercial lease to Shang Shao Ming and this lease is valid for 50 years commencing 17 April, 1985 and this Commercial Lease was registered on 7 June, 2011. I annex and marked (sic) "WC8" true copy of the Commercial Lease.

20. The Second lease register noted that Shang Shao Ming was being granted 50 years lease commencing 12 April, 1985. I annex and marked (sic) "WC9" true copy of the Second Lease Register."

23. The Claimants say that lease 023 runs for 50 years commencing on 12 April 1985 and that on 17 May 2009, which was the date Mrs. Casually died, lease 023 still had 24 years to run and therefore it should not have been cancelled by the First and Second Defendants. They further submit that nowhere in the Defendants' evidence has it been shown that the First Defendant applied for and was issued a certificate of negotiator in order to have a lease over the deceased's estate. It is further submitted that section 8 of the Land Reform Act provides that for a person to have a lease issued to him in Vanuatu, he or she must apply to the Land Management and Planning Committee (LMPC) for approval and then to the Minister to issue a certificate of negotiator before the person can have a lease registered over the land that he or she wants. To bolster his submissions, the Claimants' counsel referred the Court to the Court of Appeal decisions in Livingstone v Molbarav (2012) VUCA 15 and Ngwango v Ron (2015) VUCA 28.

24. Mr. Jean-Marc Pierre gave evidence on behalf of the Second Defendant. He told the Court that he is the Director of the Department of Lands and that he has worked there since 2006. Mr. Pierre disagreed with the Claimants' contention that the First and Second Defendants had breached the statutory requirement of Section 8 of the Land Reform Act which requires that a certificate of negotiator be obtained in order to negotiate a new lease. During re-examination by the SLO, Mr. Pierre explained that for a new lease one has to apply for a negotiator's certificate but in the case of a transfer (or when someone is renewing a lease) all that is needed is a consent and approval from the Minister.



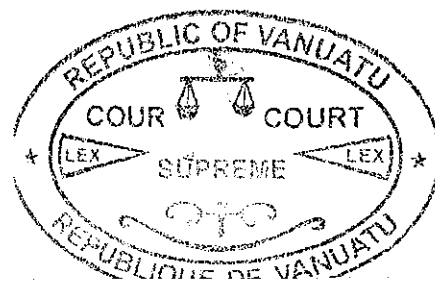
25. Mr. Pierre was shown a copy of the lease register attached to **Exhibit C1** as annexure "WC6" showing that the registration of the original lease 023 was cancelled and the First Defendant acquired the remaining period of the lease. He admitted that lease 023 which was for 50 years was registered on 12 April 1985 and on 6 July 2009 the transfer of lease 023 from Mrs. Casually to the Mr. Ming was registered with the remaining portion of the period for which the lease was registered. This appears to accord with s.60 of the Land Leases Act which provides as follows:

**"60. Transfer**

- (1) *A proprietor may, subject to the provisions of this Act, transfer his registered lease or mortgage to any person, with or without consideration, by an instrument in the prescribed form.*
- (2) *The transfer shall be completed by registration of the transferee as proprietor of the lease or mortgage and by filing the instrument.*
- (3) *A transfer shall dispose of the registered lease or mortgage transferred for the whole remaining portion (at the time when the disposition purports to take effect) of the period for which the lease or mortgage was registered.*

Accordingly, when the transfer of lease 023 was registered, the First Defendant acquired the remaining portion of the period for which the lease was registered to Mrs. Casually.

26. The Claimants counsel cross-examined Mr. Pierre as to why the Minister's consent was given after the transfer was registered in this particular case. His response was that normally the lessor's consent is given before a transfer is made and the fact that the Minister's consent was given after the transfer was registered in this matter might have been an error on the part of the Department of Lands.
27. The Second Defendant submits that the Claimants in their evidence and pleadings have failed to show that the mistake or error from the Department in not issuing the Minister's consent before the transfer of lease 023 was registered amounts to fraud and/or mistake. I agree.



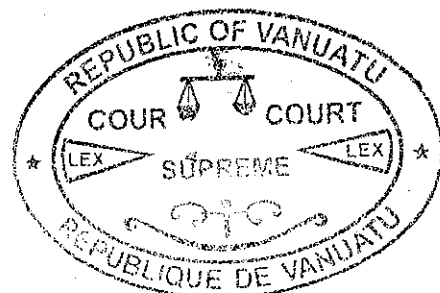
28. In considering the relief sought by the Claimants for cancellation of lease 023 on the ground of mistake, I must say that I am mindful of the Court of Appeal's decision in *Naflak Teufi Limited v Kalsakau*, Civil Appeal Case No. 7 of 2004, in which the Court remarked as follows:

*"In our view, the meaning of section 100 of the Land Leases Act CAP163 is not in doubt. We are satisfied that the object of the section is to ensure that the land register and the processes leading up to the registration of any instrument or interest is free of any mistakes, fraud or possible fraudulent activities. In other words, its purpose is to secure the integrity of the register and the internal processes culminating in registration. The section, in its terms, is one which empowers the Supreme Court where it is satisfied that any registration has been obtained, made, or omitted by fraud or mistake, to order rectification of the register by directing that any registration may be cancelled or amended. We note without comment, the disjunctive nature of the rectification power.*

*We endorse what was said by this Court in Civil Appeal Case. 25 of 2004, [2005] VUCA 5, Jone Rogara & Ors v Noel Takau & Ors about section 100: -*

*"For a party seeking rectification under s. 100 of the Land Leases Act, it is not sufficient to prove that a mistake occurred in the course of a transaction which ultimately concluded in registration of the interest which is sought to have removed from the register. In terms of s. 100, the Court must be satisfied that the "registration has been obtained, made or omitted by fraud or mistake". The section imposes a causal requirement. The mistake must lead to the impugned registration being made. The onus is on the party seeking rectification not only to establish a mistake, but also to satisfy the Court that it caused the registration to occur."*

29. In my view, the Claimants have failed to discharge this onus of satisfying the Court that the registration of lease **023** has been obtained, made or omitted by fraud or mistake to justify rectification of the lease.



**Issue No.3**

**Should the First and Second Defendants indemnify the Claimants under Section 101 and 102 of the Land Leases Act (Cap 163) for loss of the deceased's estate?**

30. Having reached the conclusion that lease 023 was not registered by fraud and or mistake to justify rectification of the lease, it follows that the Claimants are not entitled to any indemnity from the First and Second Defendants and I so find.
31. The Claimants' claim is hereby dismissed. The First and Second Defendants are entitled to costs to be taxed if not agreed.

**DATED at Port Vila, this 6<sup>th</sup> day of February, 2017.**

**BY THE COURT**



**M. M. SEY**  
**Judge**

