

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

Civil
Case No. 17/3612 SC/CIVL

BETWEEN: YVES LAU T/A LCY Garage
Claimant

AND: THE GOVERNMENT OF THE REPUBLIC OF
VANUATU
First Defendant

AND: THE DEPARTMENT OF LANDS
Second Defendant

Coram: *Chief Justice Vincent Lunabek*

Counsel: *Mr John Malcolm for Claimant*
Mr Frederick Gilu, Solicitor General for the Defendants

Date of Delivery: *17 December 2019*

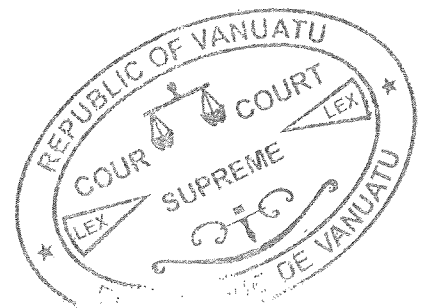
JUDGMENT

I. Introduction

1. This is a claim for rectification of the Land Leases Register pursuant to Section 100 of the Land Leases Act [CAP] and fair rental of the property to be assessed from 1980, interests and costs.
2. The basis of the claim is that the claimant had obtained entitlement to be registered as Lessee of Leasehold Title 03/0183/016 issued over two pre-independence titles 1362 and 1290 in Luganville, Santo.
3. The claim is over the plot of land the Department of Lands in Luganville, Santo is currently located.

II. Issues

4. The parties agree to the following issues to be determined by the Court:



- (i) Whether or not there was a registrable lease title 016?
 - (i-1) If yes, whether the action of the Defendants in not registering title 016 to the claimant amounts to mistake?
- (ii) Whether the claimant is entitled to a repayment of title 073 from 1980?
- (iii) The claimant asserts and the defendants dispute that Mr Lau's application for 1362 includes 1290.

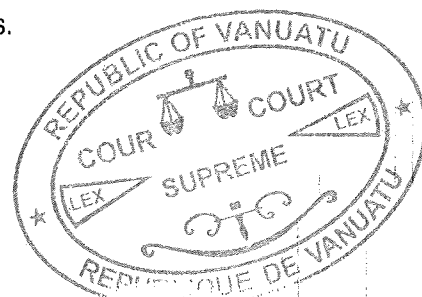
III. Backgrounds

A. Pleadings – The Claim

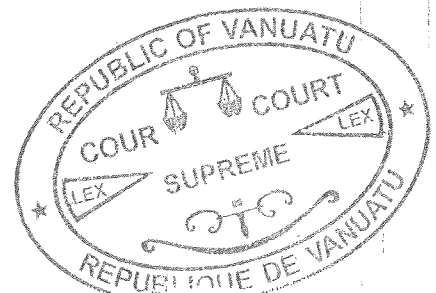
- 5. The Claimant alleges that on or about 1980, he maintained the ownership of the Property at Independence and obtained the entitlement to be registered as Lessee of Leasehold Title 03/0183/016 and paid all rentals over a number of years.
- 6. It is said that on or about 2005, the Lands Department split Leasehold Title 03/0183/016 into two titles, namely 03/0183/072 and 03/0183/073. Leasehold Title 03/0183/073 was registered in the Claimant's name.
- 7. Leasehold Title 03/0183/073 was taken without consideration or Agreement and put in the hand of the Defendants. There was no payment, no consideration or Agreement in respect to such Transfer. The said Transfer is a fraud or mistake pursuant to section 100 of the Land Leases Act.
- 8. The Defendant had occupied the property since without payment of rental. The actions of the Defendant are in breach of the Land Leases Act and the ownership of the property by the Claimant. The Claimant is entitled to fair rental for the period.
- 9. The Claimant is entitled to rectification of the Title back to its own name.

B. Pleadings – The Amended Defence.

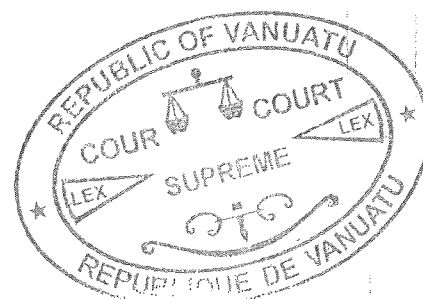
- 10. The Defendants dispute the claim. They say what follows-
- 11. The Land survey Title 03/0183/016 (Title 016) was the title given to the pre-independence titles 1362 and 1290.
- 12. The pre-independence title 1362 is located where the claimant's garage is.



13. The title 1362 was registered between the Societe Francaise des Nouvelles-Hebrides and Hans Urbern ('Mr Urbern') as proprietor of the title and is where the claimant's garage is located.
14. The pre-independence titled 1290 is located where the office of the Department of lands (the Department).
15. The Title 1290 was registered between the French Government and Mr Urbern as proprietor of the title and is where the office of the Department is located.
16. Upon or after independence, the Department drew a survey over the two pre-independence titles (1362-1290) and allocated a new survey plan title to them. The new survey plan title was 03/0183/016 ("Title 016").
17. The Title 016 was just a survey plan drawn to be allocated to the two pre-independence titles above but not for purposes of registration.
18. The unregistered survey plan title 016 covers the whole pre-independence titled 1362 and title 1290.
19. Both pre-independence titles (1362 and 1290) were owned by Mr Urbern who was later deported from the country. The reference of the name of Jean Urben was not correct. The correct name of the proprietor of the two pre-independence titles is Hanss Urbern.
20. Sometimes in 1983, the claimant's father, Mr Lau Ching Yau ('Mr Lau') applied for title 1362.
21. On or about 4 March 1983, the Luganville Urban Land Corporation ('LULC') approved Mr Lau's application for title 1362 and requested him (Mr Lau) to pay improvements.
22. On 26 July 1984, Mr. Lau paid the cost of improvement of the 1352 in the sum of VT306, 000.
23. At all material times Mr. Lau applied for title 1362 and not title 016. The Title 016 was never registered as a lease title as alleged.
24. The allegation that the claimant was the owner of lease title 016 is misconceived and they deny allegations contained therein.
25. The defence reiterates that pre-independence titles 1362 and 1290 were registered between the French Government and Mr Urbern. They were vested in the Government and become state land at the day of independence pursuant to the Land Reform Act. The Government repossessed these two pre-independence titles at the time of independence in 1980.



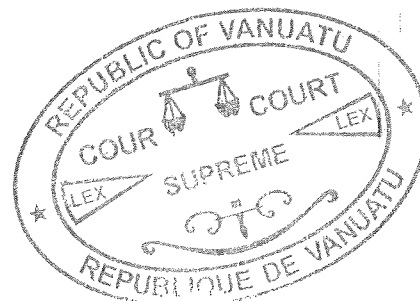
26. The claimant nor his father (Mr Lau) did not own the land subject to the two pre-independence titles at the day of independence.
27. The Departments of Lands records show that Mr Lau had been paying land rent from 2003 – 2009 and that such payments were made with respect to the unregistered title 016.
28. The land rent payment was a mistake from the system as one cannot pay land rent against a title (016) that never existed as a lease title.
29. The total land rent payment made was VT252, 859. The state is willing to refund the claimant's total payment above on the ground that such payment was made towards a title (016) that was not registered and did not exist.
30. The allegations that the claimant owns Title 016 since independence is misconceived and they deny overt allegation contained therein.
31. On March 1997, the Principal Lands Officer submitted a request to the Principal Surveyor to subdivide title 016 into two plots.
32. By letter dated 13 March 1997, Mr Lau was also copied and informed.
33. On March 1998, the Principal Lands Officer sent a reminder for the subdivision of title 016 to the Principal Surveyor. Mr Lau also was copied and informed of the same.
34. On or around 28 October 1998, the Department of Lands subdivided the survey plan title 016 and created plans titles 03/0183/072 ('title 072') and 03/0183/073 ('title 073').
35. Title 072 covers old title 1362 and is located where the claimant's garage is and titled 073 covers part of the old title 1290 and is situated where the office of the Department of Land is.
36. On 7 June 2005, the Department registered Lease Title 072 (which was old title was 1362) between the Minister of Lands as the Lessor and the claimant as the Lessee, as applied.
37. Mr Lau or the claimant never applied for title 073 for pre-independence title 073 as title 073 was never registered as a lease in the claim aunt's name as alleged. Title 073 is still owned by the State.
38. The Defence says the claimant has no standing and is not entitled to the rectification sought.
39. Title 016 was just a new survey plan allocated to both pre-independence titles 1362 and 1290 but not for purpose of registration after independence after allocating that title 016, the Department then subdivided it (016) to title 072 and 073.



40. Title 072 covers the old titled 1362 (where the claimant's garage is located) and title 073 covers part of old title 1290 (where the Department's office is situated).
41. Mr Lau applied for title 1362 (but not for title 1290 nor both titles).
42. Following Mr Lau's application for title 1362, on 7 June 2005, upon completion of all relevant processes, the Department registered title 072 between the Minister as lessor and the claimant as lessee.
43. On the basis of the paragraphs above, the claim is misconceived and must be dismissed with costs to the defendants.
44. Further that section 6 of the State Proceedings Act No. 9 of 2007 ("State Proceedings Act") prohibits the commencement of a proceeding against the State unless detailed notice of the intention to commence the proceeding is given to the State.
45. Based on the preceding paragraph, the claimant failed to give notice to the State prior to instituting this case as legally required by section 6.
46. The failure to give notice operates as a complete prohibition of the commencement of a proceeding against the State.
47. The claimant must pay costs of VT30,000 for non-compliance of section 6 rather than recommence the proceeding as legally required which case would be a duplication of process and cause further delay and costs to the claimant.

C. Pleadings: Reply to Amended Defence.

48. The claimant takes issue with the defendant's amended defence and in particular, the following:-
 - (a) The two pre-independence Titles were merged into title 016 and says the entire property was sold by the Government as a merged title;
 - (b) It was meant to be registered and it was sold as a whole property incorporating both titles;
 - (c) Lau Ching Yau was purchasing title 016 which incorporated both titles;
 - (d) The LULC accepted money for both titles;
 - (e) He accepts he paid VT306, 000 for both titles on 26/07/84;



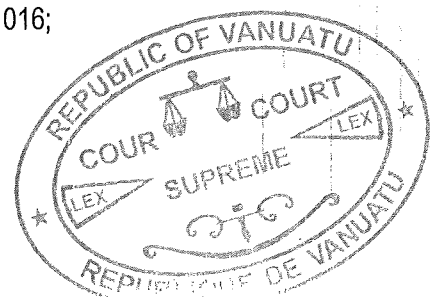
- (f) The failure to register title 016 was a mistake or fraud by the defendants;
- (g) They paid the rental on the entire property and after 2009 the defendant wrongfully and without notice re-registered the titles separately as 072 and 073;
- (h) The payment continued regardless;
- (i) The claimant denies any such letter provided;
- (j) He also denies any right to the defendant to re-register without notice and remove a portion of the property previously 1290;
- (k) The entire action was a misconceived fraud and a theft of what was previously 1290
- (l) The claimant agrees to payment of VT30,000 costs as requested.

IV. Evidence

49. The evidence in support of the claim and defence is by way of sworn statements filed and cross-examination of witnesses.

A. Agreed Facts

50. Before the trial hearing, parties through their respective counsel, agreed to the following fact:
1. The Title in dispute is 03/O183/016 ("title 016"). This is a new survey plan title allocated to pre-independence titles 1362 and 1290, at the day of or after independence;
 - 1.1. Both pre-independence titles 1362 and 1290 were owned by Hans Urben ("Mr Urben");
 - 1.2. Mr Urben was deported after independence.
 2. On 4 March 1963, the Luganville Urban Land Corporation Board ("Board") approved Mr Chung Yau Lau's ("Mr Lau") application for Title 1362 with the condition that he (Mr Lau) would submitted to the Luganville Urban Land Corporation his proposal for payment of improvements;
 3. On 26 July 1984, Mr Lau paid costs of improvements in the sum of VT306, 000 as requested by the Board;
 4. Mr Lau had made some payments in the past for the unregistered title 016;



5. On 7 June 2005, the second defendant registered Lease title 03/OI83/072 between the Minister of Lands as lessor and the claimant as lessee.

B. Evidence for the claim

1. Sworn statements in support of the claim.

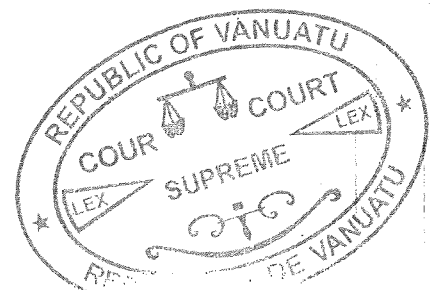
51. The claim is supported by the following sworn statements:-

1. Sworn statements of Yves Lay of Luganville, Manager of the LCY Garage, vehicle operation situated in Luganville, Santo:-

- (i) Filed 19 December 2017;
- (ii) Filed 15 May 2018;
- (iii) Filed 15 May 2018 (Amended sworn statement);
- (iv) Filed 6 August 2018 (Further sworn statement).

2. Oral testimonies of the claimant

52. The claimant Mr Yves Lau gave evidence to this effect. He is a mechanic and he lives in Luganville, Santo. He confirmed the contents of the sworn statements and say they are true.
53. He was cross-examined by Mr F. Gilu. He is the Manager of LCY Garage in Luganville, Santo. To his understanding, Titles 1290 and 1262 are in issue in this case and Title 1362 is where his garage is located in Luganville, Santo.
54. To his understanding, before independence Titles 1290 and 1362 were separate titles. But after independence titles 1290 and 1362 are in one title 016. He accepted his father is the owner of that title 016. He says that because the Luganville Urban Land Corporation (LULC) has approved that title.
55. He was shown a letter of the LULC to the claimant's father dated 4 March 1983 approving Mr Lau's application for title 131362. He confirmed that letter. He confirmed also that his father application to lease title 1362 had been approved. He confirmed he had no other evidence to show that his father had applied for title 1362. This letter is the only document he had for the approval of title 1362 to his father.
56. It was put to him and he accepted that around independence period his father applied for title 1362 and the LULC approved it. He accepted his father purchased title 1362. The evidence of the payment was document 4 in his Amended sworn statement filed 15 May 2018.



57. He was specifically asked:

"Q. Look at the receipt. The receipt referred to title 136 (part) and title 1290 (part)". He answered": "A – Title 1362 and title titles is 306,000 Vatu".

58. He was asked again he confirmed his evidence that this is the payment for both titles.

59. It was pointed to him that the receipt at document 4 referred to above says 1362 (part) 1290 (part). He replied "yes for both titles". He agreed that the receipt says 13632 (part) and title 1292 (part).

60. He was asked he accepted his father is the owner of Lease Title 016. In respect to title 016, he was asked and he accepted he did not have any certificate obtained. His mother did apply. He did not have any executed lease document but he has the receipt. He did not have any consent document. He said his father applied, bought the land and applied for the registration. But the government has never registered the title.

61. He was asked of paragraph 3 of his Amended statement relating to land rent to two titles, he said he received land lease and he paid for title 016 each from ever since her mother died.

62. He was asked he said since 1994 – 1998 he said land rent for title 016.

63. He was taken to the invoices or receipts are page 28 of his statement referred to title 016 and specifically to title 1362. He confirmed these from pages 33 to 35.

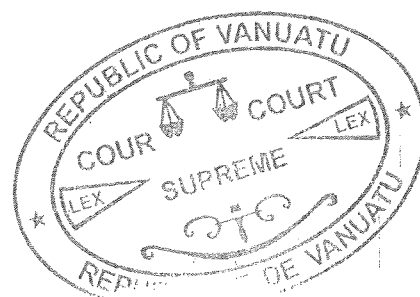
64. He was taken to page 41 of that statement relating to land titles invoices history from 2003 – 2007 he accepted the invoices referred to Title 016 and specifically title 1362.

65. The Defence accepted that the invoices issued with reference to title 016 but that reference title meant title 1362.

66. He was asked to go to paragraph 5 of his Amended statement that he did not know that title 016 would be changed to title 073. He said he did not know the process of leading to subdivision.

67. He was asked and he accepted he received the document at page 72 dated 21 June 2004 in the year 2004. He accepted that document at page 72 dated 21 June 2004 in the year 2004. He accepted that document at page 73 came with a certificate and a plan (at page 74).

68. He was asked and he said he understood these documents and he accepted the plan (at page 74) does not cover the full title. He understood and was aware title 018 is not in fill and he will get only part of it.

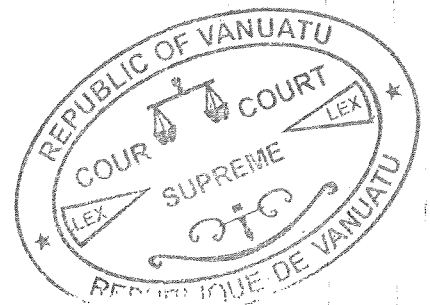


69. In 2004, he went to Land Department. Apparently he spoke to one Mr Robin Toka, the Manager of Land Departments. Mr Toka told him he did not get any lease. He said he asked he wanted Title 016. Mr Toka told him 072 first after 073. When he received registration of title 072, two months after, he was told he cannot have title 073. He said if he knew that he would not accept title 072.
70. He believed he owned titles 072 and 073 as they are in title 016. He did not understand why they changed it. The title paid was in title 016.
71. Title 072 in title 016 was given in 2004. He was asked of any land rental on title 072. He answered no. The Lands Departments charged all titles in 016.
72. Mr Lau was re-examined. He was referred and asked of the Amended statement page 72 he received the document in June 2004. He did not have any option to object.
73. He said they did not give him any notice. There was nothing in the document for the government to take over title 073.
74. Pages 4 – 6 document reference is made to title 016. He said 1362 and 1290.
75. He was asked to go to Gambetta statement 19 February 2018. He was asked if he saw that document before. The title has been subdivided in 2 plots. He accepted the suggestion it has to be post 2005.
76. He confirmed the reference to title 016 and improvements on it were the garage and the house. He was asked of document at pages 4 – 5 he confirmed he thought he purchased title 016. There was no advice to him that he can object to.
77. He was referred to page 4 of his Further statement, he was asked to clarify (at page 5) about title 016 whether these was anything that title 016 cut in half (part). He answered no. He accepted that was what was put for sale.

C. Evidence for the Defence

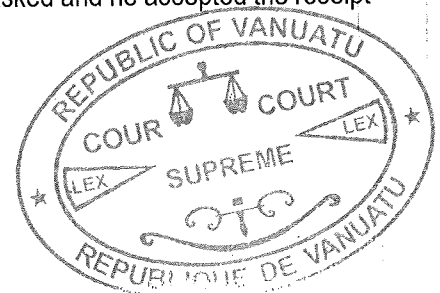
1. Sworn statements in support of the Defence

78. The Defence is supported by the following sworn statements:-
1. Sworn statements of Paul Gambetta filed 19 January 2018.
 2. Further sworn statement of Paul Gambetta filed 20 June 2018.



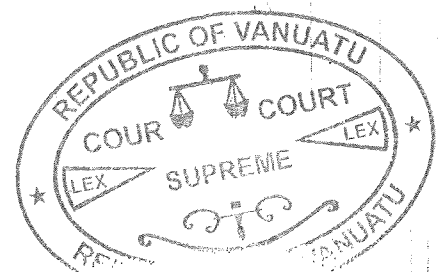
2. Oral testimonies of the Defendants

79. Mr Paul Gambetta gave evidence on behalf of the First and Second Defendants to the following effect. He is Acting Director of Lands. He is the senior photographer under the survey section of the Department of Lands.
80. He confirmed his signatures on the two sworn statements he filed. Their contents were true.
81. He was cross-examined. In 1980 – 1983, he was not involved in this case as he was still a student. His evidence in this case was taken from the Land Department. There were some documents but not all documents of the said land.
82. There were no records of Title 016 as a lease.
83. He was asked and he accepted that if the claimant purchased title 016 with its improvements, he will be entitled to title 016.
84. He was referred to Document PG1 to his First statement about the List of titles among other things of Deported properties all numbered. He said they were new survey plans. If registered, the new leases will be given with same numbers.
85. About the time, the Luganville Urban Land Council Board gave Mr Lau title 016 whether he saw this document (dated 19th June 1998) before. He answered no.
86. He was asked whether this was expected to be put for sale as referred to in his Further Statement in PG5. He answered yes. Title 016 all was sold.
87. He was asked if he has a survey plan 016 whether there is any ability to sell half (1/2). He answered any subdivision of 016 and he referred to the letter of Principal Lands Officer to subdivide survey plan 016 into titles 072 and 073 in 2005.
88. He was asked but before 2005, there was no subdivision of survey plan title 016, so the only way to sell is sell all title 016. He conceded that by saying yes.
89. He was asked and he also accepted that for the payment of improvements as attached in (PG5) titles 1362 and 1290. Hans Urben owned the entire property. He accepted the property was sold in 1984. He further accepted the Luganville Urban Land Council Board assessed the improvements of the property at 306,000 Vatu.
90. He was asked he said the improvements could mean more or could mean one improvement on the property. The garage is on both land (1362 and 1290). He was also asked and he accepted the receipt



for the cheque dated 26 July 1984 showed the improvements of the property. The Document "PG5" was on improvement of title 016, he accepted that.

91. He was asked and he conceded that the improvements were Urban Land Office and the Round house (garage in title 016).
92. He accepted also that Lau purchased the improvements of the garage and the house and that the subdivision of title 016 in 072 and 073 were done after 2005 (See PG6).
93. He accepted that after the Land Department subdivided the property (016), title 072 was registered lease in the name of the claimant. Title 073 was already occupied by Land Department.
94. It was put to him PG9 was the document on subdivision of half (1/2) of Title 016. He said yes. Title 073 was given to the government Land Office on the side of the main road.
95. He was asked of land hand written plan on the Document PG9 he accepted the suggestion put to him that it was how the proposed subdivision on 016 occurred.
96. He was referred to his statement and the Document PG3 and he accepted the person named Dominique was an employee of the Lands Department. He commented on the signatures shown to him that they were not similar.
97. It was put to him that the purpose was to obtain title 073 to officiate the Lands Department occupation of the said title. He denied by saying no.
98. He was asked whether he knew Mrs Urban Han's application in respect to titles 1362 and 1290 was refused. He replied she was a deportee. He was asked he confirmed the property purchased by Mr Lau was 016. Mr Lau purchased only 1362 but not 1290.
99. He was asked of his Further Statement why the government amalgamate the diagonal line cut across the garage. He responded it is reasonable. He was asked again and he accepted again Mr Lau paid the property for 306,000 vatu.
100. He was asked if he took a registered land or a land purchased by contract by a person, he needed to give notice or opportunity to that person. He referred to the two (2) letters of the Principal Lands Officers to the Principal Surveyors copied to the claimant.
101. He was asked to go to the two letters (PG7) and (PG8) he referred he accepted there was no signatures on the two notices (letters) and he did not have signed copies.



102. He was also challenged that even if the two letters were sealed and signed. Where is the letter to Lau? He replied none. It was put to him that the letter (PG8) was not addressed to Mr Lau and MR Lau said he did not receive it. He replied no, none.
103. He asked to explain title 072 was registered in 2005. The length of the delay. He answered the contract is on PG5.
104. It was put to him that it was fraudulent situation. He answered yes.
105. Paul Gambetta was re-examined. He was asked to clarify the use of Plan 016 to pre-independence title. He answered he did not know why. There is an amalgamation. He did not know.
106. He was asked to clarify the payments made by Lau for land rental from 2003 – 2009 which makes reference to title 016 but not 1362. He answered that it was a mistake to invoice someone with registered land.
107. He was asked whether in 2005 the Department of Lands registered title 073. He answered that 073 was never registered. All government properties are not registered. The registration of 072 was based on negotiator certificate.
108. He was referred to Document PG5 Title reference: 1362 (Part) and 1290 (Part). He answered the garage is on the two (2) titles which is the bigger part of 1362. The allocation of 1362, the smaller part is title 1290. Title 072 covers the bigger part of 1362.

V. Assessment of Evidence

109. On assessing the evidence the following fact findings emerge –

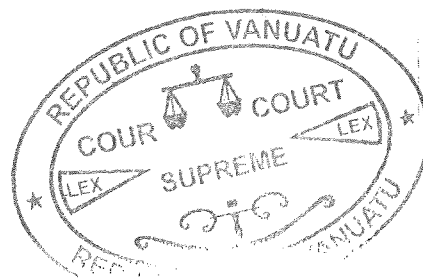
1. Prior to independence in 1980

110. Prior to independence in 1980, the parcel of land in issue was owned by Mr Hans Urben in two Pre-independence Titles. They were:-

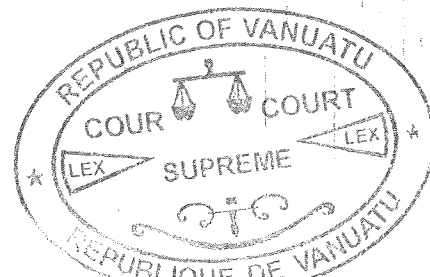
- i) Title 1362 – the garage now owned by the claimant, now titled 03/0183/072.
- ii) Title 1290 now 03/0183/073 – the house owned by Urben but now the Lands Department.

2. At Independence in 1980 – 2005

111. At independence Mr Urben was deported, both titles 1362 and 1290 were seized and vested back into the Government.

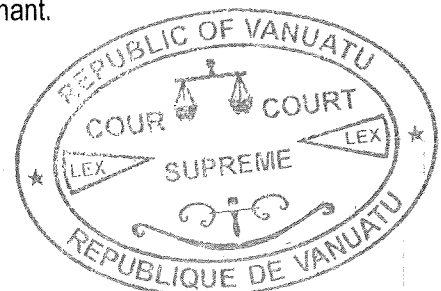


112. At independence, the Lands Department re-titled all of the property in Luganville under a new cadastral plan.
113. Titles 1362 and 1290 being adjoining properties were amalgamated or condensed under a new lease number 03/OI83/016.
114. The lease number had a Survey Plan and was over the entire land. This is reflected in the Amended Defence at paragraph 18 to the effect that **"the unregistered survey plan covers the whole pre-independence titles 1362 and 1290"** and put up for sale on the board outside the Lands Department as title 016.
115. In 1990, the claimant applied for and was approved as the Purchaser in July 1984. There were not much records of this purchase in the Department of Lands. The Department of Lands did not have or seemed to have lost most of the relevant document since their possession. Exhibit P.G.5 is a receipt from Luganville Urban Land Corporation to the claimant for VT306,000 for:
- a) The property of Urban Hans over title 1362 (part) 1290 (part) at Luganville; and
 - b) The actual receipt – next page, is for "improvements" over land 1362 part 1290.
116. The Document on PG6 shows the "improvements" on title 016 specified as:
- (a) Urban Lands Office
 - (b) Round house used by Mr Lau Chung Yau.
117. The evidence of Lau which is not challenged was that on the deportation of Urban, Lands Department look over the urban house to hold as an office until they found promises for themselves or until registration.
118. There was no registration and the Department of Lands did not leave. They paid no rental and did not purchase what was previously 1290 (part) from the claim.
119. It is noted that on that Exhibit PG6, there is a recommendation for the board to be kept as the Urban Lands Office..."as such proceedings have issued to regularize the premises owner's name. This property has been subdivided into two plots."
- The subdivision of the property title 016 into two plots was in 2005. So the document PG6 had to be past 2005. It is a fact that there were no proceedings issued to resolve title issues. The recommendation in 2005 had already been put in place without notice to the claimant or being advised and their right to complain.
120. In 1997, the Lands Department requested the Survey Department to subdivide title 016. The letter was copied to the claimant who denied over receiving it (Exhibit P7). The letter in Exhibit P7 was unsigned



and on blank paper. A reminder was sent in 1998 (Exhibit P68). It was signed and on letterhead of the Department of Lands. But neither letter was addressed to Lau and he denied receiving the same. It is accepted as a fact.

121. A plan for subdivision was done in 1998 (Exhibit P69) for title 016. However, the newly subdivided plan 016, now 072 and 073 are nothing like the original plans for title 1290 and title 1362. It is a fact as testified by Mr Gambetta that the boarder on 1290 and 1362 was diagonal across both buildings (Lands Department and Round House (garage)). It is noted that it was intersecting or cross at the time of the survey plan 016 was done. It is more probable than not that it could have been done exactly as 072 and 073 to avoid the issue.
122. From the time of the sale to the date of subdivision of 016 to 072 and 073 the claimant paid the land rentals on the entire property.
123. From 2005 the Lands Department accepted the same amount of rental but allocated the entire sum to the garage property. It is a fact that there is no evidence of advice to the claimants why or what they were doing.
124. The following further facts as accepted:
 - (i) All the documents of Lands have disappeared. The Department does not know;
 - (ii) The Department never registered 016 for reasons that are not known;
 - (iii) Exhibit PG3 that William Dominique, a Lands Officer, on 07 August 1995 obtained a Power of Attorney giving the lease building to Lands in 1995 is disputed by the claimant. Mr Gambetta accepted the suggestion that it was a forged document which was relied on;
 - (iv) Exhibit PG4 only named 03/0183/016 as being approved of sale of Title 1362 (only);
 - (v) Exhibit PG5 – the words (part) was at Titles part 1362, part 1290 meant they were only selling part of the property. The claimant disputed that as it can mean they were part of the entire title 016. The evidence of Mr Gambetta was that it was not possible to sell part of (part of 016). It had to be subdivided or sub-leased for a partial sale to be registered;
 - (vi) The subdivision to 072 and 073 was not objected to by the Claimant but there was no advice or right to object to the same given to the Claimant.
125. Despite selling the Claimant the entire property of Hans Urben being 1362 (part) 1290 (part) re-labelled 03/0183/016, and advertised on the board was a single piece of land, the Survey Plan for 016 never placed with a Lease Title and registered in the name of the Claimant.



126. Further, despite the payment for improvements which were described as both the house and garage (PG6), the Survey Plan for 016 was never placed with a Lease Title and registered in the name of the Claimant.

VI. The Law

127. The sale of land subsequent to 1980 to individuals is governed by the Land Leases Act [CAP. 163]. The relevant provisions are within Section 1 – Interpretation; Section 10 – Survey Plan; Land Survey Plan – Section 11; Combination and subdivision in Section 13 and Section 22.

128. They are set out as follows:

i) Section 1 – Interpretation

- a) "*parcel*" means an area of land separately delineated by a survey plan prepared by or under the direction of the Director of Surveys;
- b) "*registrable*", in relation to an instrument, means required to be registered or capable of registration under this Act;
- c) "*survey plan*" means the plan prepared under section 10;
- d) "*transfer*" means the passing of an interest by act of the parties and not by operation of law and also the instrument by which such passing is effected;

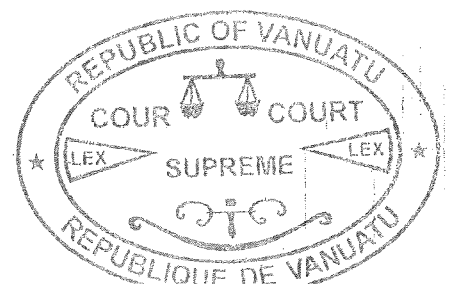
ii) Section 1 – Land Survey Plans

- (1) The Director of Land Surveys upon application, and on payment of the prescribed fee, shall prepare or cause to be prepared in respect of each parcel, the subject of a lease required to be registered, a survey plan, the original copy of which shall be retained by him, and certified copies of which signed by the parties to the instruments shall be attached to the original instrument of lease to be presented for registration and to the copies of the instrument to be retained by the lessor and the lessee.
- (2) The plan shall bear a distinguishing number and shall be referenced to the cadastral plan.

iii) Section 11 – Correction of land survey plans

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 to 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 Surveys to correct the survey plan whenever such correction does not materially affect the interest of any person.



iv) Section 12 – Combination and subdivision

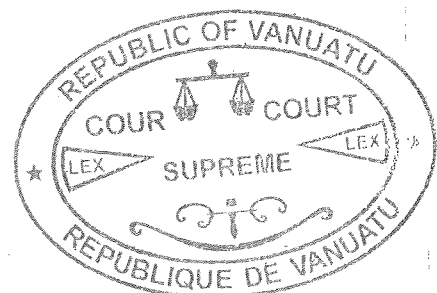
- (1) Where registered leases granted by the same lessor, free from any registered encumbrances other than the agreements and liabilities contained or implied in the lease, of continuous parcels are held by the same proprietor, upon application by him accompanied by a surrender of the existing leases in the prescribed form and a new lease in the prescribed form the Director shall effect combination by closing the register relating to the surrendered leases and opening a new register in respect of the new lease.
- (2) Subject to section 49(2) upon application by the proprietor of a registered lease for the division of the land comprised in his lease into two or more parcels accompanied by a surrender of the existing lease in the prescribed form and new leases in the prescribed form the Director shall effect the division by closing the register relating to the surrendered lease and opening new registers in respect of the new leases resulting from the division:

Provided that –

- (a) A proprietor of a lease shall not be entitled to subdivide the land comprised in his lease without the written consent of the Director of Land Surveys;
- (b) Any person aggrieved by a decision of the Director of Land Surveys refusing consent under paragraph (a) may appeal to the Court which may make such order as it thinks just.

(3) Section 22 – Instrument ineffectual until registered

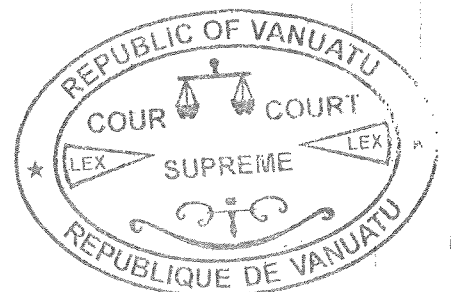
- (1) No registered lease or mortgage shall be capable of being created or disposed of except in accordance with this Act. Every attempt to create or dispose of a registered lease or mortgage or to create, extinguish, transfer, vary or affect, any right or interest in a registered lease or mortgage otherwise than in accordance with this Act shall be ineffectual to create, or dispose of a registered lease or mortgage or to create, extinguish, transfer, vary or affect any right or interest in the lease or mortgage.
- (2) Subject to the provisions of subsection (3) every instrument creating or disposing of a registered lease or mortgage shall be registered.
- (3) It shall not be necessary to register –
 - (a) Any lease for a period not exceeding 3 years unless it is required to be registered lease or mortgage shall be registered;
 - (b) Any transfer, mortgage, or other instrument disposing of any lease being a lease for a period not exceeding 3 years which is not registered or required to be registered under Section 35;
 - (c) Any will;



- (d) Any appointment of a personal representative;
 - (e) Any appointment of a trustee in bankruptcy or any receiving order in bankruptcy; or
 - (f) Any order of a court unless the registration thereof or of the effect thereof is specifically required by this Act.
- (4) If requested so to do, the Director shall register such instrument as is mentioned in subsection (3)(d) or (e) and may register any other instrument mentioned in subsection (3) save a will which shall not be capable of registration.
 - (5) Nothing in this section shall be construed so as to prevent any unregistered instrument from operating as a contract.
 - (6) The death of any person by or on behalf of whom any instrument of dealing has been executed shall not affect the validity thereof and any such instrument may be presented for registration as if the death had not occurred.

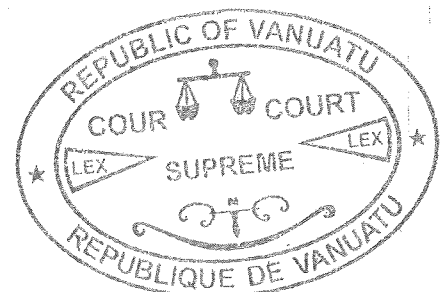
VII. Submissions and Application of the Law to the Facts

129. The Defendants submitted to the effect that Mr Lau applied only for title 1362 and that such application did not include title 1290 on the grounds advanced as follow-
130. Firstly, the approval letter dated 4 March 1983 and addressed to Mr Lau (refer to "PG4" of the sworn statement of Paul Gambetta filed on 19 February 2018) and which the Claimant relies on specifically states that "*Your application for Title No. 1362 has been approved ...*" Although the letter makes a general reference of survey plan title 016 on its top left, it is clear from its content that the approval is made specifically to title 1362. Asserting otherwise would be contrary to the content of the approval letter.
131. Also, it is not disputed that titles 1362 and 1290 are two different and separated titles. This was conceded by the Claimant during cross-examination.
132. Despite the survey plan (and unregistered) title 016 was allocated covering both titles (1362 and 1290), it did not take away the existence of the two titles, unless title 016 was registered as lease which it did not. This can be confirmed by the approval letter of 4 March 1983, the receipts of payment of improvements and the invoices of land rent (which will be discussed later), which all make specific references to either title 1362 or 1362 (Part) 1290 (Part).
133. Secondly, the approval of Mr Lau's application for title 1362 was made on condition that Mr Lau submitted his proposal of payment of improvements. On 26 July 1984, Mr Lau paid the improvements

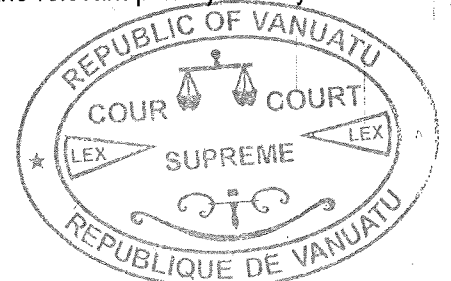


of VT306, 000. The receipts of such payment referred to Land Title No. 1362 (Part) 1290 (Part) (see "PG5" of the sworn statement of Paul Gambetta filed on 19 February 2018).

134. During cross-examination, Mr Paul Gambetta explained that in the context of lands, the reference of 1362 (Part) 1290 (Part) means part of 1362 and part of 1290. Mr Gambetta further said that reference of "part" of the two titles was made because the round house or improvement which Mr Lau purchased is situated in the middle of the two plots of lands and is covered part of title 1362 and part of 1290. Mr Gambetta's statement can be confirmed by the survey plans of the two pre-independence titles marked as "PG1" and "PG2" of further sworn statement of Paul Gambetta filed on 20 June 2018 and survey plans for title 072 (which covers the land purchased by Mr Lau).
135. Therefore, the defendants submit that the receipt dated 26 July 1984 shows that Mr Lau purchased the improvement or round house which is located on part of 1362 and part of 1290 and the claimant's contention that the reference of Land Title 1362 (Part) 1290 (Part) on the receipt show that Mr Lau purchased survey plan title 016 including 1290 is misconceived.
136. Thirdly, the other evidence that shows that Mr Lau applied only for title 1362 are the invoices of land rent that there were issued by the Defendants.
137. The defendants acknowledge that their pleadings in the Amended Defence admitted that the reference of survey plant title 016 in the invoices was a mistake. This is on the basis that the Claimant should not pay land rent for a survey plant title 016 that was never registered as a lease.
138. The defendants, then, say that those pleadings were made in fall short of facts of proper records within the Department and that pleadings are only mere allegations until proven. And it is the contention of the defendants that the establishment of facts goes beyond what was alleged by the claimant's pleading so as to re-assert the defendants' case.
139. They submit that the burden of proof is on the claimant to prove that he had been invoiced to pay land rent of survey plan title 016 as alleged. To that effect, the claimant procured copies of invoices issued since 1999 – 2009 and statement of invoice payment history (refer to pages 28 – 36 and 37 and 41 of Amended Sworn Statement of Yves Lau filed on 15 May 2018). We submit that those invoices and statements though referred to tile 016, specifically referred to title 1362 in brackets. To rely on the defendants' pleadings to establish his case is inviting the Court to rely on allegation without looking into the merits of the facts.
140. Therefore, despite our pleadings as stated under paragraphs 40 and 41 above, submit that those evidence of invoices and statement of invoice of payment history disclosed by the claimant clearly show that at all material time, the intention of the defendants was that Mr Lau and the claimant made payments for title 1362.



141. On the claimant's contention that Title 073 was registered on his name then transferred to the defendants by fraud or mistake. The defendants submitted the Department of Lands does not have records of such documents of the alleged Minister's consent (unwitnessed) and transfer document. Also; the Department of Lands never registered a transfer over survey plan title 016 in the Claimant nor anyone's favour as alleged on the ground that the said survey plan title 016 was never registered as a lease so to guarantee a transfer of lease over it. This is confirmed under paragraphs 27 and 28 of the Sworn Statement of Paul Gambetta filed on 19 February 2018.
142. Therefore the Defendants submit that the allegation that title 073 was registered in the Claimant's name and transferred to the Defendants by fraud or mistake is misconceived.
143. The Defendants submitted that the assertion of fraud or mistake under Section 100 of the Land Leases Act only applies to cases of lease agreement and not applicable in contractual agreement such as in the current case.
144. They submitted that the invocation of fraud under Section 100 of the LLA is also misconceived.
145. Moreover, during cross-examination, the Claimant stated that he owns both lease title 072 and 073 however when put to him whether or not he paid land rent of tile 073, he (Claimant) responded affirmatively that he did from up to 2005 (which we submitted otherwise) and admitted that he did not pay any land rent of title 073 from 2005 to date.
146. They submitted that from 1999 to 2009, the Claimant was paying land rent for title 1362 (but not 1290) which was located within the survey plan title 016, as discussed previously. With respect to lease title 072, the Claimant only paid land rent in 2017, as confirmed under paragraph 23 of Further Sworn Statement of Paul Gambetta filed on 20 June 2018.
147. They submitted that the Claimant did not give any consideration by paying land rent of the 073.
148. In the current case, the Defendants submitted that the Claimant did not show that he had obtain approval of certificates, consents and payment of the stamp duties and necessary fees in order to obtain the registration of survey plan title 016 nor title 073. Therefore they submitted that the Claimant does not have any unregistered instrument for neither survey plan title 016 nor title 073 and accordingly cannot neither rely on subsection 22(5) of the Land Leases Act.
149. They submitted, therefore, that the invocation of Section 100 of the Land Leases Act which is the cause of action of the Claimant's claim cannot be applied to the Claimant's case.
150. I consider the Defendants' submissions and I reject them in their entirety. The reason being that first, they missed out the critical and crucial factual point of this case; the second is that they also admitted the point in their amended defence (at paragraph 18) albeit they said there were no records of the said transaction in the Department of Lands files records from 1980 – 1984 (the relevant period) as they



were lost without justifications or reasons or unknown and as such, they are bound by their own pleadings ; the third is that they made submissions on the point using the Claimant's material against him without putting any material in response leaving an adverse inference applicable to the evidence of the Defendant and fourth, importantly, the evidence of the defence through Mr. Gambetta confirmed and supported in substance the claim and the Claimant's evidence.

151. Based on the Land Leases Act, I agree and accept the following crucial and critical facts pointed out by Mr Malcolm on behalf of the Claimant and their legal effect:-

1. There is no evidence the combination of title 1290 and 1362 into the 016 plan was a mistake – it appears the garage and house mainly have crossed over the boundaries. Hence the new titles 072 and 073 have a boundary line at right angles in line with the buildings. The Department of Lands could have done that with title 016 (a & b) in 1980. This did not happen. The evidence is in PG9 page 3 showing the relationship and PG10, compared to the old leases in the further statements of Gambetta.
2. The correction had not followed procedures in sections 10 and 11 – due notice of change was not given and no opportunity to be heard was given to the Claimant.
3. Survey plans means the plan prepared under section 10. The powers apply at original registration. There was no division of the two titles at the time of sale and the sale of 1362 does not reflect the actual land in now title 073.
4. The Director must correctly follow procedures as to giving notice before correcting a mistake.
5. The payment of the purchase of 016 was a contract for the sale and purchase of the entire title. If it was intended to be different, there should have been defence of the same. There was none despite an Amended Defence filed.

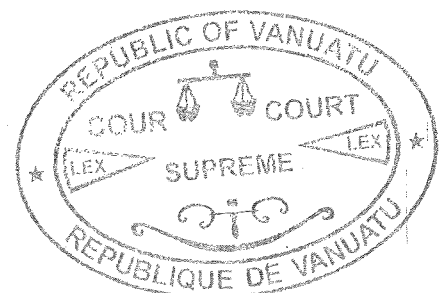
152. In the circumstances of this case, Nitchiku v The Republic of Vanuatu [2012] VUCA 3 and Colmar v Rose [2011] VUCA 20, are the relevant case authorities on the point.

153. Both cases are summarized as follows:

1. Nitchiku v Republic of Vanuatu [2012] VUCA 3

The Claimant asserted a mistake by the Defendant under s.100 Land Leases Act where a case was subject to a correction of an asserted error in a Survey Plan excluding seafront land and removing 30 hectares from the lease of the appellant.

2. Colmar v Rose [2011] VUCA 20



This matter involved a sale of a lease to Aljan Ltd. Mr Colmar argued he had a previous sale and purchase backed by a wrongly removed caution.

The Court of Appeal (at page 9 of 18) uphold the principal set in the **Fairchild v Glenhaven Funeral Services Ltd [2003] 1 AC 32 (HL)** that on inferences all evidence must be weighed accordingly to the proof which it was within the power of one side to have produced and the other to have contradicted. Aljan gained registration of the lease (001) and the presumption benefit of indefeasibility of the actual knowledge of Mr Colmar's caution and, without notice to Mr Colmar or compliance. The Court held that because of the lack of notice to Colmar and compliance with the law, it was a fraud on the Valele Trust and the land was held by Aljan in trust for Valele.

154. The Lands Department here have lost all of their filed and documents (1980 – 1984). There is an adverse inference applicable to the evidence of the Defendants.

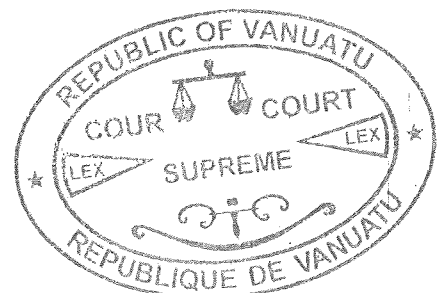
VIII. Conclusion

155. In the presence case, the conclusion that I reach is the following:

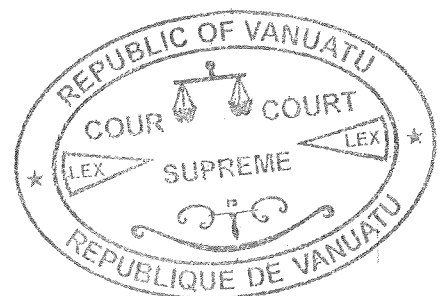
- 1) The failure to register lease 016; and/ or
- 2) The failure to give notice of the subdivision; and /or
- 3) The failure to give an opportunity to the Claimant to be heard were a fraud on the purchaser or a contract for the sale of what was the entire 016 and the Government holds title 073 in trust for the Claimant.

156. I accept the Claimant's submissions in support of this conclusion which are to the following effect:

- 1) There is no evidence or assertion by the Defendant that the combination of titles 1362 and 1290 into a single title 016 was a mistake;
- 2) The evidence showed titles 1362 and 1290 likely encroaches over the improvements being the garage and the house.
- 3) The plan in the new Gambetta Statement shows the line dissecting 1362 and 1290 was at an angle to the boundary. The new plan for titles 072 and 073 shows a new dissecting line, at right angles to the boundary line with the improvements just on either side of the new lease line. It was clear that if the Defendants wished to resolve that issue could have been done by rather than combining the titles to 016 with both improvements which is what occurred, they could have simply done two titles in 1980, the same as at the purported subdivision in 2005 to 072 and 073.



- 4) Thus the sale of 1362 only means the Claimant must own part of the house on what is now 073 and the Government owns part of what is now 072.
- 5) The combination was into one Survey Plan which accords with the Claimant's evidence the intention and discussions in 1980 – 1984 were that the occupation of the house by Lands Department then was only a convenience. On registration or upon lands finding an appropriate space they would vacate.
- 6) The obvious inference was the Defendant then did not register 016 to protect its own free use of the property it had moved into, despite having sold it to the Claimant.
- 7) Equally on the evidence of Paul Gambetta they could only sell part of 016 because they could only sell the part that was 1362 if:
 - a) It was subdivided off 016; or
 - b) It was subleased; and
 - c) Mr Gambetta admitted that what was registered (073) was very different to 1362.
- 8) It is a nonsense to say it was a separate sale. A separate sale was a legal and factual impossibility. And what was purchased was not 1362 which did not exist in 1985 anyway.
- 9) There is an inference the Defendant could have refuted but claims to have no knowledge of what occurred in 1980 – 1984 and has lost all the documents.
- 10) Here this inference is rationally correct and so, the combination to 016 was not a mistake and could not be subsequently subdivided without a process of compulsory purchase on notice. The subsequent subdivision was either deliberate fraud or a mistake. It is noted the Defendant bolstered the argument for subdivision with an admitted forged document. Further it is also accepted that the subsequent subdivision to titles 072 and 073 was either a mistake or fraud due to the lack of notice under sections 10 and 11 of the Land Leases Act.
- 11) The suggestion that the sale of 016 was only in part cannot be correct. It could be a part sale if there was either two titles or a sublease situation where the division on the property was correctly surveyed and marked. It is a nonsense to say someone sells a lease but only part of it with no plans, no subdivision or nothing on the lease or documents. The Claimant purchased Title 016, which was a combination of 1290 and 1362 and then the Land Department wrongfully refused to register.
- 12) The suggestion it was only a Survey Plan is also a non-sense. It was a plan capable of being attached to a Standard Form Lease and registered in the same way as all the other Survey Plans – as per "PG1", and as admitted in cross-examination by Mr Gambetta.



- 13) Title 016 was an entire single piece of land. Pursuant to the definition in the Land Leases Act it was a parcel of land being an area of land separately delineated by a Survey Plan (016).
- 14) It was registrable – capable of registration. To say it was unregistered not having a Standard Lease attached would be a nonsense given the same would apply to 072 and 073 and all the other registered leases alienated in 1980.
- 15) Section 10 of the Land Leases Act puts a positive onus on the Director on the payment of VT306,000 and provided the Survey Plan to prepare the lease and either by fraud or mistake failed to comply with the law.
- 16) The fraud or mistake means under the principals of the Colmar case, title 1290 is held on trust by the Government for the Claimant.
- 17) The receipt documents show that the receipt was in reference to 016. It was for 1362 (part 1290 (part)) and for the improvements. The improvements were described in the subsequent memo as being the round house and the Lands Department building. Both of them hence both titles. The retention of title 073 was a fraud or breach of contract and the Defendant hold the land in trust for the Claimant.

IX. Answers to Issues

157. I answer to the issues posed for the determination by the Court in the following way:-

"Q(i) – Whether or not there was a registrable lease title 016?

A – I answer, yes.

Q(i-1) – If yes, whether the action of the Defendants in not registering title 016 to the Claimant amounts to mistake?

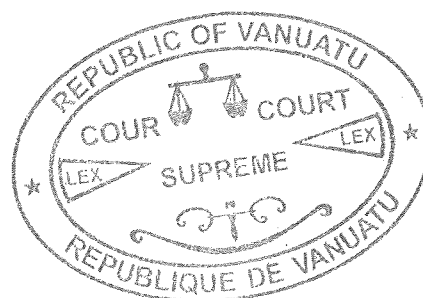
A – I answer, yes.

Q(ii) – Whether the Claimant is entitled to a repayment of title 073 from 1980?

A – I answer yes from July 1984.

Q(iii) – The Claimant asserts and the Defendants dispute that Mr Lau's application for 1362 includes 1290.

A – I answer yes on the basis of evidence."



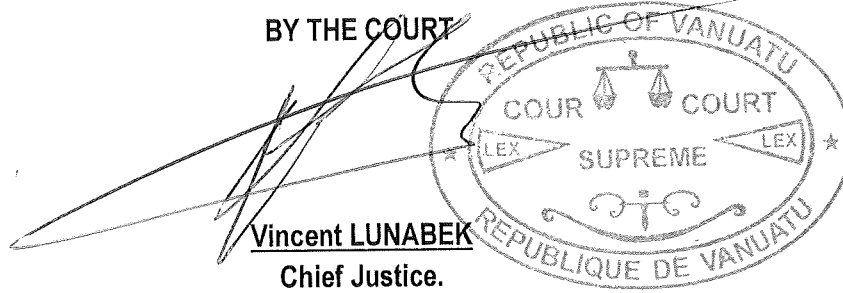
X. **Orders**

158. The Court makes the following orders:

- (a) The Claimant is entitled to rectification of the title 03/0183/073 back to his own name and rectification of the Land Leases Register is so ordered to this effect;
- (b) The Claimant is entitled to fair rental to be assessed from 1984;
- (c) The Claimant is entitled to costs on the standard basis to be agreed or assessed.

Dated at Port Vila, this 16th day of December 2019.

BY THE COURT



Vincent LUNABEK
Chief Justice.