IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

CIVIL APPEAL CASE No.05 of 2001

BETWEEN: JONE ROQARA
LEON LALIE
Appellants

AND: NOEL TAKAU
PAKOA ANDREW
CHARLEY PAKOA
BEN SAUL
Respondents

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice Bruce Robertson
Hon. Justice John von Doussa
Hon. Justice Daniel Fatiaki
Hon. Justice Oliver Saksak

Counsel: Mr. Robert Sugden for the Appellants
Mr. Garry Blake for the Respondents

Hearing date: 25 October 2001
Date of Judgment: 1 November 2001

JUDGMENT

For years there have been disputes about rights in respect of certain land within the pre-independence Title 170, a substantial area of land on the island of Efate.

On or about 23rd May 1997, these two appellants together with one Alfred Carlot, were granted Leases by the then Minister of Lands in respect of titles 12/1011/003, 12/1011/002 and 12/1013/005.

The respondents had contended in a Statement of Claim filed in the Supreme Court in March 1999, that those Leases had been obtained by fraud. They sought orders for rectification of the register in respect of the registered Leases by cancelling the grants pursuant of the provisions of Section 100 of the Land Leases Act. It provides:

> *"(1) Subject to subsection (2) the Court may order rectification for 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, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."*

The Statement of Claim which was filed, detailed the fact that Pakoa Andrew was the paramount Chief of Eratap Village and the President of Efate Island Council of Chiefs and a member of the Malvatumauri National Council of Chiefs. Noel Takau, Charlie Pakoa and Ben Saul, all alleged that they were either personally or in representative capacity on behalf of the Teouma Farmers Association occupiers part of the land within the pre-independence Title 170 pursuant to licences granted to them by Pakoa Andrew.

It was further alleged that in 1993 Pakoa Andrew had lodged a claim in the Efate Island Court in which he asked to be declared to be the true custom owner of various lands including the old Title 170. There were a variety of claims made for these lands.

On 22 April 1994 an Order was made by the Efate Island Court that there was to be no selling of land within various titles (including 170) until the Efate Island Court decided who was the true custom owner.

The Statement of Claim continued:

"14. On or about July 1996, each of [the appellants] applied to the then Minister of Lands for the issue to them of certificates of registered negotiator in respect of the leasehold titles referred to in paragraphs 6, 7 and 7 above.

15. On or about 19 July 1996, the [then Minister for Lands] issued certificates of registered negotiator to each of those appellants.

16. Each of [the appellants] procured the issue of the certificates of registered negotiator by means of false and misleading applications in that:

(a) they each failed to disclose the existence of persons having leases of the affected land;

(b) they each failed to disclose the existence of persons having licences to use the affected area;

(c) they each failed to disclose their knowledge of the claimed customary rights over the affected land;

(d) they each failed to disclose the existence of persons in physical occupation of the affected land.

17. Acting on the faith and truth of the matters set out in the applications for registered negotiator status, [the Minister of Lands] was induced by the non-disclosure and not otherwise, and by reason thereof granted the certificates.

18. In truth and in fact, the non-disclosure of those matters made their responses to questions 15, 17, 21, and 27 on the application form false and untrue in that:

(i) The [present respondents] and the people they represent held leases of parts of the effected land;

(ii) The [present respondents] and the people they represent had licences to use the affected land;

(iii) [Pakoa Andrew] and six other claimants have lodged claims in the Efate Island Court claiming to have customary rights over the affected land; and

(iv) [The appellants] failed to disclose that [the present respondents] and the people they represent were in physical occupation of the affected land.

19. [The appellants] each responded falsely to the aforementioned questions on the application form, well knowing their responses thereto to be false and untrue, or recklessly and not caring whether they were true or false.

20. In the premises, the certificates of registered negotiator were procured fraudulently.

21. In reliance upon the fraudulently procured certificates of registered negotiator, each of [the appellants] negotiated and were granted leases in respect of titles 12/1011/003, 12/1011/002 and 12/1013/005 respectively granted in favour of t[he appellants] were obtained by fraud."

In the judgment delivered in the Supreme Court on the 8 February 2001, the Judge concluded:

"For all these reasons I find that proper course to take to put the position of the parties back to square one is for me to exercise the power under

Section 100 of the Land Leases Act for the registration issued to [the appellants] for agriculture leases be cancelled. Therefore, the registration of the three leases issued to [the appellants] is cancelled."

We are advised that notwithstanding the intituling in the Supreme Court proceedings, the only effective respondents in the case were the present two appellants Jone Roqara and Leon Lalie. Alfred Carlot had effectively abandoned the litigation. He has taken no part in the proceedings before us. Accordingly it follows as a matter of law that as he made no challenge to the Orders made in the Supreme Court, the Agricultural Lease 12/1011/003 granted to Mr. Carlot for 75 years commencing on 2nd April 1997 is cancelled pursuant to the Orders in the Supreme Court. Nothing decided in this judgment has any effect upon that ruling.

Mr. Sugden has advanced an extraordinary array of challenges to the decision of the primary Judge. But the central core of the complaint was that the Judge erroneously decided the case not in accordance with the pleadings but on the basis of evidence which was lead before him some of which was not relevant to or operative upon issues raised in the Statement of Claim.

The case as tried was effectively about whether the present Appellants together with Mr. Carlot (who was a Senior Officer in the Ministry of Lands, who on the evidence presented, acted as Chairman of the Rural Development Committee which recommended his own application for approval together with the applications of the present two appellants which had been prepared and advanced by him on their behalf) failed to disclose material which was of critical importance including particularly that-

(a) there was a dispute about the ownership of the land in question;

(b) there was a Stay Order in relation to the land in the Island Court; and

(c) that the land was occupied by the current respondents.

A good deal of the hearing in this Court centred around the provisions of Section 6 and 8 of the Land Reform Act [CAP.123]. There is no question but that the present appellants together with Mr. Carlot, in July 1996 requested the Minister of Lands to issue certificates of registered negotiator to each of them. Mr. Sugden argued that such was not necessary and of no legal effect, and it was not legally efficacious. The fact that for whatever reason they did so apply is common ground.

The Statement of Claim, particularly in Clause 18 was directed to an alleged breach of 'Form A' which is provided for in the Schedule to the Land Reform Act. It appears to have been assumed that this would have been completed. In reality it was never completed.

We are forced to conclude that there was never a proper meeting of minds by or of the parties in the hearing held in the Supreme Court. In light of the very serious allegations which were being made, it is perhaps surprising that the appellants and particularly Mr. Carlot gave no evidence. It is of course true as Mr. Sugden reminded us, that the onus throughout was on the present respondents who were the plaintiffs in the proceeding but on the evidence led there were issues which unquestionably invited a response.

Among the findings made by the primary Judge was a finding that Pakoa Andrew had rights under Section 5 of the Land Reform Act. The primary Judge could have mistaken the position with regard to the statutory requirement for a registered negotiator where the land is disputed. The Judge appears to have been particularly concerned about the role of Alfred Carlot being a judge in his own case although this was not specifically pleaded as being an operative matter.

It cannot be ignored that there was absolutely no challenge to the evidence from Sato Kilman (the Minister who granted the leases) that if he had been told of the dispute he would not have done so.

Mr. Sugden contends however that this issue, like those referred to previously was irrelevant on the pleadings. He claims that the Court in determining the case on the basis of such matters which had not been properly pleaded, his clients were denied the opportunity of deciding whether to call evidence and generally, prejudiced in the conduct of their defence.

Counsel also raises the fact that there appears to be a blurring of the line between whether it had been unnecessary to obtain a registered negotiator status in 1996 and the subsequent grant of the lease in 1997. Mr. Blake contends that each was part of one inter-related transaction and that the failures to disciose material particulars on the first occasion had a continuing tainting effect on everything that happened thereafter.

Not without some degree of hesitation we have been persuaded that the material findings made by the trial Judge, and which are expressed as being the foundation from which he reached the conclusion that he did, went rather further than a strict reading of the pleadings as advanced. Although it is not easy to see how further evidence may materially alter the position, especially as Section 100 speaks of mistake as well as fraud, we cannot be confident that such is absolutely the position.

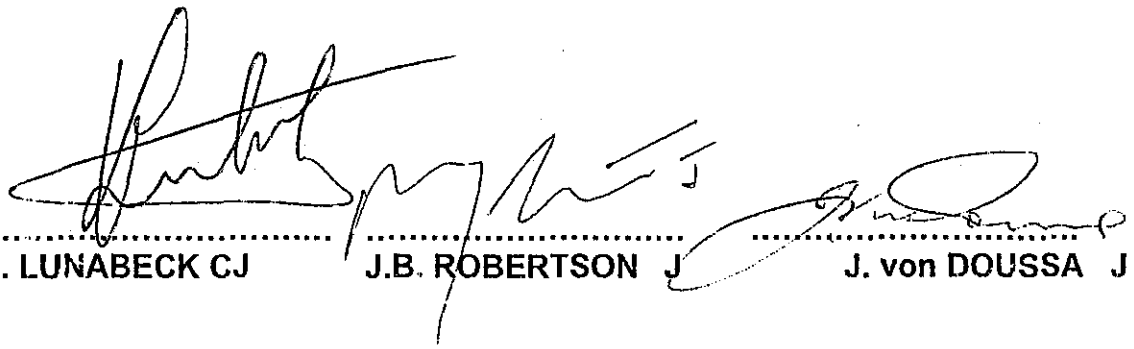
It is a fundamental principle of the law that, in any case, a person against whom allegations are made should know what the allegations are with precision so that they can decide how to respond to them. We have been persuaded that the line here was breached. If the dispute is considered solely in terms of the strict letter of the pleadings, the judgment appears to have strayed into areas which do not come within them and that serious factual issues which were not

raised by the pleadings and upon which evidence was led at the trial over counsel's objections, had a material influence on the Judge.

Accordingly the appeal must succeed. There will need to be a further opportunity for the respondents to prove the allegations which would justify the relief they sought.

DATED at PORT-VILA, this 1st DAY of NOVEMBER, 2001

BY THE COURT



V. LUNABECK CJ **J.B. ROBERTSON J** **J. von DOUSSA J**

D. FATIAKI J **O. SAKSAK J**