

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**

(Appellate Jurisdiction)

CIVIL APPEAL CASE No.01 OF 2009

BETWEEN:

**ELIZABETH PRASAD and RICHARD
SOLZER**

Appellants

AND:

**ARNOLD PRASAD, ANDRINA KL THOMAS,
MARGARETH PEATO, ESTHER TAVUE,
ALICE PITPITE and PETER PRASAD of
Matantas, Big Bay, Santo**

First Respondents

AND:

GOVERNMENT OF VANUATU

Second Respondent

Coram: *Chief Justice Vincent Lunabek
Justice Oliver Saksak
Justice Nevin Dawson
Justice Ronald Young*

Counsel: *Mr Jack Kilu for the Appellant
Ms Andrina Thomas for the First Respondents
Mr Alatoi Ishmael Kalsakau for the Second Respondents*

Date of hearing: 21st April 2009

Date of Judgment: 30th April 2009

JUDGMENT

BACKGROUND

On 31 July 1980 Bisun Prasad leased land known as the Side River Land for 50 years. In the 1960's he began living with Elizabeth Moses. They had 2 children, Arnold and Andrina. Elizabeth died shortly after their birth. Elizabeth and Bisun were never married.

On 7 September 1966, Bisun Prasad married Elizabeth's sister, Rose Morin. They had five children; Margareth, Alice, Esther, Peter and Elizabeth. Bisun Prasad died on 21 August 1990 intestate. Rose died in 2000 also intestate.

By virtue of the Queens Regulations, the Succession Probate and Administration Regulations of 1972 Rose was entitled to succeed to her husband's estate (and his interest in the Side River Land). And in turn upon Rose's death her children were entitled to succeed to her estate (including her interest in the Side River Land).

These proceedings came before the Supreme Court when a long running dispute regarding the Side River Land came to a head after Rose's death. Rose had never managed to register her leasehold interest in the Side River Land during her life time. After Rose's death her daughter Andrina sought to register a lease in the name of Bisun Prasad's seven children from his two relationships. This registration was never completed. In the meantime the appellants sought and obtained a registered lease over the Side River Land.

The Supreme Court faced an application by six of the Prasad children seeking rectification of this registered lease claiming either Rose's estate or Bisun's estate were the true owners of the lease and the registration by the appellants had been obtained by fraud or mistake.

The Supreme Court Judge, after concluding that Bisun Prasad and Rose Morin were lawfully married, ordered rectification of the land register by cancelling the appellants' registration and substituting as lessees the five children of Bisun and Rose who were entitled to succeed to Rose's estate.

THIS APPEAL

This appeal is based on two points which can be shortly dealt with.

The appellants say:

- (i) Bisun Prasad never held the Side River Land as lessee. His family were squatters on the land and therefore the foundation upon which the Supreme Court Judge had based his judgment was wrong.
- (ii) If there was a valid lease in favour of Bisun Prasad, the appellants say the Judge failed to make any findings of mistake or fraud pursuant to s.100 of

the Land Leases Act which were necessary to justify any rectification of the Register.

NO LEASE

In his first Judgment of 19 September 2008 (Supreme Court of Vanuatu Civil Case No.186 of 2005,) the trial Judge said:

“The parties agree that Bisun Prasad was granted a lease of the Side River Land for 50 years from 31st July 1980.”

This concession by all parties was presumably based on an acknowledgment that a copy of the lease of the Side River Land, in favour of Bisun Prasad for 50 years from 31 July 1980, was annexed to Andrina’s affidavit of 27 September 2006 in these proceedings. There can therefore be no doubt that Bisun Prasad did enter into lease with respect to Side River Land for 50 years from 31 July 1980. This was accepted at trial by all parties and cannot now be resiled from. There is therefore no basis upon which this submission can properly be made.

NO FINDING OF FRAUD OR MISTAKE

Section 100 of the Land Leases Act [CAP.163] provides as follows:

“100. Rectification by the Court

- (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 cause such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”*

The appellants claimed that “the trial Judge did not make any findings of fraud, mistake or omission against the appellants to warrant cancellation of their duly registered lease”.

In a series of issues sent to the parties before the trial the Judge identified the relevance of s.100 in this way:

“Under s. 100 of the Land Leases Act:-

- (a) Does the evidence establish that the registration of the Defendants lease was obtained or made by fraud or mistake, and what was the fraud or mistake?*
- (b) If so, does the evidence establish the Defendants had knowledge of the fraud or mistake or caused it or substantially contributed to it by their act, neglect or default?”*

In considering Section 100 the Judge said (p.6):

“The Court then moved to consider the issue under paragraph 5 of the agenda. Given that the persons entitled to the Side River land on the death of Rose Morin were either her 5 children, or the seven children, the registration of the lease of the second defendants was, at least, a mistaken one as it did not reflect the true entitlement of Elizabeth Prasad, and denied altogether the entitlement of her siblings. The Court invited the second defendants to indicate why, in those circumstances, the Court should not find that the registration was obtained or made by fraud or mistake. Mr Solzer explained that in 2001 the Government announced that all titles with back rent would go back to Government. This led the second defendants to inquire as to ways to safeguard the property” (Mr. Solzer’s words). The Lands Department explained to them that there was some VT83,000 outstanding from 1980. The second defendants asked if they could be registered on the title. Mr Solzer said they explained to the Lands Department what had happened in 1984 when an incorrect lease had been issued to Rose Morin. He said that a search of the official records of the Lands Departments showed that in 1997 Rose Morin left some documents with the Lands Department saying she made a will the land was to be transferred to the second defendants. In support of this assertion Mr Solzer cited the exhibit “EP4”/EPRS10 to the affidavit of Elizabeth Prasad sworn on 14th August 2008. Those documents however, relate to a different piece

of land, and a different registered lease. In any event, if the letters did refer to the Side River lease, they do not support the proposition asserted by Mr Solzer. Moreover, the parties have accepted that as a result of the order made on 15th May 2006 in Probate Case No.2 of 2004 Rose Morin died intestate.

Elizabeth Prasad with the assistance of a translator then gave the following explanation for her entitlement to the Side River land:-

'We are entitled as there were conflicts between the children and their parents and there was a fight. Arnold Prasad and Peter had a fight with our father and mother. So my mother chose me to look after the property. She cannot rely on the eldest one so I was chosen to look after the property.'

And Mr Solzer added 'We only applied for the leases as Mrs Prasad told us several times of trouble and sought our help and told us several times before 2000 she wanted the land transferred to Elizabeth and me'.

Andrina Thomas and the second defendants, in the course of explaining their respective positions frequently returned to the wishes of their mother as the explanation for their legal entitlements to Side River, but they must accept that those entitlements fall short of a testimentary will, and cannot override the law which applies in the absence of a will.

It is readily understandable that the second defendants, on ascertaining that the Side River land might be under threat because of the outstanding payment of past land rents, should themselves pay the rents so as, in their words, to "safeguard the property". That is the action which would be expected of any beneficiary. However that action does not alter the legal equitable interest of the several beneficiaries in the estate. Rather, it gives the beneficiary who outlaid monies to protect the estate the right to recover those monies from the estate when it is distributed. On the evidence, it is plain that the second defendants knew that the claimants were entitled a share of the Side River land, and that by obtaining the registration in their names they were quite deliberately obtaining a benefit which would exclude

the other children. Had those facts been known to the officials in the Department of Lands it would have been the duty of those officials not to register the lease, at least without reference to those whose interests would be defeated. In my opinion the registration of the second defendants' lease was obtained by fraud or mistake. The fraud, in a legal sense, being on the part of the second defendant, and the mistake being on the part of the Department of Lands officials. That conclusion empowers the Court under s.100(1) of the Land Leases Act to order rectification.

However rectification shall not occur except as provided in s.100(2). In this case, I am satisfied that the second defendants had the requisite knowledge. They were, as I have found, fully aware of the fact that their actions would defeat the claim which the other children had to the Side River land."

This extensive quotation illustrates contrary to the Appellants' submissions the Judge considered whether registration of the appellants' lease was obtained by fraud or mistake and whether the appellants knew of the fraud or mistake. His conclusions as to the application of s.100 to the facts of this case were well open to him. There is no merit to this ground of appeal.

The appeal, for reasons given, will be dismissed. Costs and disbursements to the respondents on the standard basis.

DATED at Port-Vila this 30th day of April 2009

BY THE COURT


.....
Vincent LUNABEK CJ


.....
Oliver SAKSAK J

.....
Nevin Dawson J


.....
Ronald YOUNG J