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

Civil Appeal Case No. 13 of 2009

BETWEEN: PETER W. COLMAR
First Appellant

AND: VALELE TRUST
Second Appellant

AND: ROSE VANUATU LIMITED
First Respondent

AND: DINH VAN THAN
Second Respondent

AND: MINISTER OF LANDS
Third Respondent

AND: ALJAN (VANUATU) LIMITED
Fourth Respondent

AND: JOHN TARIMOLBARAV, SAMSON LIVO, JOSEPH SAVA, ROYMOLIVALELE, JOSEPH WARI and BEN MATA
Fifth Respondents

Coram: ***Hon. Chief Justice Vincent Lunabeck***
Hon. Justice John Mansfield
Hon. Justice Mark O'Regan
Hon. Justice Daniel Fatiaki

Counsels: *Mr. N. Morrison for the Appellants*
Mr. F. Laumae for the First and Second Respondents
Mr. J. Ngwele for the Third Respondent
Mr. M. Hurley for the Fourth Respondent
Mr. J. Timakata for the Fifth Respondents John Tarimolbarav and Samson Livo
Mr. J. Malcolm for the Fifth Respondents, John Tarimolbarav, Joseph Sara, Roy Molivalele, Joseph Wari ad Ben Mata

Date of Hearing: *23 October 2009*

Date of Decision: *30 October 2009*

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

JUDGMENT

1. The Appellants should properly be described as Peter W. Colmar as trustee for the Valele Trust. We shall use the term "*Valele*" to describe them in that way.

2. Sometimes an apparently simple interlocutory application can have unintended consequences. This appeal provides an example.

3. Valele got an order from the Court of Appeal for specific performance of a contract to transfer a lease from the First and Second Respondents (the sellers) to the Appellants. The Court of Appeal referred the matter back to the trial judge in the Supreme Court to make the formal orders for specific performance. Because the lease was over custom land, the transfer had to be consented to by the custom owners. That is where things started to go off the rails.

4. The Fifth Respondents (who said they were the custom owners) intended to ask for an order that their status as the custom owners be noted in the orders to be made by the Supreme Court. They were concerned that the lease might otherwise be transferred without their consent, and without the negotiation opportunity which their consent entailed. So they applied under Civil Procedure Rules, rule 3.2 to the Supreme Court that they be noted as "*interested parties*". That application was opposed.

5. The Supreme Court judge had asked Valele to submit a draft order to give effect to the order of the Court of Appeal. It did so. It relevantly provided that the transfer of the lease should be registered "*on lodgment of any necessary consents*". The Fifth Respondents convinced the Supreme Court judge to be more specific. The order for specific performance included Valele obtaining "*... from all custom-owners necessary written consents in compliance with the provision of the lease*" and lodging them before the transfer of the lease was registered. No complaint is made about that order.

6. The Supreme Court judge, by order 2 of his orders, then said:-
"*For the avoidance of doubt and for the purposes of paragraph 1 (b) [quoted above], the custom owners who must give their consents to any transfer are John Tari Molbarav, Samson Livo, Joseph Sava, Roy Molivalele, Joseph Wari and Ben Mata, or their duly authorised representatives.*"

7. We shall call that the "*Custom-owners order*".

8. This appeal concerns the Custom-owners order. As can be seen, it related to the Fifth Respondents. Valele complains that the Custom owners order was made without jurisdiction, in breach of the rules of natural justice, and was beyond the orders sought by the Fifth Respondents.

9. As to the last point, the Fifth Respondents or some of them (who were separately represented by two counsel at the hearing of the appeal) acknowledged that the Custom-owners order went beyond what they asked for, because, on its face, it decided that they were the custom-owners whose consent was necessary for the transfer of the lease, rather than simply noting them as interested parties so the Department of Lands would not register the transfer of the lease without considering whether their consent to the transfer was necessary.

Procedural issues

(1) Background

10. The lease concerned certain land on Aese Island. It was lease title 04/2624/001 (the lease). In 1988 the Land Records Office registered an instrument which apparently recorded the transfer of the administration of the lease to "*Taitas Kuru, Molivatore, Morris Molidoro, Timothy Molbarav, Seroutu, Livo Family (Mavea).*"

11. In 2005 the lease was transferred to the sellers, The First Respondent is a company controlled by the Second Respondent.

12. On 5 June 2004, the sellers agreed to transfer the lease to Valele (the Valele transfer). Valele apparently paid the transfer price. The sellers tried to get out of the contract. It is not necessary to say why. Their attempt was successful before the Supreme Court on 12 February 2007. But, as noted the Court of Appeal ordered on 24 August 2007 that the Valele transfer should be specifically performed. It is fair to say the Court of Appeal did not think there was any merit in the ways the sellers tried to get out of their contract.

13. Valele lodged a caution against the lease title on 12 May 2005. They were notified the caution had been registered on 17 January 2007. It is not clear that the caution was ever registered. In any event, the caution was withdrawn by the Director of Lands on 12 August 2007. It is not clear what power was used to do so, or why that was done. Valele was given no notice, and did not want the caution withdrawn.

14. The sellers were on notice of the prospect of the Valele transfer being specifically performed by the appeal to the Court of Appeal and by correspondence from the solicitors for Valele. Nevertheless, they went about further dealing with the lease. On 21 June 2007 they agreed to transfer the lease to Aljan (Vanuatu) Limited (Aljan). It was not, apparently, conditional on whether the Valele transfer was valid and enforceable. We shall call that "*the Aljan transfer*".

15. The Aljan transfer was not brought to the attention of the Court of Appeal. It should have been. Parties to proceedings before the Court must be frank with the Court. If the Court of Appeal had been told about the Aljan transfer, it would have had to consider what orders it should make. The sellers, by keeping that to themselves, were not open with the Court. It is also not clear how the sellers could agree to the Aljan transfer when

knew the Court of Appeal was about to decide on the enforceability of the Valele transfer.

16. Over a period of time, while Valele was seeking the consent of the custom-owners to the Valele transfer, Aljan was seeking their consent to the Aljan transfer. Aljan got the consent of the Fifth Respondents to the Aljan transfer in June 2007. The Aljan transfer was registered on 14 August 2007. That is two weeks before the Court of Appeal, not knowing about the Aljan transfer at all, ordered that the Valele transfer be specifically performed. That shows how important it was for the sellers to have told the Court of Appeal about the Aljan transfer. They did not even tell the Supreme Court about the Aljan transfer, even when that Court was making the orders of 12 November 2007, including the Custom-owners order. Nor, at that time, did any of the Fifth Respondents tell the Supreme Court they had consented to the Aljan transfer when they made the application to become "*interested parties*".

17. The significance of those omissions may be decided in Supreme Court Civil Case No. 32 of 2008 (the 2008 action) referred to below.

18. To complete the background, we note that the lease was surrendered, and replaced with a new Rural Commercial/Tourism and Agricultural lease for a term of 75 years (the new lease). The agreement between Aljan and the Fifth Respondents was made on 18 July 2007, and the surrender and the new lease registered on 13 June 2008.

(2) <u>The 2008 action</u>

19. As a result of those events, Valele was in a very difficult position.

20. They decided to accept that the registration of the Aljan transfer, the cancellation of the lease, and the new lease, meant that they could not longer get specific enforcement of the Valele transfer. That was the case

even though they had paid the sellers the agreed price. It would not have helped, even if the Custom-owners consented to the Valele transfer.

21. So Valele started the 2008 action. They sued the sellers, Aljan, and the Fifth Respondents as well as the Minister of Lands. They claim damages against each of those defendants for loss of their equitable interest in the lease. They allege that the sellers acted in contempt of Court (but implicitly also in breach of their agreement with the Valele). They allege the Minister of Lands wrongly registered the Aljan transfer (and implicitly the surrender of the lease and the grant of the new lease) in the face of the caution they had lodged for registration. They claim the Fifth Respondents falsely represented themselves as the true custom owners. They claim Aljan at material times knew of their equitable interest in the lease, and acted with the other defendants to defeat it. They also claim that Aljan holds the new lease in trust for them, and seek to have the new lease transferred to them.

22. This is not the occasion to comment on that action. It would seem, however, that if the facts alleged are correct, and even if Aljan was not complicit in the conduct, the Appellants may also intend to claim that the sellers by their conduct may also hold the payments received from Aljan for the Aljan transfer on the Appellants' behalf, and the Fifth Respondents (or other defendants) who received payment for consenting to the surrender of the lease and the registration of the new lease may also hold the payments received from Aljan on their behalf. We have noted also some other apparently implicit assertions in the Claim which may need to be specified. That is not, by any means, intended to be a full analysis of the claim nor advice as to how it might be advanced.

(3) Evidence as to the custom owners

23. Apart from the Fifth Respondents, and the information recorded at [10] above as to the registration of the custom owners by the Department of

Lands, there was other material before the Supreme Court judge when considering the Custom-owners order made on 12 November 2007.

24. There were sworn statements of Densly Valele, the eldest son of Titus Kara, of Titus Karu, and of Tom Tafti Valele, also a son of Titus Karu on the topic. They were sworn on 12 September 2007.

25. Apart from the Fifth Respondents, each of Titus Kara, Elijah Molivatole and Morris Molidoro are persons whose names as custom owners appeared on the Lands Department document of 1988, referred to in [10] above, also may have had a claim to be recognized as custom owners.

26. In addition, the Minister of Lands filed two sworn statements of 20 October 2009, shortly before the hearing of this appeal. They show that the lease was over an area of land on Aese Island which covered part of each of the two customary areas – the *Saranmoli* customary land and the *Vunambulu* customary land. They also show that on 20 August 2007 the Joint Village Land Tribunal for Aese Island declared that James Rad Family is the custom owner of *Vunambulu* customary land, and that there has been no Land Tribunal decision about the custom ownership of *Saranmoli* customary land.

The hearing and orders of 12 November 2007

27. On 5 and 7 September 2007, the Fifth Respondents applied (in similar applications) to be named as "*interested parties*", under Rule 3.2 of the Civil Procedure Rules. As explained by their counsel on the appeal, they wanted to ensure that the Valele transfer was not registered without the consent of the custom owners, and so to ensure that the orders to be made by the Supreme Court for specific performance of the Valele transfer be subject to a condition that such consent was necessary. Apparently, they did not think that a reference to "*all necessary consents*" in the orders proposed by Valele was sufficient.

28. Unfortunately, the application went further than that. It said that they were the custom owners of the lease. Their supporting sworn statements also said that they were the custom owners of Aese Island. The sworn statement of John Tari Molbarav (which the other Fifth Respondents adopted) said that they were not prepared to consent to the Valele transfer, and that they were aware of another document signed by Tom Tari Valele, Densly Valele, Moli Valele, Ben Valele, Elijah Valele, Ruben Valele, and Lui Valele of 13 February 2006 apparently consenting to the Valele transfer. They thought those persons may be sons of Titus Valele.

29. As noted, the Supreme Court judge's order expressly said that Valele must obtain written consent from all the Custom owners. That order is not challenged. It was entirely appropriate.

30. Then the judge said:-

"*There is a great risk of the Claimants obtaining signatures of other persons who claim to be authorized representatives of the custom owners and obtain a transfer of lease which compromises the interests of the true custom owners. From the evidence, the custom owners are named in Annexure A to the further sworn statement of John Tari Molbarav dated 25th October. In his first sworn statement dated 27th September 2007, Mr. Molbarav says in his evidence that he denies that the persons who signed the letter addressed by the Valele Family to the Lands Department dated 20th August 2007 were the true authorized representatives of the custom owners. Joseph Sava, Roy Molivalele, Joseph Wari and Ben Mata all confirm that evidence in their respective sworn statements of 27th September 2007. The Claimants have not responded sufficiently or at all to these statements. On the balance of probability on their evidence, they have shown that their interests stand the high risk and likelihood of them being compromised by other persons not properly authroised, being u*

to give consent to the transfer of lease. The interests of the custom owners therefore need to be adequately protected."

31. Consequently, the judge made the custom owners order, set out at [6] above. That is the order appealed from.

The subsequent procedural events

32. Valele, based on the consents of those who they considered to be the proper registered owners (Titus Karu, Molivatole, Morris Moldovo, Molbarav and Livo family), had the Valele transfer registered on 10 December 2007.

33. The Department of Lands then decided to "*re-instate*" registration of the Aljan transfer, which had apparently been registered on 14 August 2007. Valele was not notified of that decision (although it was aware it might be made) until a search of the records on 8 August 2008. That search also revealed the surrender of the lease and the issue of the new lease. That led to the 2008 action.

34. On 8 October 2008, the Supreme Court judge gave directions in the 2008 action, and ordered that the proceedings in which the Custom-owners order was made on 12 November 2007 be struck out.

35. On 22 July 2009, the Supreme Court judge refused to re-instate that action and to set aside the Custom-owners order made on 12 November 2007, and also refused Valele leave to appeal out of time from the Custom-owners order.

36. So, on 12 August 2009, the Appellants applied to the Court of Appeal for orders:-

(1) extending time to appeal from the Custom-owners order;

(2) to the extent necessary, giving leave to appeal from that order; and

(3) appealing from that order, or from the decision of 22 July 2009.

Consideration

(1) Is the Custom-owners order an interlocutory order?

37. The Custom-owners order, on its terms, clearly stated who were the Custom-owners of the leased land. It is an order which therefore finally decided that issue. Others may rely on that decision.

38. There is some dispute in the old authorities about whether an order is interlocutory, because the application is one which need not finally determine the rights of the parties or because the order itself does not finally determine the rights of the parties. In most cases that is a sterile debate, because if the rights of the parties are finally decided (as here), that fact would commonly lead to the grant of leave to appeal, if leave to appeal was necessary, because the justice of the case demands it. There may be particular cases where the conduct of one or other of the parties, or other considerations, may lead to a different result.

39. In this matter, as the Custom-owners order operated to finally decide who are the custom owners of the leased land, we have no doubt that, if leave to appeal was necessary, it should be given. That order operates on the parties to the action, and stands so others (including the Department of Lands) may act on it. It is not consistent with the decision of the Joint Village Land Tribunal decision for Aese Island, referred to at [26] above. We do not consider that any conduct of Valele, in the circumstances, should operate to refuse them leave to appeal, if the Custom-owners order was an interlocutory one.

40. As the parties did not make detailed submissions on what constitutes an interlocutory order, we propose therefore to give Valele leave to appeal from the Custom-owners order, if such leave is necessary. The dispute

about when an order is in fact an interlocutory order is best left to another case.

(2) Should an extension of time to appeal be granted?

41. The decision of the Court of Appeal in *Laho Ltd. v. QBE Insurance (Vanuatu) Ltd. [2003] VCA 26* sets out the factors generally to whether an extension of time to appeal should be granted.

42. In our judgment, an extension of time to appeal from the Custom-owners order should be granted to 12 August 2009, the date of filing of the application/appeal by Valele. We briefly give our reasons why we reach that view.

43. It is correct that the delay is a long one. It is also correct, as counsel for Aljan submitted, that there are several and somewhat varying reasons offered for the delay. But the situation of Valele was a difficult one. In the light of the Custom-owners order, they were nevertheless able to get the Valele transfer registered. It was only after some time that its status was questioned by the Department of Lands, and only in August 2008 that they learnt that that transfer had been deregistered and that the Aljan transfer and the new lease had been registered. When they learnt of these things, they promptly started the 2008 action. They were entitled to specific performance of the Valele transfer as against the sellers (subject to the consent of the custom-owners) but the sellers' later conduct had apparently prevented them from getting the benefit of that right. So, any prejudice to the sellers by extending time to appeal is of their own making.

44. In the case of the Fifth respondents, counsel appearing for Samson Livo and John Tarimolbarav took a neutral position, and counsel for the others (possibly including John Tarimolbarav, as both counsel said they appeared for him) stressed that the Custom-owners order went beyond what they had sought in their application in the first place.

45. On its appeal, only Aljan advanced any argument about being prejudiced if time to appeal were extended. Accepting Aljan's case, as its counsel argued, that it was a purchaser of the lease for value and without knowledge of the Valele transfer, it is not really prejudiced by extending time to appeal. That is because it is faced with the 2008 action in any event. It will incur the costs of that action, subject to its outcome. It will have to defend the claims that it was complicit with the sellers in frustrating the Valele transfer. If it was a purchaser for value in good faith, its registered interests will be protected: s 100 (2) of the Land Leases Act [CAP 163].

46. On the other hand, it is very important to the community generally that the proper processes for the determination of custom owners be used. The process by which the Fifth respondents came to be declared as the custom owners is not that process. We discuss that matter below. In fact, as the balance of our reasons shows, in our view the Supreme Court judge should not have made the Custom-Owners order. That is a matter relevant to the grant of an extension of time to appeal.

(3) Should the Custom-Owners order be set aside?

47. Valele argued that the Custom-owners order was made

(i) Without jurisdiction;

(ii) Without giving procedural fairness to other putative custom owners, or to it;

(iii) Contrary to the evidence; and

(iv) Without any request to do so.

48. We can deal with the last point shortly. Although the Fifth respondents only asked to be joined as interested parties, the ground of that application was that they were the custom owners. Their sworn statements clearly said that. They did not suggest in those statements that there were others

who might be, or also were, custom owners. Had they done so, the Supreme Court judge may simply have noted their claim to be custom owners on the final order, leaving it to the Department of Land to decide how it could be satisfied that the necessary consent of the custom owners was given. In fact, Valele resisted their application to be joined as interested parties in part because, it argued, they were not the custom owners.

49. The Supreme Court judge was put in a difficult position by the claims of the Fifth respondents. It is understandable that he wanted to give some finality to the issue and some guidance to the Department of Lands.

50. However, we consider that there was material before the Supreme Court judge which indicated that there was a dispute or a potential dispute about whether the Fifth respondents were the only custom owners of the land, or were some of the custom owners, or were not custom owners at all. We have referred to that evidence above at [25] and [28], and the passage of the reasons of the Supreme Court judge quoted at [30]. That is the foundation for our conclusion. We reject the careful submission of counsel for Aljan to the contrary. In reaching that conclusion, we have not taken into account the most recent information from the Department of Lands about the decision of the Joint Village Land Tribunal for Aese Island.

51. That conclusion really dictates the outcome of the appeal. There is a process for resolving disputes about custom ownership. It is discussed by the Court of Appeal in *Valele Family v. Touru [2002] VUCA 3* at pages 7 to 10. We shall not repeat those comments, which we respectfully endorse. We add that, since the facts on which that judgment was given, the Customary Land Tribunal Act [CAP 271] came into force on 10 December 2001. The Customary Land Tribunal Act from that time provides a system based on custom to resolve disputes about customary land (except for proceedings then pending in an Island Court) by a series of Land Tribunals, reviewable by the Island Land Tribunal. Under section 33 and

subject to the Constitution and supervision of the Supreme Court under section 39, decisions made under the Customary Land Tribunal Act are final.

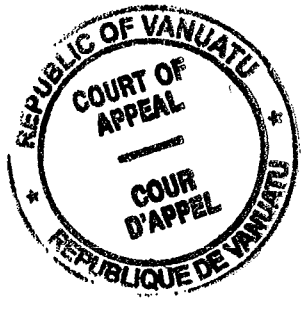
52. The Supreme Court has a supervisory jurisdiction only where a Land Tribunal fails to follow any of the procedures under that Act. It does not have primary jurisdiction to hear and decide, in the case of a dispute, who are the custom owners of particular land. Of course, the Supreme Court also has jurisdiction under s 22 of the Island Courts Act [CAP 167]. That did not arise here.

53. Under section 8 of the Land Leases Act [CAP 163], the Director of Lands has limited power to get such information as the Director seeks before deciding to register any instrument. The Director, or the officers of the Department, sometimes will be faced with deciding whether the correct custom owners have agreed to the transfer of a lease. If there is no apparent dispute, the Director apparently often accepts at face value what is presented. If there is an apparent dispute, it is a matter for the Director what should be done. Any decision of the Director can not be a binding decision about who are the custom owners, because that role is entrusted to the Land Tribunals and the Island Courts, but it may be effective to enable registration of the instrument. That issue was not fully debated on this appeal, so it is preferable to say no more about it.

54. For present purposes, we consider that, once it was clear that there was some dispute about who were the custom owners of the land, the Supreme Court did not have jurisdiction to decide the issue. We think that, in error that is what the Supreme Court judge did by the Custom-owners order.

55. For that reason alone, that order should be set aside.

56. We briefly refer to the arguments about procedural fairness.



57. The Court of Appeal in *Raupepe v. Raupepe [2000] VUCA 6* said at page 3:

"It is a fundamental procedural requirement in Court proceedings concerning the ownership of land that all people who claim, or are likely to claim, an interest in the land be before the Court. There were two reasons for that. The first, is the natural justice reason to ensure that those whose interest might be affected have the opportunity to be heard at the trial and to put whatever information they want to put in support of their position or against somebody else's position. The second reason is that the judgment of the Court, because it determines for the world at large who owns the land, must be one that binds all those people who might have an interest in the land. A judgment would not bind those people unless they are before the Court as parties."

58. As we have indicated, there was material before the Supreme Court to suggest that the Fifth respondents may not have been, or may not have been all, the custom owners. Even if the Supreme Court had jurisdiction to decide who were the custom owners, those other persons should have been notified that the question about who were the custom owners was to be decided so that they had the chance to given evidence and to make submissions. The fact that Valele had filed sworn statements from them or some of them, was not enough. Valele had a different interest. It may be that, by proper notice of the issue, further persons (such as the James Rad Family) may also have taken part in any such hearing.

59. Consequently, on that ground also, we would set aside the Custom owners order.

60. It is not necessary to consider the arguments about the other ways in which Valele say that natural justice was not given.

61. We should note one particular argument advanced on behalf of Aljan. It said Valele was estoppel from disputing the correctness of the Custom-owners order. The nature of the estoppel was not fully developed. It is clearly not an issue estoppel or a res judicata as that order is subject to appeal. It is clearly not promissory estoppel, because no promise is asserted upon which Aljan have relied. Presumably, some form of estoppel by conduct is asserted. But there is no evidence that Aljan acted to its detriment relying on Valele's attempts to have the Valele transfer registered. That contention must be rejected.

Conclusion

62. For the reasons given, we

(1) give leave, to the extent necessary, to appeal from the custom owners order made on 12 November 2007;
(2) extend the time to appeal from that order to 12 August 2009; and
(3) allow the appeal by setting aside that order.

That is, ultimately, order 2 of the orders of the Supreme Court made on 12 November 2007 is set aside.

We do not need to address the other matter raised on the appeal, seeking to appeal from the Supreme Court order of 22 July 2009 refusing to recall or set aside the Custom-owners order.

We have considered whether any order for costs should be made

Valele required a significant time indulgence to enable the appeal to be brought, and ultimately now any substantial rights they have will be decided in the 2008 action. The respondents, other than Aljan and the Minister of Lands, are partly responsible for the circumstances giving rise to the appeal and they have been unsuccessful. Aljan also opposed the appeal unsuccessfully. The Minister took

a neutral attitude on the appeal, but appeared to assist the Court. However, as there remains some uncertainty about how and why the Valele caution was removed, and about how and why the Valele transfer was registered and then deregistered, we think it is also appropriate that there should also be no order for costs in favour of the Minister.

Accordingly, each party should bear his or its own costs of the appeal.

DATED at Port Vila, this 30th day of October, 2009

BY THE COURT

.....
Hon. Vincent Lunabeck CJ

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Hon. J. Mansfield J.

.....
Hon. M. O'Regan J.

.....
Hon. D. Fatiaki J.