

**BETWEEN: VANUATU COPRA AND COCOA  
EXPORTERS LIMITED (VCCE)**  
(Appellant)

**AND: PETER COLMAR**, Trustee of Valele  
Trust, Luganville, Santo  
(Respondent)

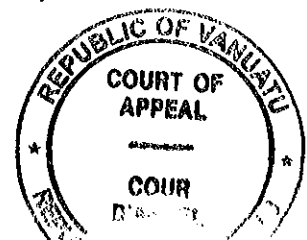
**Coram:** Hon. Chief Justice Vincent Lunabek  
Hon. Justice John von Doussa  
Hon. Justice Daniel Fatiaki  
Hon. Justice Ronald Young  
Hon. Justice Robert Spear  
Hon. Justice Dudley Aru  
Hon. Justice Mary Sey

**Counsel:** Mr. James Tari for the Appellant  
Mr. Nigel Morrison for the Respondent

**Date of hearing:** 17th April 2013  
**Date of judgment:** 26th April 2013.

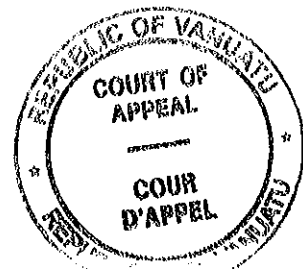
### **JUDGMENT**

1. This appeal concerns an unsuccessful claim by Vanuatu Copra and Cocoa Exporters Limited (VCCE) in the Supreme Court for eviction of Colmar from leasehold title No. **03/OH71/026** (the title), in Luganville, Santo and the successful claim for rectification by Colmar. Before considering the grounds of appeal filed by VCCE, it is necessary to have regard to some of the history to this case.



## **Background**

2. On the land were two storage docks formerly owned by the Vanuatu Commodities Marketing Board (the VCMB); VCCE had the use of one of the docks as a tenant under a rental arrangement which commenced in May 2003.
  
3. On 18 July 2005, in Civil Case No. 15 of 2004 Colmar (as the Valele Trustee), after successfully suing VCMB and obtaining an award of damages of VT2,000,000, was granted an Enforcement Warrant (Non Money Order) procuring the surrender and transfer of the ownership of one of the storage docks from VCMB to him. On or about 30 June 2006, the VCMB consented to transfer possession and ownership of one of the two storage docks on the title to Colmar. Colmar then attempted to evict VCCE but he failed to do so.
  
4. On 21 September 2006, the Minister of Lands gave consent to the surrender of the lease and the transfer of half of lease title being one of the storage docks to Colmar. A new title was created as 03/0H71/.... but no final number was allocated. As a result, Colmar was unable to complete the transfer and registration process. Both parties continued to use and occupy the two separate docks on the title for storage of copra and other marketable commodities such as cocoa and kava.
  
5. On 19 October 2007 the Sheriff advertised the property again for sale by tender. The Notice of Sale described the property as "Storage Dock 2 (Santo)," lease **03/OH71/026**. The advertisement also stated that it was to be sold for bids above 15 Million Vatu. VCCE put in a bid of 8 Million Vatu, just over half of the reserved price of 15 Million Vatu. It was successful. On 10th

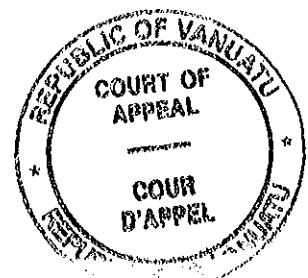


March 2008 the whole leasehold title was transferred from VCMB to VCCE and the transfer subsequently registered. Two weeks later VCCE gave Colmar 7 days notice to vacate the property but he refused to leave.

6. On 19<sup>th</sup> May 2009, VCCE sought orders in the Supreme Court to evict Colmar. Colmar denied that VCCE was entitled to the whole title. He also filed a counter-claim claiming that he was entitled to the other dock and part of the title pursuant to the Warrant of Enforcement. Colmar contended that the sale made by the Sherriff to VCCE at 8 Million Vatu was in relation only to half the property on the title. Colmar claimed that VCCE was knowingly deceptive in proceeding to register the whole title in its name in 2008. Colmar therefore sought an order for rectification of the title.
7. In a judgment delivered on 7<sup>th</sup> February 2013, the Primary Judge dismissed VCCE's claim to evict Colmar and in relation to the counter-claim the Court entered judgment for Colmar. The Judge ordered rectification of the lease by vacating registration of the whole lease in favour of VCCE and ordered 2 new separate titles for the lease - one for each party.

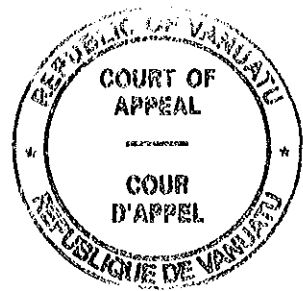
### **Appeal Grounds and Issues**

8. The appellant now appeals on seven grounds as follows:
  1. *That Supreme Court erred in law and fact in deciding that the appellant has no interest in land when it submitted its bid for the tender on the 15<sup>th</sup> November 2007.*
  2. *That Supreme Court erred in law and fact in deciding that the Supreme Court has no power to decide on the issue whether the Enforcement Warrant in Civil Case*



No. 15 of 2004 can be enforced after the 30<sup>th</sup> November 2005.

3. *That Supreme Court erred in law and fact in relying on the evidence of the Sheriff when the same Court did not decide that the advertisement in the tender notice was for land lease title 03/OH71/026 and half as stated by the Sheriff.*
  4. *That Supreme Court erred in law and fact in deciding to order rectification when there was no pleadings of fraud and or mistake pleaded in the counter-claim.*
  5. *That Supreme Court erred in law and fact in deciding to order rectification of land lease title 03/OH71/026 when there was no evidence to support the counter-claim.*
  6. *That Supreme Court erred in law and fact in deciding that there was mistake on the part of the Government in the process of registering the transfer to the appellant.*
  7. *That Supreme Court erred in law and fact in deciding that the action of the appellant in the process leading to registration of the transfer was dishonest and thus amounted to fraud.*
9. The central issues before the Supreme Court and this Court are first: whether the Sheriff in selling the dock lease by tender sold the whole of the dock or only that part occupied by VCCE. VCCE contends that it had bid for the whole title. It says it was not told that what was being sold was only half of the property. Secondly was registration of the whole lease in VCCE's favour a mistake? (S.100 (1) of the Land Leases Act). Thirdly did VCCE know that it was not purchasing the whole of the lease? If it knew it was not purchasing the whole of the lease, was the registration obtained by fraud. (S.100 (1) Land Leases Act)? If the registration was by



mistake or fraud was VCCE a bona fide purchaser for value (S.100 (2))?

10. The trial Judge's relevant findings are contained in the following passages in his judgment:

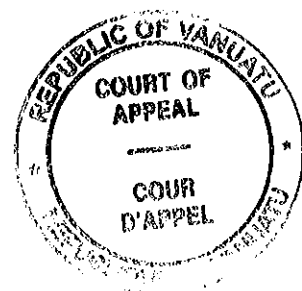
**"The evidence of the Sheriff is that he advertised for sale of part of the title and that it was to be sold for bids above VT15 Million. It was sold to the Claimant who bid for only VT8 Million. Clearly VT8 Million was valuable consideration but only for one part of the property and title, not for the whole title. All these were within the knowledge of the Claimant. However, when they permitted registration of the whole title in their favour, the Government and its servants and agents were mistaken to allow such registration. But the Claimant with clear knowledge that the whole property and title was worth more than VT8 Million and by allowing its registration and transfer into their name, they were dishonest. As such, they were guilty of fraud and therefore their acquisition was not lawful.**

**Under those circumstances, the Court accepts the defendant's submissions in relation to his counter-claim. He is therefore successful on his counter-claim and is entitled to the orders he seeks."**

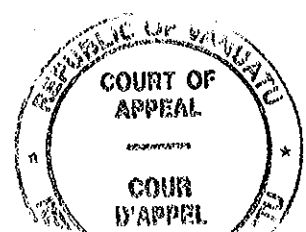
11. The Judge refused to evict Colmar, made an order for rectification of the title, ordered that two titles be issued for the property, one for VCCE and one for Colmar.

12. **DISCUSSION**

As to appeal ground 1, VCCE had no legal interest in the land until after their bid was finalised. This ground of appeal has no relevance to the appeal issues.

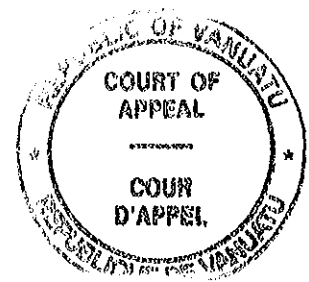


13. As to ground 2, the trial Judge declined to answer the question as to whether the terms of Colmar's Enforcement Warrant could be enforced after 30<sup>th</sup> November 2005. We agree with his reasoning at paragraph 13.2 of his judgment. The validity of Colmar's enforcement warrant was not before the Supreme Court in these proceedings.
14. Having heard counsel we consider VCCE's appeal grounds are best identified in grounds 3, 4, 5, 6 and 7. In summary, these are a challenge to the fact the Judge accepted the Sheriff's evidence that VCCE knew they were purchasing only half the dock; that there were no pleadings of mistake or fraud; and there was no evidence of mistake or fraud in the registration. Thus the appellant's submit there was no basis to refuse to evict Colmar and no basis for rectification and the creation of two titles.
15. As to ground 3, the Sheriff gave evidence relating to the sale to VCCE. He said that he had made it clear to the representatives of VCCE that he was only selling half of the title. The trial Judge accepted the Sheriff's evidence. It was open to him to do so. The Sheriff's evidence was supported in part by the notice of sale by tender which referred to the sale of "Dock 2." We therefore see no merit in the appellant's complaint that the Supreme Court erred in law and fact in relying on the evidence of the Sheriff.
16. The VCCE's complaint in ground 4 is that the Supreme Court erred in deciding to order rectification when there was "no pleadings" of fraud and or mistake pleaded by Colmar. This is wrong. While Colmar's counter-claim does not use the terms "fraud" or "mistake" it is clear that that is what was alleged by him in the pleadings. Colmar made it clear in his pleadings that he alleged



that registration of VCCE's lease was not free of mistakes nor free of fraud. We reject this ground of appeal.

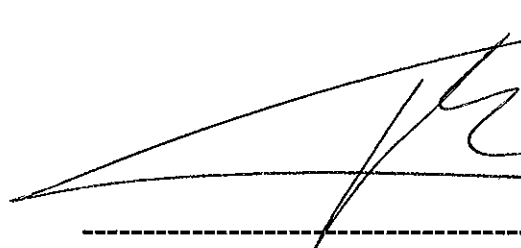
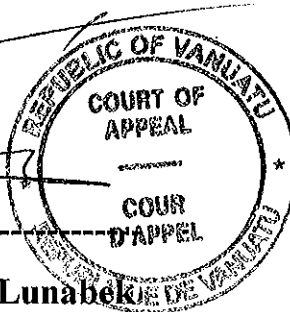
17. Appeal grounds 5, 6 and 7 are really one ground, that there was no evidence of mistake or fraud to justify rectification. We do not agree. As to mistake the evidence accepted by the Judge was that Colmar had purchased half of the leasehold title before VCCE's purchase. Secondly the evidence established VCCE was only sold half of the leasehold interest by the Sheriff. The registration of a transfer of the whole of the leasehold title was therefore a mistake in terms of Section 100 (1). Further there was evidence accepted by the Judge that VCCE knew of Colmar's interest in the property before it purchased the half share in the lease. In addition for VCCE to register a transfer of the whole of the lease when it knew (given the acceptance of the Sheriff's evidence) it had not purchased the whole of the lease meant its registration was obtained by fraud.
18. The Judge was therefore correct to find Colmar had established mistake and fraud pursuant to Section 100 (1). As we have noted in finding the registration was mistaken and fraudulent because of the actions of VCCE the Judge was inevitably right in concluding that VCCE had knowledge of the mistake and fraud. VCCE could not therefore claim it was a bona fide purchaser for value.
19. In summary to return to the issues identified in paragraph 8 of this judgment, the Judge was entitled to accept the Sheriff's evidence that VCCE knew they were only purchasing half the property. When VCCE registered a transfer of all the property this was a registration based on mistake and fraud. It justified rectification pursuant to S.100 (1) of the Land Leases Act.



20. We see no merit in any of the grounds of appeal. For these reasons the appeal is dismissed. The appellant must pay the respondent's costs of the appeal at the standard rate.

**Dated at Port Vila this 26th day of April 2013.**

**BY THE COURT**

  
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**Hon. Chief Justice Vincent Lunabeko**