

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

Civil Appeal Case No. 30 of 2015

BETWEEN: KALO SANDY
Appellant

AND: VANUATU ROWING ASSOCIATION (INC.)
First Respondent

AND: REPUBLIC OF VANUATU
Second Respondent

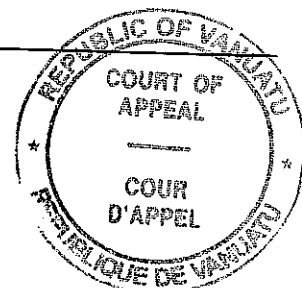
Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John von Doussa
Hon. Justice Raynor Asher
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd

Counsel: *Mr. J. Ngwele for the Appellant*
Mr. J. Malcolm for the First Respondent
Mr. K. Tari for the Second Respondent

Date of Hearing: 17 November 2015

Date of Judgment: 20 November 2015

JUDGMENT



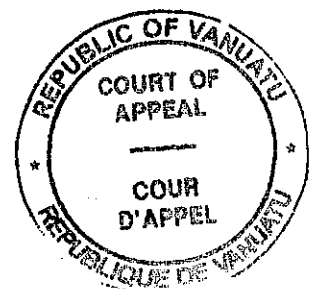
Introduction

[1] This is an appeal from the judgment of Sey J dated 29 July 2015. The claim in the court below was for judicial review, filed by the Vanuatu Rowing Association (Inc.) (the VRA). The decision in question was that of the Minister of Lands to grant owner lease title 11/OD41/064 to Kalo Sandy and another for a sum of VT500,000.

[2] The background facts are not in dispute. The area concerned is land within Port Vila at the Tassiriki area. The previous alienator Pierre Bourgeois (deceased) developed the area into a subdivision for residential purposes with green spaces for public use. One such area is in title 11D/OD41/064 (“the leased land”). It is a green space and on the edge of the first lagoon. Thierry Bourgeois in 2009–2010 granted permission to the VRA to use it to build their club premises in order to the water for their boats. The project was approved by the government. The club premises were duly built.

[3] On 20 November 2012, the Minister of Lands, then Mr Stephen Kalsakau, granted a lease over the land in title 11D/OD41/064 to “SPK and Kalo Sandy”. The lease was signed on 27 February 2013. As is recorded in the judgment of Sey J, there were a number of curious features of this new lease which are not the subject of factual challenge:

- (a) The “premium value” ultimately fixed in the established way for the leased land, which will be discussed below, was VT15,400,000. However the value fixed for the lease given by Mr Kalsakau to SPK and Mr Kalo was VT500,000 and the annual rental was VT15,000.
- (b) On 5 June 2013, Mr Kalo’s then lawyers, Kapapa lawyers, gave the VRA seven days notice to remove themselves from the property or face a claim for VT500,000.
- (c) On 12 August 2013, Kapapa lawyers advised the VRA that they had the right to evict it, but that they would sell the property to it for VT35,000,000, (70 times the premium price).



(d) One of the purchasers was Mr Kalo. SPK was his 12 year old son.

[4] During the trial Mr Kalo was questioned about other leases he had acquired from the former Minister of Lands, Steven Kalsakau. He confirmed that he had paid VT1.4 million for lease title 11/0031/050 situated at Joint Court Area and that such land belonged to the former Finance Minister. Mr Kalo also confirmed that he had paid VT1.2 million for the old Mental Hospital lease title 11/OE21/037 and that he had sold the property a few days later to a Chinese purchaser for VT16 million. Mr Kalo agreed that he enjoyed a profit of almost VT15 million on the sale of lease title 11/OE21/037.

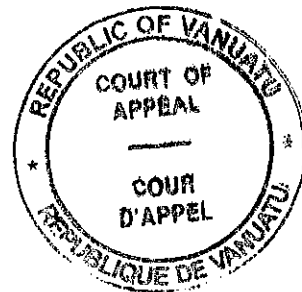
[5] There was a forgery on part of the survey plan. When Mr Kalo was cross-examined about this and the alteration of the area on the Negotiator Certificate from 1000 to 3544m² he said:

I don't know who changed it. It was the people at survey department who changed that figure. If they had advised me that the land was not appropriate I would not have taken it. The admin fee was VT2000 which I paid.

[6] The VRA issued the claim for judicial review in the court below to challenge the Minister's decision. Sey J in her decision of 29 July 2015 held that the decision to grant the lease was unreasonable in the *Wednesbury* sense. She held that the land was leased in breach of s 9 of the Land Reform Act [CAP123] and ultra vires the powers in s 32 D(2), (3) and (4) of the Land Leases Act [CAP163]. She quashed the Minister's decision as ultra vires, declared the lease null and void, and ordered the Director of Lands to rectify the title by cancellation of the lease.

The appeal

[7] The appeal identified three main grounds of challenge. The first was that the Minister as custodian of all state land acted lawfully in granting the lease. The second was that the decision of the Minister was not unreasonable in the *Wednesbury* sense. The third was that the Judge was incorrect in ordering rectification by cancellation of the lease pursuant to s 100 of the Land Leases Act [CAP 163], and had no power to do so.



Decision unlawful

[8] Under the Land Leases Act, s 31 provides as follows:

31 Leases

Subject to the provisions of this Act and of any other law, the owner of land may lease the land or part of it to any person for a definite term.

[9] Section 32 D(2), (3) and (4) provide that:

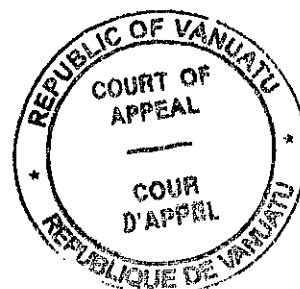
...

- (2) A new lease is not to be issued unless the lessee or the registered proprietor pays to the lessor a premium based on the full rental value of the unimproved value of the land as determined by the Minister from time to time and the contract rent as agreed to by the lessor and the lessee.
- (3) A lessee must pay to the Minister the premium referred to in subsection 32D (2) before the lease is issued to the lessee.
- (4) The Minister may by Order prescribe the full rental value of the different classes of leases which are to be reviewed every 5 years. "

[10] Pursuant to s 9 of the Land Reform Act [CAP 123], "On the Day of Independence all state land shall vest in the Government and be public land and be held by it for the benefit of the Republic of Vanuatu." The Minister of Lands on behalf of the Government is responsible for approving leases over public land as submitted by the appellants.

[11] The lease stated that the Minister Mr Kalsakau was acting under s 9(1). Section 32D(2) prohibits the issuing of new leases unless the lessee pays to the lessor a "premium based on the full rental value of the unimproved value of the land as determined by the Minister from time to time".

[12] This provision requires that there must first be a determination of the unimproved value of the land in question. Once this has been determined, then only can its full rental value form from the basis upon which a premium is determined for payment by the lessee.



[13] The evidence of the Valuer-General disclosed that the Minister responsible for lands has by Order 86 of 2009 prescribed the full rental value of different classes of leases within Port Vila. This was not done in respect of this lease. No evidence was put before the Judge of the full rental value or the unimproved value of the land. This value was not taken into consideration by the Minister when determining to the premium of VT500,000. The finding by the Judge when referring to the application of section 32D was that:

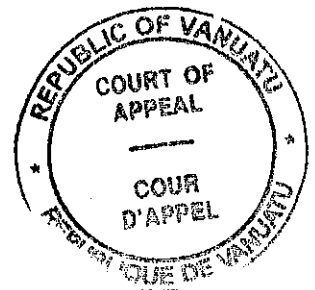
[58] ... The section clearly spells out that a new lease is not to be issued unless the lessee or the registered proprietor pays to the Minister a premium based on the full rental value of the unimproved value of the land as determined by the Minister from time to time and the contract rent as agreed to by the lessor and the lessee. A lessee must pay to the Minister the premium referred to in subsection 32D(s) before the lease is issued to the lessee. In this case however, the premium paid by Mr. Kalo is by far less than the assessed premium amount of VT15, 400, 000. Suffice to say that, in negotiating the premium with the Third Defendant, the Minister failed to observe the requirement of s 32D(2) and (3) and thus he acted ultra vires the powers conveyed on him under the LRA.

[14] We respectfully adopt this reasoning of Sey J as a correct analysis of the Minister's actions. There was no evidence of a determination of the unimproved value of the land at the date when the lease was approved, and we consider that such a determination is a prerequisite to a lawful transfer under s 32D(2) and (3). The transfer of the lease was unlawful and ultra vires and was properly quashed.

Decision unreasonable

[15] The transfer of the lease was at an extreme undervalue. Mr Kalo made a 7000 per cent profit. Indeed, as Mr Malcom for the VRC pointed out, based on the price that Mr Kalo wanted for the land, he paid 1.4 per cent of its value to the Minister. The Minister did not file an affidavit. He did not explain the failure to get a determination of value, or the price, which plainly on its face was absurdly low.

[16] On its face Mr Kalsakau failed entirely in his duty as a Minister. He did not act according to law or in the interests of the Republic. No reasonable Minister would have contemplated a lease at such an extraordinary undervalue. The decision has the quality of outrageous irrationality that warrants intervention under *Associated Provincial Picture Houses v Wednesbury*



Corporation [1948] I KB 230. The decision to grant the lease was correctly quashed on that ground also.

[17] It can also be observed that there is no indication that Mr Kalsakau paid any regard to the occupation of the site by the VRA, and the desirability of the leased land remaining available to the public, but since it has not been argued we place no weight on that for the purposes of this decision.

The power to rectify under s 100

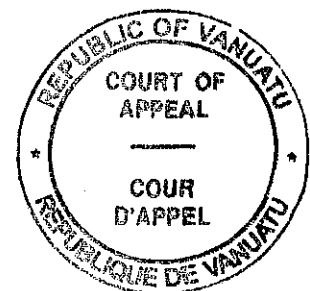
[18] On this issue the appellant submits that the VRA was not a competing applicant for a lease over the land in question, and that the claim was for judicial review only. It was submitted by Mr Ngwele for Mr Kalo that there was no s 100 claim under the Land Leases Act which could warrant the Judge's rectification of the title by cancellation of the lease.

[19] It was further submitted that at best the Judge could only make a declaration that the decision of the Minister of Lands to grant the lease was unlawful and that it should be quashed. It was submitted that leases can only be cancelled under ss 99 and 100 of the Land Leases Act for mistake or fraud. It was submitted that the lease was only registered after all the necessary approvals were obtained and procedures complied with.

[20] In her decision the Judge said:

This contention in my view is misconceived as it fails to take cognizance of the application of section 100 of the LLA (Land Leases Act) which empowers the court to order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.

[21] Section 100(1) of the Land Leases Act empowers a court to order rectification of the register by directing that any registration be cancelled or amended "where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake."



[22] We deal first with the procedural argument. Rectification of the register is the relief the VRA sought in its written claim. Thus, while the claim was a claim for judicial review, under r 2.1 of the Civil Procedure Rules it was also a civil proceeding, and could include both a judicial review claim and a civil claim for rectification of the register. It was plainly on its face a claim for rectification of the register as well as for judicial review.

[23] The lease was, as we have set out, invalid. Under s 100(1) of the Land Leases Act the Court may order rectification if any registration has been "... made or omitted by fraud or mistake". The lease which had been issued was not in compliance with s 32D(2) of the Land Leases Act. It was therefore as Sey J found, an invalid and unlawful lease, and was issued unreasonably in the administrative law sense applying the *Wednesbury* principle. We have no doubt that if these matters had been drawn to the attention of the Director he would have refused to register the lease. If asked why the response would be that, it would be a serious error to register an invalid lease. It was, therefore, registered by mistake.

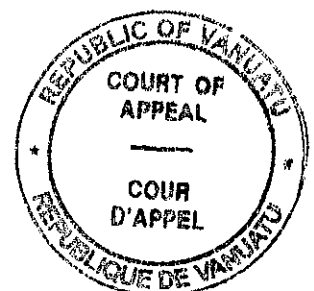
[24] No question arises of the invocation of the doctrine of indefeasibility and the protection of purchasers, given that Mr Kalo was complicit in the mistake and must be taken to have known (given his subsequent demands) that he was acquiring the land at an outrageous and unjustified price.

[25] Therefore the Judge was within her powers in directing that the registration of the lease be cancelled.

Result

[26] For these reasons, the appeal is dismissed.

[27] The respondents are entitled to costs on a standard basis to be taxed failing agreement.

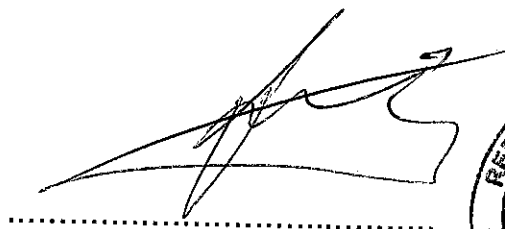


A further matter

[28] We understand that this transfer and others involving Mr Kalsakau and Mr Kalo may already be subject to investigation by the Ombudsman under the Leadership Code Act, but in case that not be so we refer this and the other related transactions raised in the cross-examination of Mr Kalo to the Ombudsman for investigation.

DATED at Port Vila this 20th day of November, 2015

BY THE COURT



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Hon. Vincent Lunabek
Chief Justice

