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

Civil Appeal Case No.740 of 2017

BETWEEN: NOEL VARI
Appellant

AND: JULIANE VARISIPITI
First Respondent

AND: THE REPUBLIC OF VANUATU
Second Respondent

Coram: ***Hon. Vincent Lunabek, Chief Justice***
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd
Hon. Justice Paul Geoghegan

Counsel: ***Edward Nalyal for appellant***
Silas Hakwa for 1st Respondent
Sammy Aron for 2nd Respondent

Date of hearing: ***17th July 2017***
Date of Judgment: ***21st July 2017***

JUDGMENT

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1. When Michael Varisipiti died in May 2016 he was the lessee in an Agreement for Lease of land in old title 610 with the Republic as lessor. The Agreement provided that the Republic would grant Mr Varisipiti a lease over the land. After his death the Republic refused to grant a lease over the land to Mrs Varisipiti the administratrix of Mr Varisipiti's estate. Instead the Republic granted a lease over the land to Noel Vari the Second defendant. Mrs Varisipiti challenged the registration of the lease by the Republic to Mr Vari in these proceedings.

2. The Judge in the Supreme Court concluded that the Agreement to Lease was valid and that Mr Varisipiti's interest in the agreement could pass to Mrs Varisipiti as executrix and trustee. He cancelled the registration of the lease to Mr Vari as based on mistake. He directed the Republic to register Mrs Varisipiti's lease of the land as trustee. It is from these three decisions the appellant appeals.

Background Facts

3. On 14th March 1994, Mr Varisipiti leased from the Republic the land in old title 610. The lease was to be for 75 years from 14 March 1994. The lease provided for a survey and a formal lease.

4. The Minister of Lands, as lessor, signed as approving the lease, on 28th September 1994. In 2001 Mr Varisipiti arranged for the land to be surveyed. The Director of Land Survey allocated a new title number 04/2943/020 to the land and he approved the survey plan. But Mr Varisipiti did not then arrange for a formal lease to be prepared and signed by the Republic. Mr Varisipiti died on 15th May 2006.

5. In August 2006 Mrs Varisipiti's Solicitors prepared a draft lease with respect to 020 and submitted it for approval in terms of the Agreement for Lease. The Department of Lands advised Mrs Varisipiti to pay all outstanding rental and pay a fee to the Republic for execution of the lease. She made both payments.

6. The Department of Lands then prepared a lease with Mrs Varisipiti as lessee and sent it to the Ministry of Lands for signature. Despite a follow up nothing further was heard of this lease.

7. Mr Vari was Mr Varisipiti's brother. Mr Vari and other family members took the view that Michael Varisipiti had held lease 020 on behalf of his wider family and not in his personal capacity.

8. And so on 10 July 2006 Mr Vari wrote to the Director General of Lands asking if the Agreement for Lease could be changed from Mr Varisipiti's name as lessee to the Vari family representatives, Loloso Livo and John and Noel Vari and asked that the Agreement for Lease be replaced with a formal registered lease in their names as lessees. On 24th August 2006 the three men made a formal application for Ministerial consent to the lease in their favour.

9. On 24th October 2006 the Solicitors for Mrs Varisipiti wrote to the Director of Lands. They advised Mrs Varisipiti was applying for letters of administration with respect to her husband's estate. They pointed out Mr Michael Varisipiti was the lessee in an Agreement for Lease of the 020 property. The Solicitors said that as soon as letters of administration were granted Mrs Varisipiti would become the lessee and that in the meantime there should be no registration of a lease of the 020 land in favour of anyone else.

10. Mrs Varisipiti applied for letters of administration with herself as trustee. Mr Vari and his family opposed a sole grant of administration to Mrs Varisipiti. An interim

order in Mrs Varisipiti's favour was made in January 2008 and she was finally, by order of the Supreme Court, appointed the administatrix of the estate in March 2008.

11. On 10 October 2007 the Minster of Lands issued a Certificate of Registered Negotiator to Noel and John Vari and Loloso Livo with respect to the 020 lease.

12. The day before, on 9th October 2007 the solicitors for Mrs Varisipiti delivered by hand another letter to the Director of Lands about the 020 lease. They told the Director about the progress of the estate administration. They emphasised that part of Michael Varisipiti's estate was the 020 lease. They said they understood others may attempt to register a lease with respect to the land. They said no such registration should be approved until Probate was resolved. They gave notice they would seek an injunction to prevent any such registration.

13. On 15th October 2007 the Director General of Lands wrote to a representative of Mrs Varisipiti. He said that he considered the land was Vari family property and noted the Agreement for Lease was signed before Mr and Mrs Varisipiti were married. He said that after Mr Varisipiti's death his younger brothers and his uncle had applied for registration of the lease on behalf of the Vari family. The Director said some time later Mrs Varisipiti, in her son's name, had applied to register the lease. Approval for a negotiators certificate had been given to Mr Vari and two negotiator certificates would not be given. The Director General said that if the Supreme Court granted Mrs Varisipiti the probate application over this land title to the lease could be easily transferred to Mrs Varisipiti.

14. The Solicitor for Mrs Varisipiti wrote again to the Director of Lands and the Minister asking a series of questions about the Director's actions. No direct response was received but on 20 December 2007 the Director of Lands told the Solicitors for Mr Varisipiti " ..... *the lease will be registered. When the custom ownership of the land is conclusively determined the custom owner may apply to be substituted as the lessor of the lease*". The registration referred to was to the Vari family.

15. The Solicitors again wrote on 21st December objecting to the registration but to no avail. As it turned out the lease in favour of Mr Vari had been registered on 15th November 2007.

The Proceedings and the Supreme Court Judgments

16. In 2010 Mrs Varisipiti issued proceedings seeking cancellation of the lease in favour of Mr Vari, and rectification of the register and registration of the 020 lease in favour of her as trustee in Mr Varisipiti's estate. In the alternative, damages were sought from the Republic.

17. The parties agreed to hold the trial in two parts, the first whether the Agreement for Lease survived the death of Mr Varisipiti. If it did not that would dispose of the proceedings.

18. If it did survive, then the second part of the proceedings, as to whether there had been a mistake in the registration of the lease in favour of the Vari family and what the consequences of such a mistake would be, would be held.

19. At the first hearing the Supreme Court concluded that the Agreement for Lease survived the death of Mr Varisipiti and the Agreement formed part of his estate. Leave was sought to appeal that judgment to this Court (said to be an interlocutory order). It was refused on the basis that the question proposed to be answered on appeal was not an issue before the Supreme Court. The parties then agreed that the part heard trial in the Supreme Court would resume. A summary judgment application was before the Court but that was abandoned so that a full trial could be held, on the remaining issues.

20. On 14 December 2016, prior to the resumed hearing in February 2017, a conference was held with all parties represented before the Trial Judge. At that conference the Republic accepted that the registration of Mr Vari's lease was obtained by mistake as Mrs Varisipiti claimed. The Republic accepted therefore Mr Vari's lease should be cancelled and a lease in favour of Mrs Varisipiti should be registered with respect to lease 020. Counsel for the Republic told the Judge they had written to Mr Vari advising him of the Republic's position.

21. In February 2017 immediately before trial commenced Mr Vari sought leave to file a counterclaim against the Republic on the basis that if the Court ordered his lease to be rectified as a result of a mistake by the Republic then he had an indemnity claim. The Judge refused leave.

22. At trial the Judge concluded that the lease to Mr Vari had been registered by mistake. (s.100(1) Land Leases Act) as the Republic had conceded.

23. Further the Judge said that Mr Vari had never been "in *possession*" of the land and therefore s.100 (2) had no application. He ordered cancellation of Mr Vari's interest and he made an order directing registration of a lease in favour of Mrs Varisipiti as trustee of her husband's estate.

The Appeal

24. The Notice of Appeal by Mr Vari raised the following grounds-

    a) The Agreement for Lease was not part of Mr Varisipiti's estate and so rights under the Agreement ended when Mr Varisipti died.

    b) In any event Mr Varisipiti breached Clause 4 of the Agreement for Lease by failing to obtain a registered lease. As a result the Agreement for Lease was null and void.

    c) The Judge in the two hearings failed to conduct a proper and fair hearing.

    d) The Judge erred in his observations in his judgment about custom ownership of the land because custom ownership remained unresolved.

    e) The Judge erred in concluding Mr Vari was not in possession of the land in lease 020 when there was evidence he was in possession.

    f) The costs award was unfair to Mr Vari.

25. In his submissions Mr Vari raised a new point not previously considered in the Supreme Court. He submitted that the Agreement for Lease was not valid because the Minister of Lands as lessor had not signed the lease. Counsel for Mr Vari abandoned this submission at the hearing of this appeal.

Was the Agreement for Lease part of Mr Varisipiti's estate?

26. The appellant's case is that because the Agreement for Lease was not a registered lease no interest in land was created and there was therefore nothing to be included in Mr Varisipiti's estate. Mr Vari points out that an interest in land as defined in the Land Leases Act includes a lease but the definition of a lease expressly excludes an agreement for lease (s.1 Land Leases Act).

27. We are satisfied that the Agreement for Lease did form part of Mr Varisipiti's estate. We agree with the Judge in the Supreme Court that the Agreement for Lease was a contract and contractual rights ordinarily survive the death of a contracting party. The exception is in personam contracts. In such contracts the rights or obligation created by the contract can only be performed by the relevant party to the contract. That is not the case here.

28. It is common ground that an Agreement for Lease is not an interest in Land (s.1, Land Leases Act, definition of lease). This submission overlooks the fact that the Agreement for Lease is a contract. That proposition is confirmed in s.22(5) of the Land Leases Act which provides:

> *"Nothing in this section shall be constructed so as to prevent any unregistered instrument operating as a contract"*

29. As we have noted, an Agreement for Lease is not an in personam contract and so the rights under that contract can pass to Mr Varisipiti's estate. We are satisfied therefore the Agreement for Lease was part of Mr Varisipiti's estate and the rights under the agreement did not end when he died.

Breach of Clause 4

30. The Agreement for Lease provided:

> *"This agreement shall subsist only until an approved Survey plan of the leased land has been completed and a formal lease has been executed".*

31. The appellant submitted that because Mr Varisipiti, during his life time, had not arranged for a formal lease to be executed he had breached clause 4 and at the time of his death the Agreement was void given that breach. That submission misapprehends clause 4. The clause does not oblige Mr Varisipiti to do anything. Clause 4 provides that if he obtains an approved survey (as he did) and if he arranged for a formal lease to be executed (which he did not) then the "formal lease" would take over from the Agreement for Lease. But in the meantime the Agreement for Lease subsists and so Mr Varisipiti did not breach Clause 4 of the Lease. We reject this ground of appeal.

Trial Prejudice

32. The appellant submitted that the process used by the Judge to hear this case was flawed given the Judge had held two hearings, the first to deal with the inheritance point, the second to deal with all other matters.

33. The appellant submitted as follows:
    a) The first hearing did not involve cross examination and this was unfair to the appellant. The first hearing involved consideration of legal point.

b) Counsel for the appellant could not suggest what relevant cross examination the Judge had not heard before his ruling. We reject this complaint.

c) Secondly after the first hearing it was agreed there would be a full trial on the remaining issues. This involved abandoning an existing Summary Judgment application. The appellant suggested this process was somehow unfair but could not identify any particular unfairness. There could be no objection to the process undertaken, a full trial on the remaining unresolved issues. There was no unfairness in that process.

d) Finally the appellant said the delay between the first and second hearings was "unreasonable *and affected the Appellant*". However the appellant could not identify any way in which he was adversely affected by the delay between the First and Second Trials. We therefore reject this ground of appeal.

Custom Ownership

34. In his second judgment the Judge made some observations about the custom ownership of the land. In his appeal the appellant challenged these observations. Who the custom owners of this land are is irrelevant to these proceedings. Currently the Republic of Vanuatu through the Minister of Lands is the lessor standing in for the custom owners. This case is about lessee rights. And so the Judge's observations about custom ownership of the land were an aside and one not to be taken as a ruling or conclusion about custom ownership of the land.

We reject this ground of appeal.

Possession of Land

35. In his judgment the Judge concluded that after Mr Vari had obtained the registered lease of the land he had never been in possession of the land.

36. In this appeal the appellant challenged the Judge's factual findings that Mr Vari had never been in possession of the land.

The Judge however noted at 49:

"Notable by its absence from the second defendants defence (Mr Vari) is any reference or reliance on the provisions of section 100 (2) nor is there any averment that the second defendant acquired the lease for value consideration albeit that he denies knowledge of any mistake (s) ...."

37. Counsel for the appellant accepted that Mr Vari had never pleaded reliance on s.100 (2) of the Land Leases Act that he was in possession of the land and a bona fide purchaser. Given that properly made concession the question of whether Mr Vari was or was not in possession of the land was irrelevant. The question of possession of land is only relevant as one of the factors to be established if a litigant wishes to invoke s.100(2). Mr Vari did not raise s.100(2) at trial. We therefore reject this ground of appeal.

Costs in the Supreme Court

38. In the Supreme Court Mr Vari was ordered to pay 20% of the successful parties costs and the Republic, 80%.

39. We consider Mr Vari was fortunate to only be ordered to pay 20% of the costs. The first trial was based on Mr Vari's unsuccessful claim. By the time of the second trial the Republic had conceded the case against them. There remained for trial primarily the issues raised by Mr Vari. Mr Vari was not successful on these issues. And so there was ample justification for an award of costs against Mr Vari.

Summary

40. For these reasons therefore the appeal will be dismissed.

41. At the second hearing in February 2017 the second defendant (Mr Vari) sought leave to file a cross claim against the first defendant, the Republic. The claim was essentially a claim for indemnity under s.102 of the Land Leases Act. It was premised on the basis that it would only be relevant if the Court concluded there had been a mistake in registration but the Court refused to rectify the lease. The Judge refused Mr Vari's application to bring the cross-claim. He concluded that the claim was prohibited as not being against "*the claimant*", here Mrs Varisipiti. Further he concluded this was not a proper counterclaim because it was premised on a mere possibility, that the Court would refuse rectification.

42. Rule 4.8 (6) of the Civil Procedure Rules provides that a counterclaim includes a claim against a person who is not a claimant but who is a party to the proceeding. This was the situation here. Mr Vari, a party, was making a claim against the Republic, also a party.

43. The fact that a cause of action in a counterclaim is dependent upon the Court's conclusion as to the original claim is not a reason to reject a counterclaim. Indeed such a situation is common. The claim for indemnity under s.102 arose in this case

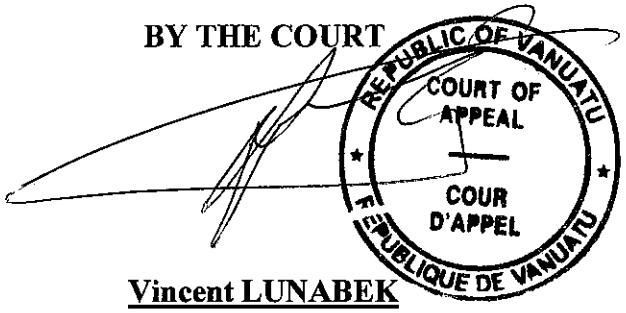
from the same basic set of facts and was conveniently heard together with the primary claim. The claim for indemnity, in the event that rectification was ordered, in any event arose at the moment of mistaken registration.

Costs

44. The appellant has failed in all grounds of appeal. Costs are awarded in favour of both respondents on a standard basis to be paid by the appellant.

DATED at Port Vila this 21st day of July 2017

BY THE COURT



Vincent LUNABEK
Chief Justice