IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU **Civil Case No: 29 of 2001**

(Civil Jurisdiction)

BETWEEN: JEFFREY SILAS

Plaintiff
Solicitor: Bill Bani & Partners

AND: MELCOFFEE SAWMILLS LTD.

First Defendant
Solicitor: Geoffrey Gee & Partners

AND: MINISTER OF LANDS

Second Defendant
Solicitor: State Law Office, Port Vila

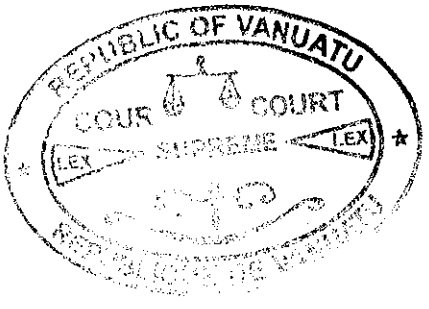
AND: DIRECTOR OF LAND RECORDS

Third Defendant
Solicitor: State Law Office, Port Vila

CORAM: Mr Justice Oliver A. Saksak
Ms Cynthia Thomas - Clerk

Counsels: Mr Daniel Yawha for the Plaintiff
Mr John Malcolm for the First Defendant
Mr James Tari for the Second and Third Defendants.

Dates of Hearing: 21st and 23rd July, 2003
Date of Judgment: 8th December, 2003.



JUDGMENT

Introduction

This is a reserved judgment.

The Original Action

In the original Originating Summons filed on 17th July 2001 the following persons were also named as Plaintiffs:-

Roma Bulelam;
Iombe;
Kebou;
Maki Setok;
Bob;
Fabiano Toutous;
Louis;
Robert;
Moise;
Daniel;
Walter Joseph Tamtam;
John Makura;
Mahit;
Tice Ishmael and
Silas Hinge.

The Amended Action

An amended Originating Summons was filed on 16th January 2002. It named Jeffrey Silas as the only Plaintiff. The following persons were referred to in the pleadings under paragraph 5 of the amended Originating Summons as occupying and developing the Pre-Independence Title No.726:-

Fabiano Toutous;
Roman Bulelam;
Iombe;
Setok Maki;
Jeffrey Silas;
Mahit;
Bob;
Kevu;
Robea;
Moise; and
Louis Worwor.

Neither the original nor the amended Originating Summons specifically state that Jeffrey Silas is suing in a representative capacity. His statement of claim states –

1. "The Plaintiff is a Ni-Vanuatu citizen and is resident in Santo.

2. The Second Defendant is a duly incorporated company in the Republic of Vanuatu and can sue and be sued in its own name.

3. The Second and Third Defendants represent the Government of the Republic of Vanuatu, and are responsible for the administration of land and/or land leases in the Republic of Vanuatu.

4. Prior to Independence, the Plaintiff and his family occupied and developed the land customarily known as Tinau and Lorethiakarkar land situated at Shark Bay, Santo and which is comprised in Pre-Independence land title No.726.

5. Other persons who also occupied and developed the Pre-Independence title No.726 include:-
(refer to the 11 names above).

6. At Independence Day all land by operation of the law reverted to the indigenous custom-owners where-of the land customarily known as Tinau and Lorethiakarkar, Pre-Independence title No.726 reverted to the indigenous unidentified custom-owners.

7. Since the customary ownership of Tinau and Lorethiakarkar land is disputed between custom claimants, the Plaintiff entered into an "Agreement to Lease" the same said land with the Minister of Lands on 6th September, 1994 which Minister was acting on behalf of the disputing custom claimants.

Particulars

The Agreement to lease:-

(i) is in writing and is dated 6th September, 1994;
(ii) was duly approved by the Minister of Lands on 13th October, 1994;
(iii) was executed between the Minister of Lands representing the disputing land-owners and the Plaintiff pursuant to section 8 of the Land Reform Act;
(iv) was to lease to the Plaintiff, for a period of 50 years approximately 150 hectares of land comprised in Pre-Independence title No.726;
(v) was for agricultural and related purposes and for a rent fee of VT30.000 per annum.

8. The Plaintiff claims that the Agreement to Lease is valid and enforceable and will claim specific performance and compensation for breach of the Agreement from the Defendants.

9. Despite the existing valid Agreement to Lease which the Defendants knew of, the Defendants have however issued a lease title No.04/1813/002 in favour of the First Defendant in total breach of the Agreement to Lease and which said lease erroneously covers the Plaintiff's area of Agreement to Lease.

10. The Plaintiff claims that the registration of the lease title No.04/1813/002 in favour of the First Defendant was done through fraud, or omission or mistake."

The Reliefs Sought

The Plaintiff seeks the following reliefs:-

1. "A declaration that the Agreement to Lease is valid, binding and enforceable.

2. An Order directing the Registrar of land titles to rectify the Register by cancelling the registration of land lease title No.04/1813/002 over parts of the land covered by the Plaintiff's Agreement to lease.

3. An Order requiring the First Defendant to cause the re-surveying of its property so as to exclude the Plaintiff's Agreement to lease parts of the land.

4. An Order requiring the Defendants to pay to the Plaintiff damages for breach of the Agreement to lease.

5. An Order requiring the Defendants to pay the Plaintiff's costs.

6. Any other order as the Court deems fit."

Dismissal of Action Against Second and Third Defendants

During the course of the hearing Mr James Tari made oral application to have the proceedings dismissed as against the Second and Third Defendants on the grounds that the Plaintiff's evidence did not disclose any reasonable cause, in particular, of fraud or mistake on their part. Mr Malcolm supported that submission by submitting that the mistake was the Plaintiff's. I found no evidence of fraud or mistake and dismissed the case against the Second and Third Defendants accordingly with costs.

Particulars of Fraud, Omission or mistake

The Plaintiff filed particulars of fraud, omission or mistake on 1st October, 2002. I set them out in full as follows:

"(A) OMISSION AND OR MISTAKE

1. The First Defendant obtains a Negotiating Certificate to lease pre-independence title Nos 726 part and 2567 part on 23rd February 1994.

2. The certificate of negotiator expired after 12 months or 1 year in or about the month of February 1995 pursuant to the Act.

3. The First Defendant renegotiated another negotiating certificate on 18th April 1995 but now to lease another and or different pre-independence title No.2542 but which share the same boundries with titles No.726 part and 2567 part.

Particulars

- registered negotiator for land known as Loro
- total area granted is 600 hectares
- Lease requested for special (Re-afforestation)
- Custom Owners disputed.

4. The First Defendant pursuant to Land Leases Act is only allowed under negotiating certificate dated 18th April 1995 to register his lease only on title No. 2542 and not on title Nos. 726 part and 2567.

5. AND FURTHER Plaintiff had been residing and or developing part title 726 prior to independence and had the same executed a valid agreement to leave over 150 hectares of land over part title 726 on 13th October 1994 and whereby Plaintiff's interest prevents anyone including the First Defendant to register his lease on part title 726.

6. AND TAKE FURTHER NOTICE that the First Defendant has been authorised per his registered negotiator certificate for a lease over 600 hectares on land known as Loro (part title 2542).

   (a) The first Defendant, however, had managed to execute a lease over 802 hectares which is not warranted under his valid negotiating certificate and also apparently covers Plaintiff's Agreement to lease area which Plaintiff has not been compensated for improvement.
   (b) The first Defendant's purported lease of 800 hectares covers three (3) separated litles (ie. Nos. 726, 2542 and 2567) which first Defendant should execute three (3) separate leases.
   (c) That the Minister (Second Defendant) noticed the defect and through the Department they took steps to rectify the mistake with the first Defendant on 22nd January 1996 and on 26th June 1996 but the First Defendant refused.

7. The Plaintiff relies on his affidavit and other evidence to establish particulars of mistake and or omission.

(B) FRAUD

1. The part title 2542 on Loro which is rightly called "Lorum" is disputed in the Supreme Court.

2. That pursuant to the Act claimants are required to give "consent" before the Minister can endorse or approve the lease pursuant to section 7(a) of the Land Reform Regulation 1980.

3. In or about 23rd June 1995 the Plaintiff claims the First Defendant bribed a claimant with VT200.000 in Order to give consent to the Minister to approve First Defendant's lease.

Particulars

- Notice of consent dated 23rd/06/95 by Silas Hinge.
- Alternative Agreement between First Defendant and Silas Hinge also dated 23rd/06/95 for payment of VT200.000 to Silas Hinge.

4. AND TAKE FURTHER NOTICE that Plaintiff relies on affidavit of Silas Hinge and relevant evidence to the case to establish particulars of Fraud."

Burden of Proof and Standard

The burden of proof required in this matter is on the balance of probabilities. It rests on the Plaintiff.

The Evidence For the Plaintiff

1. Jeffrey Silas (the Plaintiff) on oath.

He is from Paama and lives at the Ex-Bristish Paddock. He has a family but they are living on the land at Shark Bay – his parents and his brothers. The land is called "TINAU". It is the name given to the land near Lorethiakarkar. It is a custom name.
He understands why he is in Court. He found out that there was a lease granted to an investor over the land on which his families are residings. The investor wants to remove them as squatters from the land. That is why they want to defend their rights.

He was shown his affidavit of 4th June 2003 which he identified and confirmed his signature and the contents being the truth. Paragraphs 2b, 26, 27 and 28 and the Annexures relating to those paragraphs were challenged by Mr Malcolm and therefore were ruled inadmissible.
The witness was shown a further document which he identified as his second affidavit dated 18th July 2003. Mr Malcolm challenged paragraphs 9, 10, 11 and 12 and the Annexures relating to those paragraphs and those were therefore ruled inadmissible. The agreement to enter the land was made in 1978 during the time of rebellion. They returned to the land in 1993 and started developing. They negotiated with custom land owner, Silas Hinge and Ishmael. He was the only person on that land. The developments include erecting houses, cattle fences and paddocks, poultry farms, gardens, forestry etc. They have put up fences and built access roads to the land. First they put up temporary houses, now replaced by permanent ones with water wells. Their fathers planted coconuts covering four hectares.

In 1994 he signed an Agreement to lease since he made arrangement with Silas Hinge in a customary manner but other families moved in and also laid claims to ownership of the land. They have clarified their position with Silas Hinge and Sul Paul. Neither of them objected but gave their consent to the Minister to enter into an Agreement to lease.

Sul Paul is deceased. He placed his signature through his thumb print witnessed by his son Kalsei Paul. (Annex JS3)

He was working at the Lands Department for about 13 years. He graduated with a Bachelor of Land Management at the University of the South Pacific. He is familiar with the processes for obtaining leases.

After the Minister had granted an Agreement to lease he continued to negotiate for a proper lease. He waited for a survey pole from the Survey Department from 1994 to 1996, a period of three years. He wrote to them on 17th January 1995 about the matter. At the time the First Defendant had not yet occupied the land but he was trying to get in.

In 1995 he began his operations. He does not know exactly when the Survey Department put up surveying poles. He made reference to the Minutes of Meeting of the Lands Selection Committee of 15th March 1995 which approved the First Defendant's Application for Part 2542. He was a Lands Officer at the time and he was aware

of this Application. He said a lease was prepared by the First Defendant and submitted to them.

As regards the payment of VT200.000 the First Defendant had to pay that amount for forest products which is normally assessed by a forest officer. That this amount is inadequate and that he was not sure that the custom-owner received that amount. Since the Lessor was the Government, the moneys should be paid into a Trust Account.

2. Silas Hinge On Oath

He is from East Santo and lives on Tinau Land. His father originates from a place called Lorenko. He is a witness in support of Jeffrey Silas' case about Tinau. He was shown two documents which he identified as his affidavits. He is illiterate. The affidavits were read into evidence with no objections.

He lays claim to Lorum Land with Sul Paul who is deceased. They have been to the Island Court and he has appealed that decision. There is no dispute over Tinau Land.

He signed a consent at Mr Croucher's office over Lorum Land on 23rd June, 1995. Mr Croucher wanted them to sign the consent so that he could go ahead and plant trees at Lorum. He sent a truck to fetch him at his house. There was no discussion. He was with Sul Paul and Kalo Niel. He forgot the names of the others. He could not give consent over Lorum so he did not sign. Then they asked him to sign again after Mr Croucher was to pay out VT200.000 to each of them (the disputing custom owners) on the same day. But he was not paid the VT200.000 and he did not know about the others (whether they were paid or not). There was no explanation. They said there was no dispute over Lorum so they could plant trees. They did not tell him that they would be obtaining a lease. He did not sign (the consent) because Sul Paul was cross with him but later they told him about the VT200.000 so he came to sign. He signed in respect of Lorum Land. Tinau is a different land. He agreed to Jeffrey Silas' father to be on that land. He knows Kalo Niel from Hog Harbour which is a long way away from Lorum. He has built a house at Lorum but is not living there. He is not sure why Kalo Nial is involved in the case. He is not a claimant, only a witness in support of Sul Paul. The dispute over Lorum Land does not concern Tinau Land. They are talking about planting trees on the right side. He lives on the left side which is bush (forest). If he had known that Niel Croucher was going to plant trees on Tinau

Land as well, he would not have signed. They were talking about Lorum which is outside Tinau. He agreed to Lorum but not Tinau.

The Defence Case

The case for the Defence is simply that there is no fraud against the Melcoffee Sawmill Ltd, the only remaining Defendant. It is their case also that the Plaintiff has not come to Court with clean hands. None of the other person named as Plaintiffs gave evidence. No appeal has been lodged against the decision of the Island Court concerning Lorum Land.

The Defence Evidence

1. Niel Croucher on Oath

He is the Managing Director of Melcoffee Sawmills Ltd, the only remaining Defendant. He lives at Luganville. He was shown a document which he identified as his affidavit sworn and dated 30th June 2003. It was read into evidence without objections. He produced documentary evidence in a Bundle of Documents tendered as Exhibit D1. At page 44 the witness makes reference to a letter by Mr K. Nicholas, the Island Court Clerk dated 14th December, 2000 who confirms there is no appeal against the Island Court decision over Lorum Land. At page 78, the witness refers to a covering letter attaching a further application for an extra 600 hectares of land in addition to the 500 hectares already applied for. At pages 18 and 19 the witness refers to the appropriate Certificates of Registered Negotiator in respect of those 500 and 600 hectares of land.
At page 70, the witness refers to his Agreement To Lease land on part 726 and part 2567 to a total of 802.55 hectares.
He paid the sum of VT200.000 to Behove and Warnalan as payments for residual trees. He did not pay Silas Hinge as he was not declared as custom-owner.
He refers to Clause 10(h) of the Agricultural Lease dated 13th October 1995 granted to him regarding payments of 10% of the rent profit derived by them to the custom-owners for any further timber culled on the land. He has no agreement with Silas Hinge.

2. **Kelsy Sual on Oath**

He is from Lorum, East Santo. He was shown a document which he identified as his sworn affidavit dated 30th June 2003. He confirmed his signature and the contents as the truth. The affidavit

was read into evidence. He acts as a representative for Sul Paul Family who are the declared custom-owner of Lorum Land according to the decision of the Island Court. Silas Hinge is not the declared custom-owner. He has not been served with any appeal and denies any such appeal. He was involved in discussions about Lorum Land. He was shown land. He did not see Silas Hinge at meetings. His family is happy to have Niel Croucher on their land and not Jeffrey Silas.

3. Kalo Nial on Oath

He is from Hog Harbour but lives at Luganville. He has a farm at Lorum. He was shown a document which he identified and confirmed as his affidavit sworn and dated 30th June, 2003. The sworn statement was read into evidence.

He does not know Silas Hinge because the latter does not belong to Lorum. He is related to Sul Paul through his father. He was very instrumental in the negotiations leading to the execution of leases because he felt it was naturally good. Silas Hinge was in meetings. They were shown maps of the area. There were moneys paid for trees growing naturally on land.

Submissions

Mr Yawha, Counsel for the Plaintiff delivered written submissions to which Mr Malcolm responded by delivering written submissions in a Bundle of Documents headed "Synopsis of Submissions".
There appears to me to be ten (10) issues which Mr Yawha seeks answers or determination of the Court on. There are as follows:-

1. Whether the Plaintiff's Agreement to Lease is valid? (Ref. Paragraph 15 of Plaintiff's submissions)

The Plaintiff's Agreement to Lease is dated 6th September 1994. It was approved on 13th October 1994. (See Exhibit D1 TAB.3 pp 27-38). It appears to bear the signature of Mr Faratia, the then Minister of Lands (p.36).
Clause 1 of the Agreement states –

> *"This agreement is for a lease of approximately the area outlined in red on the attached sketch plan situate on the island of Santo and formerly registered under title Part 726 and measuring in area approximately 150 hectares (but subject to survey) upon the terms and conditions set out in the schedule". (underlining, mine).*

Clause 4 of the Agreement states –

> *"This agreement shall subsist only until an approved survey plan of the leased land has been completed and a formal lease has been executed." (underlining, mine).*

Section 1 of the Land Leases Act [CAP.163] defines what a "lease" is and specially states that it "..... does not include an agreement to lease." (emphasis, mine)

Section 7 of the Land Reform Act [CAP.123] provides for Void Agreements as follows –

> *"All agreements between persons who are not indigenous citizens and custom owners relating to land shall be void and unenforceable in law unless they have been –*
>
> *(a) approved by the Minister; and*
> *(b) registered in the Lands Record Office. (emphasis mine)*

Section 6 of the Land Reform Act provides for Certificate of Registered Negotiator as follows –

"(1) No alianator or other person may enter into negotiations with any custom owners concerning land unless he applies to the Minister and receives a certificate from the Minister that he is a registered negotiator (emphasis, mine)

(2) A certificate issued in accordance with subsection (1) shall –

(a) state the names of the applicant and of the custom-owners;
(b) give brief details of the land in respect of which negotiations are registered; and

(3) If negotiations are completed without compliance with subsection (1) the Minister may refuse to approve the agreement between the custom-owners and the unregistered negotiator, and if he is an alienator, may declare the land unsettled land."

Findings

Applying the law to the facts as supported by evidence I find as follows:-

(a) The Plaintiff did not disclose or produce evidence showing a sketch plan of the land over which his Agreement to Lease intended to cover.

(b) The Plaintiff did not disclose or produce in evidence any survey plans of the land in question.
(c) The Plaintiff did not disclose or produce in evidence any Certificate of Registered Negotiator in his favour.
(d) The Plaintiff did not disclose or produce in evidence any lease that he holds over the said land.
(e) The Plaintiff did not disclose or produce in evidence any application for a lease over the said land.
(f) The Plaintiff's Agreement to Lease was made second in time to the Defendant's Agreement to Lease. Whereas the Plaintiff's Agreement was approved by the Minister on 13th October, 1994 the Defendant's Agreement was first approved on 28th September, 1994.
(g) The Plaintiff did not disclose or produce evidence that he has paid off the outstanding rents in the sum of VT120.000. (Ref. Annex I to J. Silas' affidavit of 4th June, 2003)

Rulings and Conclusions

1. Section 7 of the Land Reform Act is not applicable to the Plaintiff's Agreement to Lease.
2. The Plaintiff failed to comply with Clauses 3 and 4 of his Agreement to Lease.
3. Having failed to comply with clause 4 of the Agreement the life of the Plaintiff's Agreement came to an end of 13th October, 1995 when the Defendant's lease was signed and approved. (See TAB 1 pp 1-11 of Exhibit D1).

The answer to the first issue is therefore that while the Plaintiff's Agreement to Lease may have been valid, it was valid only for a time (as specified by clause 4). The Plaintiff has breached the Agreement rendering it voidable. The Minister is entitled to rescind the Agreement but they are no longer a party. In the circumstances the conclusion is that this issue must be answered in the negative.

2. Was Consent By Kalo Nial Valid? (Ref paragraphs 6-12 of Plaintiff's submissions)

In the Plaintiff's alternative argument at paragraphs 6-11 on the third page of Mr Yawha's submissions, they challenge the validity of Mr Nial's consent on the basis that he was not a party to the dispute as to ownership of Lorum Land. Therefore when he gave consent on 28th February 1994, it did not reflect the consent of the disputing parties. The consent is attached to the Defendant's Agreement to Lease (TAB 9 p.77) of Exhibit D1.

Findings

From his evidence Mr Nial is a blood relative of Sul Paul (through his father) whom the Island Court declared to be the true custom-owner of Lorum Land. He was in fact their spokesperson in the Island Court proceedings. He checked twice in Port Vila for the appeal and was provided with none.

The disputing parties in the Island Court to Lorum Land were Sul Paul (deceased), Nathrik Lath, Tice Ishmael and Silas Hinge. (TAB 4 pp. 39-44 Exhibit D1). Sul Paul (deceased) gave consent first on 18th November, 1993 (TAB 6p,53) and secondly on 23/6/95 (TAB 6 p.46). Nathrik Lath gave consent on 27th October 1993 (TAB 6 p.55). Tice Ishmael gave consent on 2nd November 1993 (TAB 6 p.52). Silas Hinge gave consent on 23rd June 1995 (TAB 6 p.45).

Except for Silas Hinge's consent and Sul Paul's second consent, all other parties gave consent to the Defendant in 1993 to allow him to begin development on Lorum Land. These consents preceeded that given by Mr Nial in respect to an agreement to lease in February 1994.

The Island Court decision declaring Sul Paul as custom owner of Lorum Land is dated 15th January 1987 (TAB 4 p.39-43).
Silas Hinge in his evidence said he appealed that decision but did not disclose or produce any documents showing –

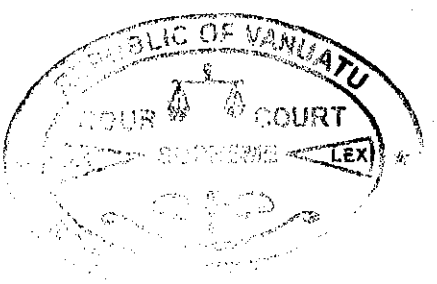
(a) such appeal and grounds thereof; or
(b) any stay of the Orders pending determination; or
(c) payment of the appropriate appeal fees.

There have been two conflicting advices from the Island Court Clerk (TAB 5 p.44, Exhibit D1) who confirm on 14th December 2000 that there is no appeal in this matter. The Registrar by letter dated 7th June 2001 confirmed at paragraph 2 that the matter is an appeal and is still awaiting a hearing. (Exhibit P.2) None of these persons were called to testify in relation to the appeal.

The Law

The law in relation to the giving of consent is not certain. The only relevant provision that can be of assistance is section 8 of the Land Reform Act. It states –

"(1) The Minister shall have general management and control over all land –



(a) occupied by alienators where either there in no approved agreement in accordance with sections 6 or 7 or ownership is disputed; or
(b) not occupied by an alienator but where owner-ship is disputed; or
(c) not occupied by an alienator, and which in the opinion of the Minister is inadequately maintained.

(2) Where the Minister manages and controls land is accordance with subsection (1) he shall have power to –

(a) consent to a substitution of one alienator for another;
(b) conduct transactions in respect of the land including the granting of leases in the interests of and on behalf of the custom owners;
(c) take all necessary measures to conserve and protect the land on behalf of the custom owners."

Rulings

(1) Section 8 of the Land Reform Act provides only for Ministerial consent in situations provided in subsection (1). There is no clear provision about consent of disputing parties where ownership of land is disputed. It is done only as a matter of practice.

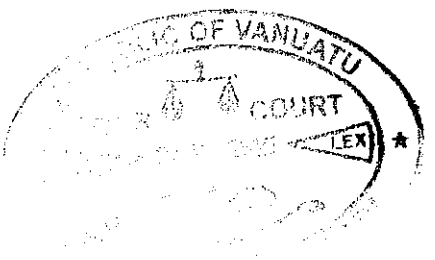
(2) When Mr Nial gave consent in February 1994 he gave it –

(a) As a person who stood in blood relationship with Sul Paul, the declared custom owner, having direct interest in Lorum Land as well.
(b) As the spokesman for Sul Paul in the Island Court he manifested his direct interest also in Lorum Land.
(c) Having made enquiries twice and was provided with no documents relating to an appeal, Mr Nial provided a consent on the honest and reasonable belief that there was no disptue.

(3) Where there is therefore no dispute, the giving of consent is not a legal requirement. It is only given as a matter of practice.

(4) If however there is in fact an appeal in existence indicating that ownership is still is dispute, all the disputing parties have given their consent to the Defendant to develop Lorum Land. Except for Silas Hinge whose consent was given after 1994, all the others gave their consent in 1993 prior to Mr Nial's consent.

Under these circumstances, the answer to this issue would be in the affirmative.



3. Whether Agreement To Lease By First Defendant Valid? (Ref. Paragraph 12 of the Plaintiff's submissions)

This Agreement was signed and approved on 28th September, 1994 by the then Minister Paul Telukluk. It was signed and approved one month ahead of the Plaintiffs' Agreement. (See TAB 9 pp.70-76) It has the same provisions as that of the Plaintiff's. Whereas the Plaintiff's Agreement did not have a sketch plan showing the actual area of land in question, the Defendant's Agreement has a sketch plan (TAB 9 p.75).
Whereas the Plaintiff did not comply with Clause 4 of his Agreement, the Defendant complied with Clause 4 of their Agreement. The land was surveyed by David Roy Norman, a registered surveyor. The survey plans are dated 2nd September 1994 (see TAB 1. P14-17 inclusive)

Whereas the Plaintiff did not show he had been issued with a Certificate of Registered Negotiator, the Defendant had a certificate dated 23rd February 1994 for 500 hectares of land on part 726 and 2567; (TAB 2 pp.18 and 20) 18th April 1995 for 600 hectares of land at Lorum on part 2542 (TAB 2 p.19) and 13th October, 1995 for 600 hectares of Land at Lorum on part 2542 (TAB 2 p.21 & p.23) (undated). There are sketch plans attached (TAB 2 pp.22; 24; 25; and 26).

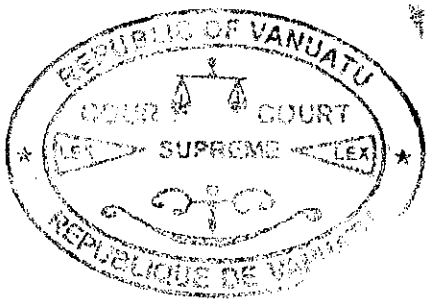
The 600 hectares to which the Certificate dated 18th April 1995 and 13th October relate were applied for in addition to the 500 hectares claimed on part 726 and 2567. This is seen clearly in the Application and the letter attaching the Application (see TAB10 pp. 78 – 79) These documents are undated but Mr Yawha raised no objections to them.

In total the Defendant was in fact applying for 1,100 hectares of land at Lorum. He was granted on Agreement over 802.55 hectares. (see TAB 9 p.70).

Under the given circumstances the answer to this issue is in the affirmative.

4. Whether Negotiations By The Defendant Were Made Outside The 12 Months Requirement? (Ref paragraph 13 of Plaintiff's submissions)

In cross-examination Mr Croucher was asked when he started negotiations and he answered "early 1990". Sul Paul (deceased) gave his consent on 18th November 1993 prior to the certificate dated 23rd February 1994 (see TAB 6 p. 53)
Tice Ishmael gave consent on 2 November, 1993 prior to the certificate of 23rd February 1994. (see TAB 6 p.52) Nathrick Lath gave consent on 27th October 1993 (see TAB 6 p.55).



This confirms Mr Croucher's evidence in cross-examination that he started negotiations in 1990. The results of those negotiations are obviously the consents given by the disputing custom owners stated "to be identified". When he applied later in 1995 for an additional 600 hectares of Lorum Land part 2542 he was granted a certificate on 14th October, 1995 (TAB 2 p.21). The custom owners of that land are stated to be War Nalan and Behov Tomker.

War Nalan gave consent on 19th May 1995 (see TAB 6 p.54) Behov Tomker gave consent also on 19th May 1995 (See TAB 6. P.51) Again these confirm that negotiations were done prior to the granting of the certificates of negotiations.

The Law

The relevant legal provision in relation to negotiation is section 6 of the Land Reform Act. The period of 12 months limited for negotiations is not a legal requirement. It is sufficient only to establish that negotiations did in fact take place.

I am therefore satisfied that negotiations did in fact take place. Whether or not these negotiations took place within 12 months is irrelevant and immaterial.

5. Was there Failure by the Defendant to advise Silas Hnge Properly? (Ref. Paragraph 34 of the Plaintiff's submissions)

In Silas Hinge's evidence he signed a consent in Mr Croucher's office over Lorum Land on 23rd June 1995 in the presence of Sul Paul and Kalo Nial. He said there was no discussion. And he said he signed the consent in respect of Lorum Land and not Tinau Land.
Kalo Nial's evidence was that Silas Hinge attended that meeting on 23rd June, 1995. He said that they were shown maps. The plans are found at TAB 2 pp 22 and 24. Chief Petro witnessed Silas Hinge's singnature on 23rd June, 1995 (see TAB 6 p.45).
Silas Hinge's evidence lacks credibility. Under those circumstances, I answer this issue in the negative.

6 Should Silas Hinge have been shown sites before the signing of Defendant's Lease? (Ref. Paragraph 38 of submissions)

On the evidence before me I am satisfied that there were discussions at which Silas Hinge was present. There were maps or plans of the land in question. I am satisfied that Silas Hinge saw those plans. After having done all that, he signed his consent on 23rd June, 1995. He could have objected then and demanded for physical inspection of sites. There is no evidence from him that he made such demands or requests.

Under those circumstances, Silas Hinge cannot now complain that he was not given a chance to inspect the site. This issue is therefore answered in the negative.

7. Did the Defendant know that Land was in Dispute?
(Ref. Paragraph 44 of Plaintiff's submissions)

From the evidence there was a dispute over ownership of Lorum Land. That dispute was brought to the Island Court for hearing and determination. The Island Court gave its decision on 15th January 1987 (see TAB 4 pp 38-43). There is no proven appeal against that decision although Silas Hinge asserted that there is. However it appears to me that in anticipation of any such appeal, and in his evidence to comply with the instructions from the Lands Department, Mr Croucher wrote the following letter seeking consents from those he understood to be disputing parties –

"Melcoffee Sawmill Company
P O Box 224
Luganville, Santo
Vanuatu

23rd June, 1995

Dear Masta Silas Hinge,

Tudei Company blong mi, Melcoffee Sawmills Ltd, hemi gat wan bigfala interest blong developem wan planteson blong ol young trees long samfala aria blong land ya nem blong em "LORUM".

Rison blong mi raetem leta ya ikam long yu emi from Company blong mi isave se yu tu yu gat sam tinktink blong defendem interests blong yu long wan appeal court hearing we ating bae ikam yet.

Ples ia nao se while yufala istap wet long Court hearing ya, moa saposyufala isave givim "Consent" blong yufala blong mi save go hed blong statem wok.

Narafala rison we imekem mi wantem statem wok quik taem nao emi from mi gat plenty youngfala trees we nao ya oli stap grow long nursury moa oli rete blong transplantem. Mi wantem askem yufala, sapos yu agree blong givim consent blong yu, plis saenem leta andaneath moa sendem ikam long company blong mi.

Yours faithfully,

REPUBLIC OF VANUATU COURT SUPREME LEX

Signed: *N. H. Croucher*
Managing Director"

This letter is identical and was addressed also to:-

(a)	Joseph Singon	-	24th August, 1995;
(b)	Behov Tomker	-	12th May, 1995;
(c)	Tice Ishmael	-	27th October, 1992;
(d)	Warr Nalan	-	12th May, 1995; and
(e)	Nathrick Lath	-	27th October, 1993.

(see TAB. 6 pp 45; 50-55).

There were two reasons for writing the letter. The first and relevant one to this issue is in paragraph two which is translated from straight Bislama into English reads –

> *"The reason for my writing this letter to you is because my Company knows that you too are thinking of defending your interest through an appeal court hearing which we think is yet to come." (emphasis, mine)*

It is clear from this that Mr Croucher and his company knew about the dispute as it came before the Island Court but were uncertain about an appeal. They only anticipated that there could be an appeal. And for that reason to secure their position they sought consents in advance.

Under those circumstances the answer to this issue is in the affirmative.

8. Was Silas Hinge tricked into signing his consent?
(Ref. Paragraphs 54 and 62 of the Plaintiff's submissions)

It was his evidence that he signed the consent at Mr Croucher's office on 23rd June, 1995. Then he contradicted that testimony when he said he did not sign because Sul Paul was cross with him. Then later he said they told him about the Vt200.000 and he went to sign. He did not say who told him about this money. It appears that Silas Hinge in fact signed the Agreement about the payment of VT200.000. (see TAB 6. P.47). It is dated the 23rd June, 1995.

In Mr Croucher's evidence he said he only paid this sum to Behove and War Nalan and not to Silas Hinge because he is not the declared custom owner.

There were two Agreements, one was the consent, the other was in respect of the payment of VT200.000. It appears to me from the evidence of Silas Hinge that he signed his consent voluntarily and without being tricked. It was his evidence that he refused to sign it in the first place. Only when some one told him about the payment of VT200.000 that he decided to return to sign the consent. He has not specified who told him about the VT200.000 payment. Under these circumstances therefore I answer this issue in the negative.

9. Was Payment of VT200.000 by Defendant a Bribe?
(Ref. Paragraphs 55-59 and 63 of Plaintiff's submissions)

The Plaintiff did not produce or show any evidence that he received any payment of VT200.000 from the Defendant. It was the evidence of Silas Hinge that he signed an agreement but he was not paid the VT200.000. Mr Croucher's evidence was that he denied having any such agreement with Silas Hinge. How the agreement concerning the payment of VT200.000 to Silas Hinge dated 23rd June, 1995 came into being was never fully explored. But that is not one of the issues raised. It was Mr Croucher's evidence that Behove and War Nalan were paid VT200.000 each. It appears that Sul Paul also was paid Vt200.000 (see TAB 6.p.46). Mr Croucher explained in evidence why that payment was necessary. He referred to Clause 10(g) of his Agricultural Lease dated 13th October, 1995 (see TAB 1. P.8). It states –

> "(g) In consideration for the payment of VT200,000 by the Lessee the Lessor hereby waives any future claims for royalty in respect of forest produce presently upon the land and acknowledges that the Lessee is entitled to clear the land in preparation for planting of the commercial timber without any further payment of compensation for such forest produce."

The payment of VT200.000 by the Defendant was not a bribe. It was a legal obligation required of the Defendant. That it was paid to some custom owners on the same day is immaterial. Under these circumstance therefore I answer this issue in the negative.

10. Was Consent Required of Silas Hinge Before Obtaining Leases?
(Ref. To paragraph 65 of the Plaintiff's submissions)

The reasonings provided in respect of Issue No.7 apply to this issue.
To answer this issue, it was not a requirement for Mr Croucher to obtain Silas Hinge's consent prior to obtaining his leases, but due to the surrounding circumstances he found himself in at the time, and complying with instructions from the Lands Department, he had to obtain consent

also from Silas Hinge. Acting either way Mr Croucher did the right thing in my considered opinion.

Other issues

Mr Yawha submitted that the case of Paul Livo v. Boetara Trust Civil Appeal Case No.5 of 2002 was applicable to this case. I do not agree. There must be a clear distinction drawn between that case and this. That is a case concerning disputes over ownership which hasyet to be heard and determined by the Island Court. This case has by-passed that arena. The Island Court has made a decision and a declaration. The Plaintiff has not shown sufficiently that there is an appeal pending. Further the Plaintiff has not shown that a stay has been made on the orders of the Island Court. The Plaintiff has not shown sufficiently that there is now a dispute over Lorum Land. I now rule that the case of Paul Livo v. Boetara Trust is not applicable here.

It appears to me from these submissions raised by the Plaintiff that he has abandonned his allegations of fraud and/or mistake altogether. In actual fact in cross-examination of Jeffrey Sailas he conceded that the Defendant was not guilty of fraud but perhaps just mistake. Following is part of the record of cross-examination by Mr Malcolm and Mr Tari –

Mr Malcolm: "Where has the Second and Third Defendants been fraudulent?"
Jeffrey Silas: "They made a mistake in registering it despite the errors made."
Mr Tari: (Suggestion) "No actual fraud on the Second and Third Defendant?" (Court Notes: The Plaintiff took time to answer)
Jeffrey Silas: "Not fraud but I think there was only mistake."

From that last answer, Mr Silas was not even sure there was a mistake. He had the onus of proof and could not discharge that burden. By using the term "I think" is a clear indication he was only assuming that a mistake had been done. That is not sufficient in my view.

Silas Hinge's concern appears to be about "Tinau" Land. That name was totally unheard of in the Island Court proceedings in 1987. No names of that sort appears in the Island Court decision in respect of boundaries or place names given by claimants, one of whom was Silas Hinge himself. (See TAB 4 pp. 39-43). In my view "Tinau" is an invention that came about only in August 1994 when Silas Hinge without any right gave purported consent to Jeffrey Silas. I set out the contents of that document in full as follows –

"Agriment Blong Minista isaenem Lis blong Graon We Hemi Dispute

Det: 16 August 1994 * (*Handwritten) Adres: (Nil given)

Graon long TINAU Near* (Title Namba Lorethakarkar*
Long SANTO* Aalan long ples we Family Tomatmaiyo* istap.
Mifala we nem blng mifala istap long pepa ia, mo mifala iklem kastom raet long graon ia, mifala iagri olsem:

1. Family Tomatmaiyo* isave lisem graon ia.
2. Rent mane hemi: VT200/HA*
3. Lis hemi blong 50* yia stat long (Nil given)
   Lands hemi save saenem lis ia long nem blong kastom ona.
4. Kasem taem we dispute istret, rent mane blong lis ia isave stap long spesel ples we oli kolem "Trust Akaon blong Kastom Ona."

Saen:
(Silas)

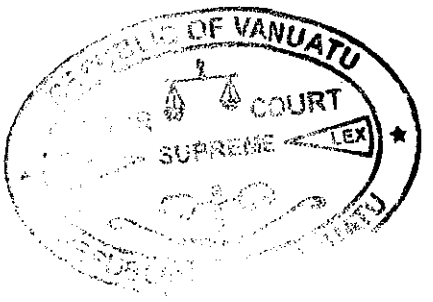
Nem mo Vilij
Silas Hinge"

(See TAB 6.p.37)
At p.38 of TAB 6 still we see another consent by Sul Paul in the following words –

"To whom it may concern

Mi Sul Paul, landona blong kraon Lorum olsem we istap long decision blong Santo/Malo Island Court of 15 January 1987.

Ples ya mi olsem landona blong graon ya, mi givim Agrimen moa consent blong letem Mr Tomatmaiyo mo famili istap, wok long pis blong Lorum Kraon we emi stap usum finis long 1978**



Ol wok moa responsibility blong mekem sua se pis kraon we Masta Tomatmaiyo mo famili blong hem istap long wan legal lease istap nao long hand blong hem.*

Any lease we emi gat emi mas follow ol "land-laws" blong Vanuatu.

Thank you tumas.

(Thumb Print)
Signed: Mi Sul Paul *Witness: Signed*
Kalsie Paul

Date: 16th August, 1994."
*(*Hand written words)*

We see here two completely differing consents. Silas Hinge's consent is not witnessed. At paragraph 4 it is stated that Tinau land is in dispute. In his evidence in chief Silas Hinge told the Court that Tinau land is not disputed. Again his evidence lacks credibility.

What appears obvious from this is that the name "Tinau" only appeared from 16 August 1994 upwards. Earlier than that the land on which the Tomatmaiyo were living as consented to by the declared custom owner, Sul Paul has always been known as "Lorum" or "Loro".

At paragraph 15 of his submissions Mr Yawha submitted also that the Land Reform Act [CAP.123] lays down procedures for obtaining leases in rural areas. If there is any suggestion there that the Defendant did not follow those procedures the evidence is overwhelming that the Defendant did follow procedures on the instructions of the Lands Department. It is interesting to note the evidence of the Plaintiff who worked in the Lands Department for 13 years, and who said he knew about the procedures of obtaining leases, that he himself did not follow the legal procedures in securing his Agreement to Lease or a lease itself.

Mr Malcolm made submissions in response, and provided case law and reference works which are comprehensive and indeed very helpful. I am indebted to him for such assistance. I have taken those submissions into consideration when providing reasons for the issues raised by Mr Yawha. I do not see it necessary to make references to all the case law cited except to make mention of the case of ANZ Bank v. Gougeon & Others. Civil Appeal Case No.6 of 1988. That is the case that established the principle or rule that 'the first in time is first in law'.

In this case I have found overwhelming evidence that the Defendant's Agreement to Lease was the first in time. Following the Agreement the Defendant followed legal procedures to obtain his leases. I accept Mr Malcolm's submission therefore that the Defendant has a legal interest. It is very dubious that the Plaintiff has any equitable interest at all.
I further accept Mr Malcolm's submissions that no fraud or legal mistake have been proven by the Plaintiff. Rectification is therefore impossible.

Conclusion

For the reasons provided above, I order that –

1. The Plaintiff's entire action be dismissed.

2. The Plaintiff will pay the Defendant's costs of and incidental to this action within 28 days after receipt of such Bill of Costs, unless he applies for taxation.

DATED at Luganville this 8th day of December, 2003.

BY THE COURT

REPUBLIC OF VANUATU COURT SUPREME

OLIVER A. SAKSAK
Judge

REPUBLIC OF VANUATU COURT SUPREME