



BETWEEN: HAVANAH BAY ENTERPRISE LIMITED
First Claimant

AND: WILLIAM KALOTITI, TIVATE KALOTITI, SAEL
KALOTITI and MATHEW KALOTITI
Second Claimant

AND: DAVID RUSSET
First Defendant

AND: DIRECTOR OF LANDS
Second Defendant

Coram: Justice H. Bulu

Counsels: Mr. Jack Kilu for the First Claimant
Mr. Saling Stephens for the Second Claimants
Mr. John Malcolm for the First Defendant
Mr. Tom Joe Botleng for the Second Defendant

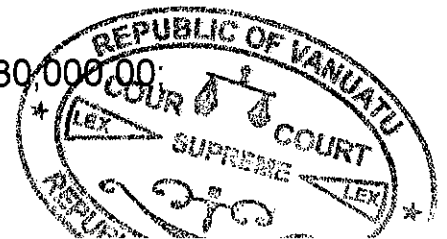
Date of Hearing: 11 October 2007

Date of Decision: 11 October 2007

JUDGMENT

Introduction

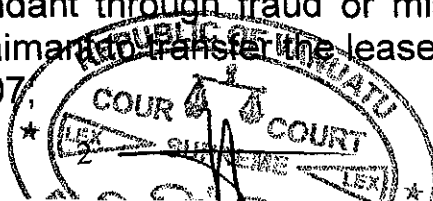
1. On 15 December 2003 the First Claimant executed an agreement to lease with the Second Claimant for the First Claimant to lease from the Second Claimant land comprised in leasehold title 12/0523/005 at Havanah Harbour, North Efate.
2. The particulars of the Agreement include the following:-
 - (a) The purpose of the Agreement is to build a fishing resort and a fuel station;
 - (b) The premium for the land is AUD\$30,000.00.



- (c) There would be an annual land rent of VT71,000;
 - (d) Should the company (First Claimant) sell or transfer the lease, 2% of the gross sale price would go to the Second Claimant;
 - (e) The Second Claimant is given priority to select workers or employees of the First Claimant Company failing which the First Claimant Company will employ its own choice of employees;
 - (f) The Agreement is signed by the Second Claimant and Dominique Dinh acting on behalf of the First Claimant Company.
3. The First Claimant has paid to the Second Claimant a premium of AUD\$30,000.00 pursuant to the Agreement.
 4. The process to issue a lease was slow. The Claimants agreed to minimize costs, for the First Claimant to proceed to construct the fishing resort on the land but that once the lease is issued, the Second Claimant would transfer the lease to the First Claimant as the premium had already been paid.
 5. The First Claimant then proceeded to build the fishing resort on the land at its own expenses. These totaled AUD\$363,436.00.
 6. When the lease was issued on or about 9 July 2006 to the Second Claimant, the Second Claimant transferred the lease instead to the First Defendant on 11 October 2006.

The Claim

7. On 26 February 2007, the First and Second Claimants filed their Supreme Court Claim claiming:-
 - (a) the First Defendant through fraud or mistake caused the Second Claimant to transfer the lease to himself on 11 October 2007.

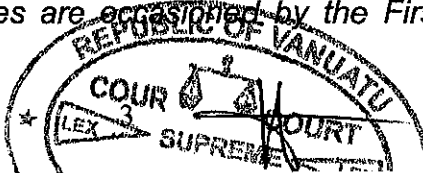


- (b) the First Defendant had enticed the Second Claimant, through fraudulent means, to transfer the lease to himself on the promise that he would pay VT10,000,000 in premium but had failed to pay the premium;
- (c) that the Second Claimant was under the mistaken belief, without consulting the First Claimant local Director, Dominique Dinh, that the First Claimant had abandoned the development on the land, when in fact that was not the case. The First Claimant had stopped work to await the issuance of the lease title which would then be transferred to the First Claimant, who would in turn mortgage it for further funds for the development;
- (d) that it was a mistake to transfer the lease to the First Defendant when:-
- the First Claimant had paid a premium of AUD\$30,000.00; and
 - the First Claimant had incurred substantial expenses in developing the property; and
 - the First Defendant has not paid any money for the lease premium.

8. The Claim ends by the prayer for relief by the First and Second Claimants as follows:-

"(a) An order that the Second Defendant shall rectify the register by canceling the transfer of leasehold title No. 12/0523/005 to the First Defendant and to register a transfer from the Second Claimants to the First Claimant Company;

(b) An order that the First Defendant shall pay the First Claimant's losses and damages commencing from the date of the improper transfer of the lease title to the First Defendant which losses and damages are occasioned by the First Defendant



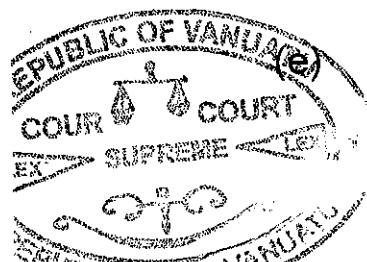
depriving the First Claimant's further development of the property in the sum of VT.....;

- (c) An order that the First Defendant shall pay aggravating damages and exemplary damages in the sum of VT5,000,000;
- (d) An order that the First Defendant shall pay the costs of this action on an indemnity basis;
- (e) An order that the First Defendant shall pay interest at the rate of 10% per annum commencing from the date of the improper transfer to himself of the lease (11th October 2006);
- (f) Any other orders as the Court deems proper."

First Defendant's Case

- 9. In his defence, the First Defendant denies any wrong doing and in particular any fraud or mistake on his part. He claimed that the First Claimant has an action against the Second Claimant but not against him.
- 10. In his sworn statement filed on 27 August 2007 the First Defendant denied any fraud or mistake on his part because:-
 - (a) he was a *bona fide* purchaser for value of land leasehold title No. 12/0523/005;
 - (b) Mr. Dinh has some sort of oral agreement with the Second Claimant, the basis of some development that has taken place. If that is true, he has a right to seek damages for breach against the Second Claimant;
 - (c) Mr. Dinh has no right against him and no lawful interest in the land;
 - (d) He is a subsequent purchaser and his title is not able to be rectified under section 100 (2) of the Land Leases Act;

He has offered to purchase the land for VT10 million plus payment to William Kalotiti of another VT15 million on sale to a third party. The funds have been paid into

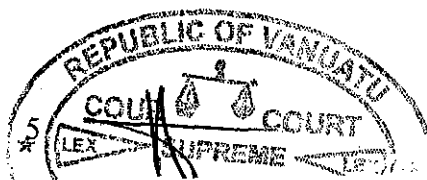


a trust account and held for 30 days and to be so held in the event of an injunction or caution. Dinh put on a caution and issued the injunction. As a consequence the funds are still in trust;

- (f) He is the registered leaseholder.

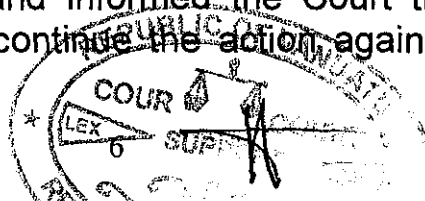
Admissions by Dinh

11. At the hearing today Dominique Dinh was examined on his two sworn statements that were admitted into evidence. Mr. Dinh made the following admissions in relation to the sworn statement filed on 7 March 2007:-
- (a) the sworn statement is his;
 - (b) the signature at the end is his.
12. In relation to the sworn statement dated 25 September 2007, Mr. Dinh admitted:-
- (a) the statement is his;
 - (b) the signature at the bottom of the document is his.
13. On cross-examination Mr. Dinh made the following admissions:-
- (a) he is a businessman who has lived in Vanuatu all the time;
 - (b) he is fully aware of difficulties in getting business going in Vanuatu;
 - (c) he has a broad knowledge of the land laws in Vanuatu;
 - (d) he accepts that the First Defendant is the holder of registered lease title 12/0523/005;



- (e) the lease was registered to the First Defendant on 11 October, 2006;
- (f) he does not have a registered lease to the land;
- (g) in 2003 he had negotiations with the custom owners;
- (h) he agreed that one needs a negotiators certificate to negotiate with custom owners in line with the land laws of this nation.
- (i) he negotiated with custom owners without a negotiators certificate;
- (j) Mr. Russet, First Defendant, has done nothing wrong. The First Claimants' claim is against the custom owners for breach of the agreement they had with First Claimant;
- (k) he has not read the statement of claim;
- (l) he has not seen the statement of claim before;
- (m) where the lessee or lessor is a custom owner the procedure requires that the consent is witnessed by a lawyer or person knowledgeable in law;
- (n) in this lease transfer lawyer Saling Stephens witnessed the process. Saling Stephens is acting as legal counsel for the Second Claimants;
- (o) custom owners (Second Defendants) had legal advise at that time;
- (p) he sees nothing wrong or fraudulent with the transfer of the lease;

14. Towards the end of cross-examination of Mr. Dinh, Saling Stephens stood up and informed the Court that the Second Claimant want to discontinue the action against the First and Second Defendants.



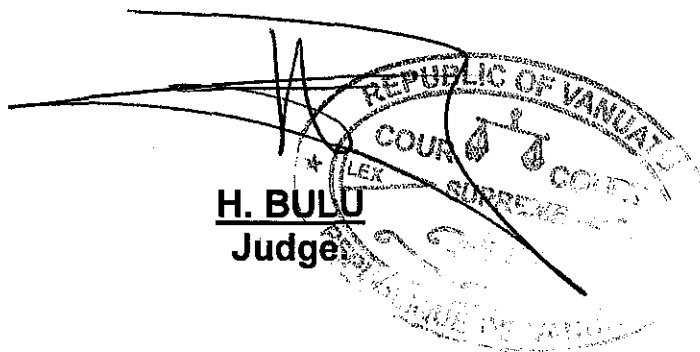
15. I then, called a short adjournment to allow Mr. Kilu to consult with his client in the face of admissions made by Mr. Dinh and the decision to discontinue the proceedings by the Second Claimant. After the adjournment, Mr. Kilu informed the Court that he has been instructed to discontinue the proceedings.

Orders

16. Given the turn of events during the proceedings today, the Court makes the following orders:-

- (a) The Claim in this matter is dismissed in its entirety;
- (b) The Interim Orders granted on 5 June 2007 are set aside;
- (c) The costs of this proceeding and incidental thereto is in favour of the First Defendant to be paid by the Claimants and to be taxed if not agreed.

DATED at Port Vila, this 11th day of October, 2007.


H. BULU
Judge

REPUBLIC OF VANUATU
COURT OF APPEALS
LEX SUPREMA
2007