

(Civil Jurisdiction)

**BETWEEN: PETER COLMAR**

Claimant

**AND: RAOUL TRAN**

First Defendant

**AND: JOSEPH LIVO MALUM**

Second Defendant

Mr Justice Oliver A. Saksak  
Mrs Anita Vinabit – Clerk

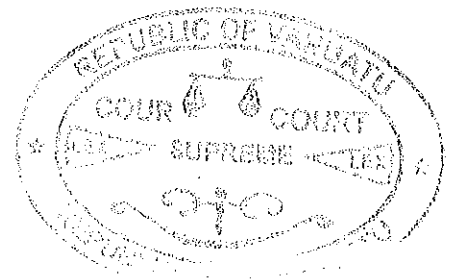
Mr Nigel Morrison for the Claimant  
Mrs Marisan Vire for the Second Defendant

Date of Hearing: 9<sup>th</sup> October 2008

Date of Judgment: 2<sup>nd</sup> March 2009

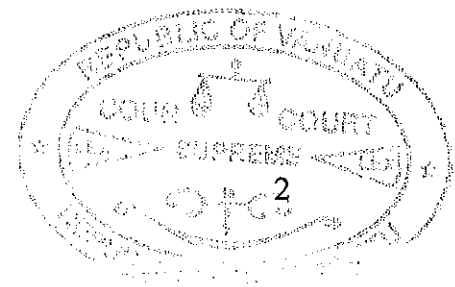
## JUDGMENT

1. This is a reserved judgment. By order dated 2<sup>nd</sup> November 2007 the Claimant obtained default judgment against the First Defendant in this proceeding but the amount of damages would be assessed. That has not yet been done.
2. As against the Second Defendant the Claimant alleged that on 3<sup>rd</sup> May 2005 the Second Defendant signed an irrevocable Land Agreement with him as trustee for Valele Trust by which he agreed to transfer Leasehold Title No. 04/2623/003 to Valele Trust under certain terms and conditions.



3. On 13<sup>th</sup> May 2005 the Second Defendant signed a Consent to the Transfer, Registration and Mortgage of the said Title.
  
4. Despite having done the above, the Second Defendant signed another transaction in favour of a different entity. The Claimant therefore alleges that was done fraudulently and as a result, the Claimant says they have been prevented from using and enjoying the use of the property and have incurred losses. They claim the following reliefs:-
  - (a) An order for specific performance by the First and Second Defendants; and
  
  - (b) A declaration that the Claimant was the first purchaser in time and that he be entitled to register the document in its favour.
  
  - (c) Damages to be assessed.
  
5. On 9<sup>th</sup> October 2008 the Court heard oral evidence on oath from Mr Colmar for Valele Trust. He confirmed the contents of his sworn statements dated 15<sup>th</sup> December 2006 in which he annexed:
  - (a) Land Agreement dated 24/12/04 – PC1
  - (b) Land Agreement dated 3/5/05 – PC2
  - (c) Consent dated 13/5/05 – PC3

The statement was tendered as Exhibit C1. Mr Colmar also confirmed his sworn statement dated 1<sup>st</sup> September 2008 which he tendered as Exhibit C2. This was basically in response to Esther Livo's and the Second Defendant's statements of 16<sup>th</sup> June 2008.



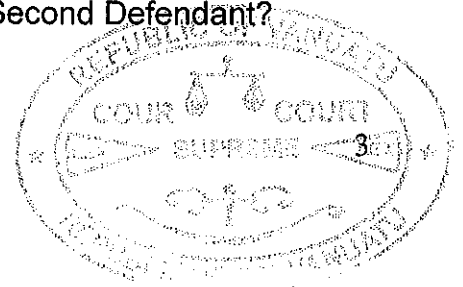
Mr Colmar also tendered a Bank Statement by ANZ Bank as Exhibit C4 showing that there was a withdrawal on their account of the sum of VT250.000. This is the amount he claims was paid to the second defendant on 3<sup>rd</sup> May 2005 when he signed the Land Agreement.

6. The Defendant was called to give oral evidence in his defence. He admitted signing the Agreement with Mr Michael Louze on 3<sup>rd</sup> March 2005 because Mr Colmar was in Port Vila. Later he went to see a Mr Peter Bouchard and the First Defendant as agents for the owners of the lease. They told him someone had offered VT12 Million whereas Mr Colmar offered VT16 Million thinking he would secure the lease. However, he was told by Mr Bouchard and the First Defendant they would not accept Mr Colmar's offer as Mr Scott had increased his offer to VT20 Million and they had agreed to his offer and not Mr Colmar's. He said Mr Colmar was already doing subdivision without first getting approval on his offer. He also said Mr Colmar did not act within one week so he gave Consent to Mr Scott instead. He accepted he did sign a Consent but said it was in favour of Scott not Mr Colmar. He also accepted he received payment from Mr Louze on 3<sup>rd</sup> May 2005 but that it was VT100.000 and not VT250.000 as claimed by the Claimant. He accepted receiving the money but denies any liability for paying it back. He tendered his sworn statement dated 16<sup>th</sup> June 2008 as Exhibit D1. No other witnesses were called by the Second Defendant.

7. The issues appear to be:-

(a) Was there a valid contract between the Claimant and the Second Defendant? And

(b) If so, was that contract breached by the Second Defendant?



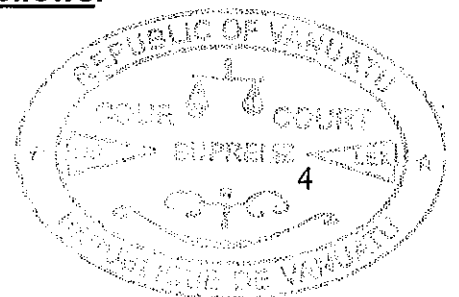
8. In contract law it must be shown there was an offer and the offer was accepted for valuable consideration. The relevant document to be considered in determining these issues are the Land Agreement dated 3<sup>rd</sup> May 2005 (PC2) and the Consent dated 13<sup>th</sup> May 2005 (PC3).
9. I examine first the Land Agreement dated 3<sup>rd</sup> May 2005. I set out the relevant parts below –

**“LAND AGREEMENT**

**This is an agreement between Joseph Livo (Malum) representing himself and Peter Colmar representing Valele Trust, both residents of Santo, and concerns a piece of rural seaside land at Sarautou, Santo, Lease Title No. 04/2623/003 of which Joseph Livo is the custom owner. Joseph Livo agrees to transfer this Lease to Valele Trust, extend the lease period for a further 75 years and change its status to a rural residential/commercial lease. Joseph Livo also consents to Valele Trust to subdivide this land into rural residential plots for sale under the following terms and conditions:**

1.....

2. **Joseph Livo agrees to transfer lease title No. 04/2623/003 to Valele Trust, extend the lease period for a further 75 years and also change its status to a rural residential/commercial lease. Joseph Livo also consents for Valele Trust to subdivide this land into rural residential plots for sale in return for a premium of two million vatu which is to be paid as follows:**



(a) VT2.000.000 upon registration of up to 40 residential leases of 75 years term in Valele Trusts favour covering most of the land and also with Joseph Livo's consent to transfer these plots to a third party.

(b) A further premium of VT300.000 per subdivision plot for seaside land and VT150.000 for those plots behind the seaside land will be paid to Joseph Livo upon the transfer of a plot to third party and that new lease being registered in the name of that third party.

3.....

4.....

5. It is hereby accepted that this agreement and all its terms and conditions become valid and irrevocable upon signatory of this agreement and payment of a VT250.000 deposit to Joseph Livo, which is non-refundable. (Emphasis by underlining).

6.....

7.....

Signed: Joseph Livo

Signed: Peter Colmar

Date: 3/05

Date: 3/05/05

Paid ANZ cheque No.

VT250.000

Signed: Michael Louze

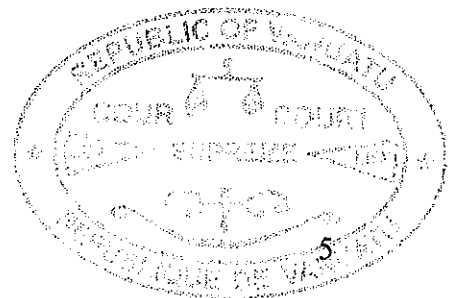
Signed: Heleenah Sale

Date: 3/05/05

Date: 3/05/05

Signed: Esther Livo

3/05/05"



10. Secondly, the Consent given on 13<sup>th</sup> May 2005 in respect of Title No. 04/2623/003. It states:-

**"I JOSEPH LIVO,**

**HEREBY CONSENT TO THE TRANSFER REGISTRATION AND MORTGAGE OF**

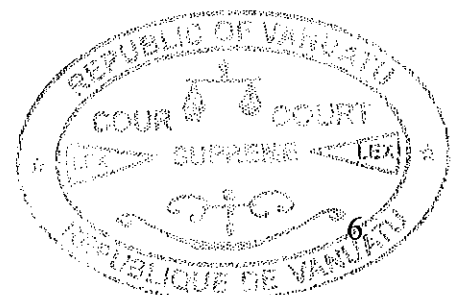
**A 75 year rural residential/commercial lease in favour of Valele Trust over the piece of rural seaside land at Sarautou Santo, lease Title 04/2623/003 of which I Joseph Livo am the custom owner, (described in the attached agreement and map) and also consent to that land being subdivided into rural residential/commercial plots which are to be sold to third parties and the transfers of which I hereby irrevocably agree to automatically sign upon being given a VT300.000 premium for each seaside plot in question and VT150.000 for those plots behind the seaside ones. As it is agreed that my consent is irrevocable I also agree that I will under no circumstances agree to transfer Lease Title 04/2623/003 to any other entity except Valele Trust. I also consent that Valele Trust may mortgage this title to ANZ Bank Vanuatu or any other bank in Vanuatu.**

**(Emphasis by underlining)**

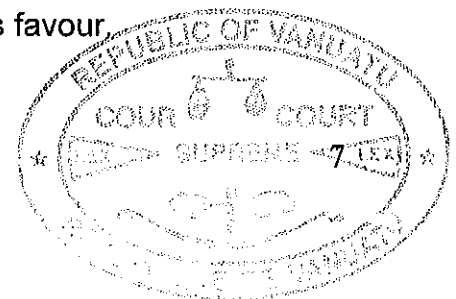
**Dated at Santo the 13 day of May 2005.**

**Signed: Joseph Livo**

**Witness: Samson Tari  
(ANZ Bank)"**



11. The Land Agreement was signed by Joseph Livo and witnessed by his wife Esther Livo. For Valele Trust, Mr Colmar signed witnessed by Michael Louze and Heleenah Sale all on 3<sup>rd</sup> May 2005. Upon signing a payment of VT250.000 was paid by the Claimant to the Second Defendant pursuant to Clause 5 of the Agreement. Under the Clause, VT250.000 is non-refundable. That was what the parties agreed.
12. A further consideration of VT2.000.000 pursuant to Clause 2(9) and a further VT300.000 and VT150.000 under Clause 2(b) of the Agreement was subject to future events occurring, so these were not immediately payable by the Claimant.
13. In all respects the Court concludes the Land Agreement and the Consent had every characteristics of a valid contract. They contained offers and acceptance for valuable consideration present or future. Both the Claimant and the Second Defendant had agreed to those terms and conditions. Their signatures as witnessed are clear indication and confirmation of their agreement and intentions. As such both parties are bound in law by what they both agreed to on 3<sup>rd</sup> May 2005 and on 13<sup>th</sup> May 2005.
14. As regards the allegation of breach of Agreement by the defendant, the Court accepts there was clear breach of the Agreements by the Defendant.
15. The Court is satisfied the Claimant has proven its claims on the balance of probabilities, and accordingly the Court hereby gives judgment in their favour.
16. The Court declares that the Claimant was first purchaser in time and that he is entitled to register the document in its favour



17. The Claimant is entitled to an order of specific performance by the First and Second Defendants in accordance with the terms and conditions of Land Agreements dated 24<sup>th</sup> December 2004 and 3<sup>rd</sup> May 2005 respectively, within the next 28 days from the date of this judgment.
18. The Claimant's claims for repayment of VT250.000 paid to the Second Defendant are rejected in view of Clause 5 of the Agreement of 3<sup>rd</sup> May 2005.
19. Any further claims for damages is subject to further proof and assessment and should the Claimant choose to do so, they are hereby directed to file and serve further sworn statements in support thereof within the next 14 days.
20. The Claimants are entitled to their costs of and incidental to this proceeding payable by the First and Second Defendants to be agreed, or be determined by the Court.

**DATED at Luganville this 2<sup>nd</sup> day of March 2009.**

**BY THE COURT**

  
**OLIVER A. SAKSAK**

**Judge**

