IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 136 /2005

BETWEEN:	**KALOTIP ROBERT, MARK KALMET, ALLEN KALON, PIERRE ONEL** Claimants
AND:	**GERALD LAUTO** First Defendant/ First Counterclaim Claimant
AND:	**BERNARD LAUTO** Second Defendant / First Counterclaim Defendant
AND:	**THE REPUBLIC OF VANUATU** Third Defendant

Hearing:	***24 May 2012***
Before:	***Justice RLB Spear***
Appearances:	***No appearance by or on behalf of the Claimants*** ***Robert Sugden for the First and Second Defendants*** ***Christina Lahua (State Law Office) for the Third Defendant*** ***Jacob Kausiama (Public Solicitor) as Amicus Curiae***

ORAL JUDGMENT

Spear J (24 May 2012)

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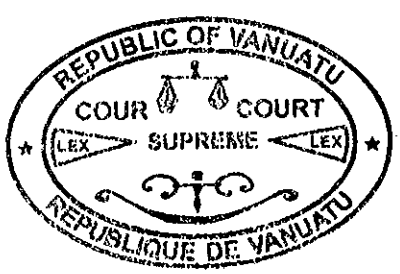
1. This long standing proceeding has finally reached the point where a judgment can be entered on the counterclaim in respect of the quantum of damages. The counterclaim is based upon the statutory availability for compensation under s. 91(5) of the Land Leases Act where a caution is registered against property without reasonable cause.



2. The claimants (as counterclaim defendants) are not present. They were initially represented by Mr James Tari and subsequently by Mr Colin Leo. Mr Leo cease to act for the claimants in October 2010 and filed a notice to that effect. Before Mr Leo's departure, however, the claim was dismissed summarily by Justice Dawson on 31 March 2010 on the basis that the claimants had no standing to proceed with the claim. Costs on a standard basis were awarded to the defendants against the claimants on the dismissal either to be agreed or taxed.

3. At the time that the claim was dismissed by Justice Dawson, a direction was also given that the claimants file and serve a response (a defence) to the counterclaim by 16 April 2010. A defence was duly filed to that counterclaim by Mr Leo which essentially amounts to nothing more than a bare denial and is quite unsatisfactory.

4. The second defendant Bernard Lauto then applied for summary judgment on his counterclaim. That came on for hearing before me in early 2011 by which time Mr Leo had withdrawn and the Court became concerned whether the claimants were even aware of the hearing which did not proceed at that time.

5. A conference was then held on 16 June 2011 before me with notice being given of the conference to the claimants by the Sheriff. Only one claimant appeared, Mr Pierre Onel who indicated, however, that he also represented the other claimants in respect of the counterclaim. Of course, he cannot represent formally. That notwithstanding, Mr Onel indicated that documentation relating to these proceedings could be sent to the claimants care of him at a certain post office box at Erakor Village. Given that the other claimants did not attend this conference, all subsequent attempts to keep the claimants informed of this proceeding have been pursuant to that indication.

6. Since that conference on 16 June 2011, documents have been delivered to Mr Onel by posting them to that postal address. However, the claimants have

neither engaged counsel nor taken any steps in respect of this matter since that conference.

7. There was a further conference on 16 August 2011 but there was no appearance by or on behalf of the claimants. Mr Leo indeed appeared but only in respect of an application for costs made against him personally. A copy of the Minute of that conference was sent to Mr Onel urging him to obtain legal representation and alerting him to the substantial compensation sought in the counterclaim against the claimants. However, as the minutes and the judgments of the Court will reflect, there has been no response at all on the part of the claimants since Mr Onel's attendance at that conference on 16 June 2011.

8. The application for summary judgment on the counterclaim was as to liability only and that was addressed at a hearing on 15 September 2011. There was no appearance by or for the claimants and the application was successful in that summary judgment was entered for liability on the counterclaim for the second defendant, Benard Lauto against each of the 4 claimants jointly and severally. The reasons for that decision are set out on the judgment given that day.

9. There then followed a series of conferences all leading up to this hearing for the assessment of damages or compensation under section 97 (5). At an earlier conference on 9 March 2012, because of my concern that the claimants were not taking any active steps in respect of this matter, I appointed the Public Solicitor, Mr Jacob Kausiama, as Amicus Curiae to assist the Court and, in particular, to subject the evidence of loss to critical examination. It was important that the evidence by subjected to such critical examination by counsel and I am grateful to the Mr Kausiama for taking up the challenge.

10. At the hearing today, there was evidence effectively from 3 witnesses.

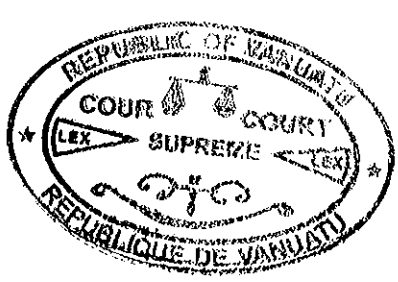
11. First, the counterclaim claimant, Mr Benard Lauto. His evidence was accepted by his sworn statement dated 22 August 2011. He was not required for cross examination.

12. The second witness was Mrs Linda Olul, a registered valuer from Port Vila. Mrs Olul gave evidence in support of two valuation reports which she had prepared in relation to the essential claim that Mr Benard Lauto had suffered loss by having to sell property at an undervalue in order to meet bank obligations all arising from the difficulties caused by the cautions that had been lodged.

13. Third, another registered valuer from Port Vila, Mr Levi Tarosa gave evidence of a similar nature to Mrs Olul.

14. Mr Benard Lauto created a sub division of some 36 sections in the area of the Second Lagoon in Port Vila. A considerable quantity of the sub-divided land was waterfront land. The claimants asserted a right as custom owners of land covering some 20 sections of lots in the subdivision and that is the basis for the two cautions they registered against that area of land. The first caution was registered on 11 April 2005 against the master title 12/0912/510 and it was lifted by the Director of Lands on 20 June 2005. A second caution was lodged by the claimants against that master title on 10 July 2005 but which caution was not lifted by the Director of Lands until 14 December 2005.

15. There appeared to be two difficulties and significant difficulties with the cautions registered. First, it is well understood and established by authority that a person asserting custom ownership of land is unable to register a caution against dealing with leasehold land – see ***Ratua Development v. Ndai & Ors.*** *CAC 32/07 (CA) 13 November 2007.* Secondly, it does not appear that the claimants have indeed ever been declared the custom owners. The evidence before me is that the declared custom owner is in fact Gerald Lauto (the first defendant), the brother of Benard Lauto who has more recently passed away. It was abundantly clear that the claimants had no reasonable cause for registering a caution against the land in question and, of course, judgment had already been entered for liability to such compensation



pursuant to the decision on the summary judgment application of 15 September 2011.

16. The claim for compensation can be explained in this way. Mr Benard Lauto arranged an overdraft facility with Westpac in March 2005 to enable him to complete the subdivision and place the sections on the market of the sale. There was, indeed, at least likelihood, if not something more, that a number of the sections would have sold in June 2005 providing that the subdivision was completed in time. The first caution had the effect of having the overdraft facility frozen by Westpac and that saw the last draw-down on that facility by Mr Benard Lauto on 18 April 2005. The facility remained frozen until 6 July 2005 when that first caution was lifted.

17. The freezing of the loan facility had the immediate effect that Mr Benard Lauto was unable to complete the development of the subdivision and so his ability to sell a number of properties in June 2005 was completely frustrated. He did not have sufficient working capital to do so.

18. Only four days after the first caution was lifted, the claimants lodged a second caution again asserting a right as customary owners and that caution was registered on 10 July 2005. That had the similar effect on Westpac who froze the loan facility and that remained the position until the second caution was lifted December 2005.

19. Clearly, the freeing up of the overdraft facility for just a few days in July 2005 completely frustrated Mr Benard Lauto's plans to complete most if not all the subdivision, sell sections and thus lose his dependency on Westpac for working capital. It meant that he was unable to afford to complete the further work required incidental to the subdivision of the land and thus sell any of the sections. The caution over the master title ensured that that no-one would take the risk of purchasing any of the sections.

20. Mr Lauto claims that when the second caution was lifted in December 2005 he was by that stage well in excess of his overdraft facility and under pressure from the bank to sell sections as quickly as possible in order to meet

the demands of the bank. The overdraft facility had an effective interest rate of 15% and a penalty rate of 25% which penalty rate was then applying. Mr Lauto stated that if he had been able to complete the subdivision in April / June 2005, as he had planned, he would have sold enough sections to remove or reduce his dependency on Westpac, he would not have been subjected to penalty interest, and he would not have had to sell sections on a forced sale basis to meet the pressing demands of Westpac. I accept this evidence which, indeed, in not challenged.

21. Mr Lauto then sold 7 of the 8 sections that had been affected by the cautions. Lots 21-25 and 29 were sold to a local business man on 2 December 2005 for a total Vt 13 million. Lot 26 was sold on 24 November 2006 for Vt 2 million.

22. The principal claim for compensation is to reflect the fact that the cautions had created a situation whereby Mr Lauto had to dispose of the sections under pressure from the bank to the only available purchaser and that has caused him significant loss as against what would have happened, and could be reasonably expected to have happened, if the cautions had not been registered and the subdivision and the sale of the sections had proceeded as originally intended.

23. The two valuers differed only slightly in respect of what they considered the seven sections were worth back in 2005. Mrs Olul considered that the seven sections (which excluded lot 20) would had been worth Vt 7,784,00 in 2005 if they had been available for sale on a non-pressured basis. Mr Tarosa's assessment was Vt 42 million.

24. Mrs Olul indeed assesses the current total value of those seven sections at Vt 129, 116,000.

25. If the more conservative valuation is adopted by the Court (being that from Mr Tarosa) it can be seen that the return in late 2005 and 2006 of 15 million vatu resulted in a loss to Mr Lauto of Vt 27 million against what he could

reasonable have expected to have received on the sale of those seven sections if he did not have to sell them under that pressure.

26. I adopt the assessment of Mr Tarosa who, indeed, impressed with his analysis of the value of each of the sections. This demonstrates a loss sustained by Mr Lauto of Vt 27 million as a direct consequence of the registration of the two cautions leading to the forced sale of the seven sections.

27. A second head of compensation is in respect of penalty interest and, as mentioned, an extra 10% (to 25%) was charged to Mr Lauto as penalty interest because he had exceeded his approved limit with Westpac. It would have been rather difficult to assess the actual loss in this respect on the evidence presented. However, it is unnecessary to do so as Mr Sugden now confirms that Mr Lauto will accept an amount of Vt 200,000 as being sufficient to cover this particular head of compensation rather than incur the costs involved in making an accurate calculation. I am satisfied that if this calculation was undertaken, the result would certainly be more than Vt 200,00 and so I am accordingly prepared to accept this amount as a realistic compromise of this particular claim.

28. According, I consider that the second defendant, Bernard Lauto, is entitled to judgment on his counterclaim for damages against each of the claimants (counterclaim defendants), jointly and severally, in the sum of Vt 27,200,000 together with cost on a standard basis to be agreed (if possible) or, if not, then as taxed.

29. The Republic seeks costs. It was joined as a party to the proceeding on the basis that the Director of Lands had wrongly accepted the second caution for registration. However, at the time that the claim was dismissed, Mr Sugden indicated then that the cross-claim against the Republic would not be pursued. Be that as it may, the Republic was drawn into this proceeding because of the actions of the claimants and, up to the time that the claim was dismissed, there was a potential liability for indemnity which needed to be protected. In all the circumstances, it seems appropriate that its costs are

paid by the Claimants. Accordingly, costs for the Republic against the Claimants on a standard basis to be taxed if they cannot be agreed

30. In so far as Mr Kausiama is concerned, as amicus curiae, his costs are met by the allocation made by Parliament for the Public Solicitor's Office and so no order as to costs needs to be made in that respect. Mr Kausiama receives the thanks of the Court for his assistance.

BY THE COURT