

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**

(Civil Jurisdiction)

Civil Case No. 216 of 2012

BETWEEN: PETER COLMAR as Trustee of Valele Trust
Claimant

AND: JAMES RAD
First Defendant

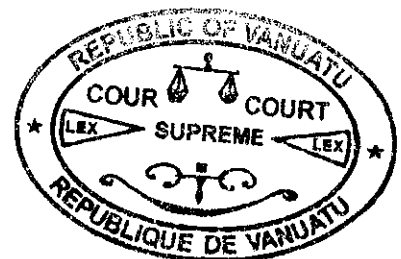
**AND: JOHN TARI MOLBARAV
SAMSON LIVO
JOSEPH SAVA
ROY MOLIVALELE
JOSEPH WARI
BEN MATA and
LOWETT MORRIS**
Second Defendants

AND: ALJAN (VANUATU) LIMITED
Third Defendant

AND: THE REPUBLIC OF VANUATU
Fourth Defendant

Hearing: 3 - 5 June 2013 and 14 August 2013
Before: Justice Robert Spear
Appearances: Nigel Morrison for the Claimant
Robert Sugden for First Defendant
John Malcolm for the Second Defendants – John Sava, Roy Molivalele,
Joseph Wari and Ben Mata
Samson Livo in person
Felix Laumae – John Tari Molbarav and Lowett Morris
Mark Hurley for the Third Defendant
Tom Loughman (SLO) for the Fourth Defendant

JUDGMENT (23 December 2013)
Reserved Decision



1. This is a further chapter in this long running dispute. It is hoped that this decision will now bring the matter to a conclusion although that may be a somewhat felon hope.
2. Mr Colmar claims that the refusal by certain of the second defendants as custom owners to the transfer of the 003 lease to him is unreasonable. He seeks a declaration that the withholding of consent by those second defendants is unreasonable and seeks an order that those defendants provide their written consents.
3. The background to this case is well summarised in the decision of the Court of Appeal *Colmar v. Rose Vanuatu & Ors*¹ It is unnecessary to have regard to the background save to mention that the Court of Appeal held that:

[90] We allow the appeal and set aside Macdonald J's dismissal of Trust's claim against Aljan. In lieu thereof, we grant relief as follows:

a) Declarations that

i) On 14 August 2007, Aljan obtained a registered title as proprietor of the 001 lease by fraud.

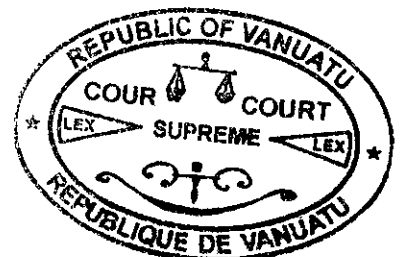
ii) At all times while it remained the registered proprietor of lease 001, Aljan held its registered interest as a constructive trustee for Peter Colmar, in his capacity as trustee of the Valele Trust.

iii) Surrender of the 001 lease and registration of Aljan's interest as proprietor of the new 003 lease on 13 June 2008 occurred at a time when Aljan had knowledge of Valele Trust's prior claim to the 001 lease. In consequence, Aljan holds the new 003 lease as a constructive trustee for Peter Colmar, in his capacity as trustee of the Valele Trust.

iv) Pending further order of the Supreme Court, Valele Trust is entitled to treat with existing custom owners being those who have already consented to the Aljan 003 lease and a representative of the Rad family, who have since been declared to be one of the custom owners to obtain their consent to the transfer of the 003 lease to Valele Trust.

b) Pursuant to s 100 (1) of the Act, the Director shall amend the Land Lease Register to record that the capacity in which Aljan holds the registered title to the 003 lease is as "a trustee for Peter Colmar, in his capacity as trustee of the Valele Trust".

¹ *Colmar v Rose Vanuatu Ltd* [2011] VUCA 20; Civil Appeal 06 of 2011 (20 July 2011)



c) Aljan, its directors, its agents, its employees and its assigns are each forbidden from interfering with any part of the process whereby Valele Trust seeks custom owners' consents to the transfer of the 003 lease, in terms of Declaration (a) (iv) above.

d) Aljan is forbidden from dealing, in any way, with lease 003, pending further order of the Supreme Court.

e) Leave is reserved for any party to apply to the Supreme Court for further directions. Any application shall be made in writing and on notice to all other parties who may be affected by any order sought.

4. The Court of Appeal remitted the proceedings to this Court to finalize outstanding issues and to resolve any other aspects of the proceeding remained before it as a result of MacDonald J's judgment of 10 March 2011. The following directions and suggestions were made by the Court of Appeal

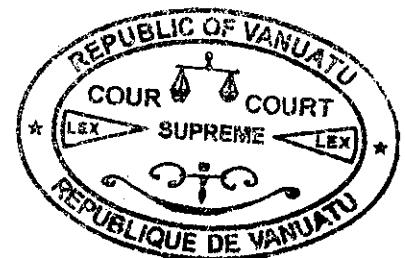
[91] We remit the proceeding to the Supreme Court to finalise outstanding issues and to resolve any other aspects of this proceeding that remain before it as a result of Macdonald J's judgment of 10 March 2011. For the purpose of that remission, we make the following directions arising out of this appeal:

a) On or before 4 November 2011, counsel for Valele Trust shall file and serve a memorandum outlining the steps taken to obtain custom owners' consents and the outcome of those negotiations. Counsel shall also identify any orders that are sought from the Supreme Court to give effect to this judgment. These shall include the formulation of a mechanism to determine the amount payable to Aljan for its outgoings. The memorandum shall be supported by a sworn statement from Mr Colmar that provides a full and accurate explanation of the processes followed, annexes all consents given and recites any other relevant primary facts.

b) On or before 18 November 2011, counsel for Aljan shall file and serve a memorandum (supported by a sworn statement from a duly authorised agent of Aljan on any material primary facts) indicating Aljan's responses to the position taken by Valele Trust and the orders sought. On the question of reimbursement of Aljan's outgoings, it would be open to put a list before the court verified by sworn statement.

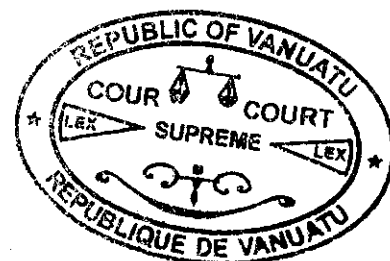
c) The Supreme Court shall allocated a conference date before a Judge on the first available date after 25 November 2011, so that the Judge can consider what orders can be made or whether a further hearing is required. The conference shall extend to any other issues arising among all parties to the proceeding that remain live following Macdonald J's judgment.

5. At paragraph 92 of the judgment, the Court of Appeal stated further:



[92] While not encouraging any further disputes in this protracted litigation, we indicate some specific areas that could arise that counsel may need to consider. First, if custom owners' consents were not available, Valele Trust will need to elect whether to withdraw its claim to title and pursue a claim for an account of profits or equitable compensation against Aljan. Second, if there were any issues about consents being unreasonably withheld, some argument may be required on whether owners are entitled to withhold consent unreasonably. We did not hear full argument on this issue and are not prepared to deal with it in this judgment.

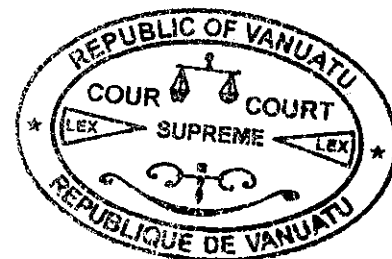
6. The position reached at the time of this hearing was that six of the custom owner claimants (those represented by Mr Malcolm and Mr Laumae) refused to consent to the transfer of the 003 lease to Mr Colmar or more exactly to the Valele Trust. They are the second defendants with the exception of Sampson Livo who indicated that would consent to the transfer.
7. The first defendant James Rad was held by a joint village land tribunal to be a custom owner of part of the land contained within the 003 lease. That decision is subject to a claim for judicial review that has been brought by the second defendants represented by Mr Malcolm but which claim for review has not yet been determined.
8. Through Mr Sugden, Mr Rad confirmed that he had no opposition to the transfer of the 003 lease to Mr Colmar and that, if it is eventually confirmed that he is a custom owner he would consent to the assignment of the 003 lease to Mr Colmar. On that basis, Mr Sugden sought leave to be excused from the hearing and leave was accordingly given.
9. Lowett Morris was joined by consent as an additional second defendant and again someone who has a claim for custom ownership in respect of the land under 003 lease. Lowett Morris is the son of the late Morris Molidovo. Mr Laumae appeared for both the second defendant James Tari Molbarav and the new second defendant Lowett Morris and confirmed that they were opposed to the assignment of the 003 lease to Mr Colmar.
10. The second defendant Samson Livo eventually appeared and represented himself throughout the hearing. He was assisted from time to time by his son Bryan Livo who is a local legal practitioner. Mr Samson Livo eventually confirmed that he also consented to the transfer of the 003 lease to Mr Colmar as trustee for the Valele Trust.



11. The second defendants Joseph Sava, Roy Molivalele, Joseph Wari and Ben Mata, all represented by Mr Malcolm, however confirmed that they were opposed to the transfer and they would not provide their consent. They are, of course, joined by James Tari Molbarav and Lowett Morris.
12. This particular claim focuses accordingly on whether those six second defendants have withheld their consent to the transfer of the 003 lease unreasonably.
13. Unsurprisingly, Aljan supports the position of the six second defendants to refuse consent.
14. As noted by the Court of Appeal in its summary of the background to this matter, an Agricultural Lease with 5 years left to run (the 001 lease) was surrendered and a new lease was granted to Rose Vanuatu Ltd for 75 years for commercial and tourism purposes. The 003 lease was then sold by Rose Vanuatu to Aljan. That sale or assignment was with the consent of all those understood to be custom owners.
15. The Court of Appeal, however, found, that Aljan held the 003 lease in trust for Mr Colmar as trustee of Valale Trust and then left it for Mr Colmar to obtain the consents of the lessors to the 003 lease to the transfer to him.
16. Section 35 of the Land Leases Act requires that the consent of the lessors in writing is to be provided to the Director of Lands before registration of the transfer from Aljan to Mr Colmar can take place.
17. Section 40 (a)(1) of the Act implies with condition applies a term that requires that the written consent of the lessor to any disposition of the land is not to be withheld unreasonably by the lessor.

41A. Implied agreement relating to disposition of leased land

(1) Notwithstanding any provision to the contrary that may be contained in this Act or in any other law, there shall be implied –



(a) in every registered lease created prior to the relevant date and which is valid on that date; and

(b) in every registered lease created on or after the relevant date,

the following agreement between the lessee and the lessor –

Notwithstanding any provision to the contrary contained in the lease, with effect from the relevant date, not to dispose of the leased land or part thereof or interest comprised therewith by the lessee without the previous written consent of the lessor, and not to withhold such consent by the lessor unreasonably.

(2) For the purposes of this section 'relevant date' means the date on which this section comes into force

(emphasis mine)

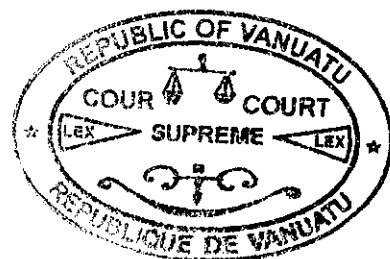
18. The only issue in this case is whether the second defendants (except for Mr Samson Livo) have withheld their consent unreasonably.
19. It is clear that the burden of proving that the withholding of consent is unreasonable falls on Mr Colmar and to the standard of the balance of probabilities..
20. The principles governing this particular issue are well summarised in the decision of the English Court of Appeal in *International Dwellings Fluid Ltd v. Louville Investments (Uxbridge) Ltd*² per Balcombe LJ

1. *The purpose of a covenant against assignment without the consent of the landlord, such consent not to be unreasonably withheld is to protect the lessor from having his premises used or occupied in an undesirable way or by an undesirable tenant or assignee.*

2. *As a corollary, a landlord is not entitled to refuse his consent to an assignment on grounds which have nothing to do with the relationship of landlord and tenant in regard to the subject matter of the lease.*

3. *The onus of proving that consent has been unreasonably withheld is on the tenant*

² *International Dwellings Fluid Ltd v. Louville Investments (Uxbridge) Ltd*(1985) EWCA Civ 11 at p325



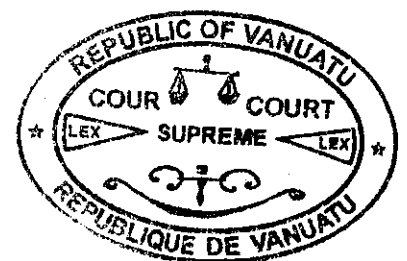
4. *It is not necessary for the landlord to prove that the conclusions which led him to refuse consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances.*

5. *If may be reasonable for the landlord to refuse his consent for an assignment on the ground of the purpose for which the proposed assignee intends to use the premises, even though that purpose is not forbidden by the lease.*

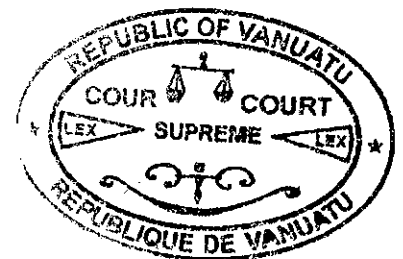
6. *There is a divergence of authority on the question, in considering whether the landlord's refusal of consent is reasonable, whether it is permissible to have regard to the consequences to the tenant if consent to the proposed assignment is withheld ... A proper reconciliation of the ... [authorities] can be achieved by saying that while a landlord need usually only consider his own relevant interest, there may be cases where there is such a disproportion between the benefit to the landlord and the detriment to the tenant if the landlord withholds his consent to an assignment, that it is unreasonable for the landlord to refuse consent.*

7. *Subject to the propositions set out above, it is, in each case a question of fact, depending on all the circumstances, whether consent is being unreasonably withheld.*

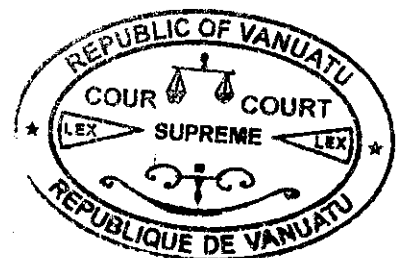
21. Industrial dwelling has been followed and approved by Courts at the highest level in the United Kingdom, Australia and New Zealand.
22. The issue as to whether the lessor's conduct was reasonable or unreasonable in relation to the withholding of consent is one of fact to be decided by the Court..
23. It is accordingly necessary to have regard to the reasons given by those second defendants other than Mr Livo who refused to give their consent. Before turning to their evidence, it is perhaps pertinent to make one or two further observations.
24. The land concerned is clearly valuable land and likely destined for development whether by the Valele Trust or Aljan. That had to have been behind the decision of the custom owners to agree to the new lease (003 lease). If there was a time when the custom owners wished to regain control of the land it was at that stage although they may have had to have waited until the expiration of the term of the 001 lease. The custom owners agreed to enter into the 003 lease with Rose Vanuatu Ltd and they must have also consented to the assignment of the 003 lease from Rose Vanuatu Ltd to Aljan. In doing so, they subjected their interest in the land to the Land Leases Act.



25. The parties involved in this case all reside within the same general but small community in and around Luganville on Santo. It is clear that they all know each other relatively well. Furthermore, in some cases they either have been or are still related. Mr Colmar, for example, was married to a member of the Valele Family who indeed supported Mr Colmar in Court. The principal of Aljan is Mr Cort who is also married into the family of one of the relevant parties.
26. It is hardly surprising that personality differences to the point of distrust have arisen given that this is such a small community. However, the Court has to be concerned with what is or is not reasonable in relation to the withholding of the consent and, as well explained in *Industrial Drilling*, the lessors are not entitled to refuse their consent to the assignment to Mr Colmar on grounds "*which have nothing whatever to do with the relationship of Landlord and tenant in regard to the subject matter of the lease.*"
27. John Tari Molbarav claims that he was never approached by Mr Colmar with a request to sign any consent form to the assignment. Lowett Morris takes a similar position but of course it does not appear that Mr Colmar was even aware that Lowett Morris was directly involved as lessor or possible lessor until the hearing commenced.
28. This particular point has no substance at all. It is clear that Mr Molbarav and Mr Morris refused to give their consent and that is clear from their evidence and the position adopted for them by Mr Laumae. The question is whether Mr Colmar has been able to prove that they withheld their consent was reasonable.
29. In summary, their objection to providing consent of the assignment to Mr Colmar can be summarised as follows:-
- a) The registration of the 003 lease over Aese Island had not been done in a proper and fair manner;

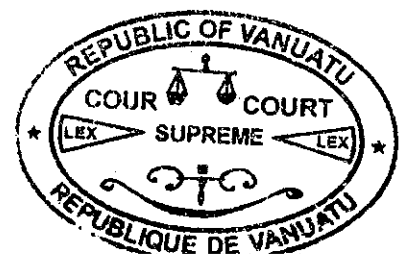


- a) Aljan only paid Vt 300,000 and promised that full premium would be paid upon registration of the lease but to date it failed to pay the balance of the premium; and
 - a) Aljan breached the terms and conditions of at least by failing to develop the land and pay Vt 500,000 annual rental since 2008, 2009, 2010, 2011, 2012 and 2013.
30. That is a somewhat curious position to adopt if not indeed quite ironic. The Court of Appeal clearly held that Aljan had acted in the purchase of the 003 lease with imputed knowledge of the equitable interest of Mr Colmar. In those circumstances, it is rather difficult to accept that the conduct of Aljan should somehow act adversely to Mr Colmar in this particular respect. A failure by Aljan to meet lease payments no doubt arose because of this ongoing dispute.
31. Furthermore, Mr Colmar was never involved in the registration of the 003 lease and the actions of Aljan and before it Rose Vanuatu Ltd are not material to the issues before this Court.
32. I consider that Mr Colmar has proven that Mr Molbarav and Mr Morris have withheld their consent unreasonably.
33. Of greater scope are the reasons advanced for the other second defendants as to why they oppose the assignment to Mr Colmar.
34. Mr Morrison neatly summarized the reasons advanced by the second defendants as to their refusal to consent:
- a) Lack of trust in Peter Colmar;
 - b) A history of unfair dealings with Ni-Vanuatu;



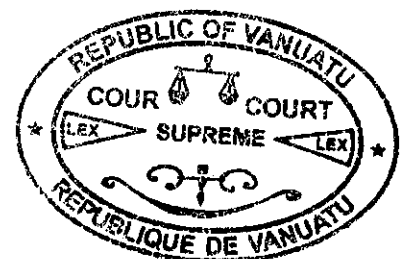
- c) They do not want him on their land;
- d) Do not believe he will comply with the lease terms;
- e) No agreement on fees and costs;
- f) No agreement to a sale for a few hundred cows;
- g) Issues with his morality;
- h) Unpaid land rentals;
- i) I believe he is being deceitful;
- j) I believe he will bring others to the land.

35. Mr Colmar called two witnesses as to his character. They confirmed that he was well regarded as a farmer and as a member of the Santo community. Their evidence is in contrast with evidence for the second defendants that Mr Colmar was a poor farmer. I unhesitatingly accept their that Mr Colmar is not just a person of good character but also a good farmer. They were both impressive witnesses and clearly men of some standing in this community.
36. Mr Tangis was chairman of the Fanafo Council of Chiefs and Mr Kalo is a former member of parliament and a cattle farmer. They would not give their unqualified support to Mr Colmar as to his character unless it had been gained by their extensive dealings with him.
37. Mr Tangis explained that he had dealt with Mr Colmar for some 30 years and that he was a custom owner of land that Mr Colmar leased. He said that Mr Colmar paid on time and sometimes in advance and gave gifts on occasions. Furthermore, Mr Colmar was honest and that he trusted him.
38. Mr Kalo said that he had known Mr Colmar for some 20 years and had done cattle business with him. He considered Mr Colmar to be a valuable asset to the cattle industry who also



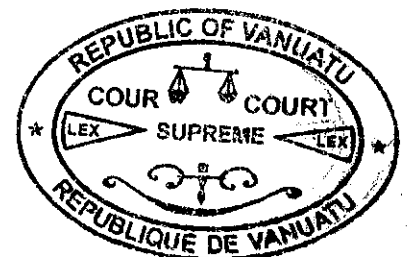
looked after the small holders of cattle. Mr Noel indeed explained that Mr Colmar had the "*best kept and managed cattle properties in Santo*":

39. When all the evidence of the second defendants is considered, it is clear that there is considerable antipathy by them for Mr Colmar and it appears more that it is just their preference not to have him as their lessee. There was a complete lack of evidence on their part that suggested that Mr Colmar would not be a person who would comply with the terms of the lease. Indeed, their evidence appeared to return more and more to the issue that Mr Colmar was not somebody with whom they wanted as their lessee and principally as a result of Mr Colmar's recent separation from Madeleine Valele. Of course, that is not a valid basis for refusing to grant consent. It has nothing to do with the question as to whether Mr Colmar is a person who would look after the land and meet his obligations under the lease.
40. When the second defendants agree to grant the 003 lease to Rose Vanuatu, they thereupon subjected themselves to the provisions of the Land Leases Act which enables a lessee to sell his interest in the lease to a third person subject only to the consent of the lessors which of course may not be unreasonably withheld.
41. While the second defendants could have refused to grant a lease directly to Mr Colmar, once the 003 lease was registered, they were subject to the lease being traded. They are in no better position than if Aljan had suddenly decided to sell the lease to Mr Colmar.
42. Aljan takes a different and somewhat more technical stance.
43. First, Mr Hurley argued that Mr Colmar did not have standing to invoke s. 41 (h) of the act as he was not a lessee of the 003 lease and has never been a lessee of that land. However I agree with Mr Morrison that this flies directly in the face of the judgment of the Court of Appeal which declared that Aljan held the land constructively as trustee for Mr Colmar.
44. The second submission for Aljan is that the custom owners have a "*paramount decision making power*" to decide who may be a lessee either at the time of a commencement of a lease or even subsequently at the time that the lease is to be assigned. I do not accept that submission. It were correct then it would mean that s. 41A(1) is a completely redundant



provision as to the withholding of consent. Why would the legislation expressly provide for the consent to assignment not to be reasonably withheld if there was a "*paramount*" right of the custom owners/lessor to consent or not.

45. If Mr Hurley's submission was correct then it would permit the lessors to effectively renegotiate every lease at the time of assignment by withholding their consent until any demands they might have were fulfilled. That can surely not be the case.
46. Accordingly, I find none of the reasons raised by the defendants who oppose consent being provided to Mr Colmar for the assignment of the 003 lease to him to be reasonable. This is not to say that I consider that those defendants had the burden of proving that their refusal to grant consent was reasonable as of course the burden is on Mr Colmar to prove that their refusal to grant consent is unreasonable. However, the evidence points to those defendants preferring to deal with Aljan as against Mr Colmar. Furthermore, Mr Colmar has proven that he is a person who can be relied on to comply with the terms of the lease.
47. I accordingly order that a written consent of the first and the second defendants be provided to Mr Colmar by 31 January 2014. Mr Colmar will provide each of those first and second defendants with a written form of consent and that is to be signed and returned to Mr Colmar within seven days of being provided. The lessors are entitled to consent fees.
48. Mr Colmar will also provide a draft transfer of the 003 lease to Aljan which is to be executed by Aljan and returned to Mr Colmar again by 31 January 2014.
49. The registration of the transfer of the 003 lease from Aljan to Mr Colmar, providing that it is accompanied by the consents of the first and second defendants, is to be registered within 7 days of presentation to the Department of Lands.
50. This leaves the issue of costs which Mr Morrison sought on an indemnity basis. However, it seems more appropriate for this commercial dispute to be resolved by an order for standard costs in favour of Mr Colmar to be agreed or taxed. Those costs are to be shared equally between the second defendants (except for Mr Livo) for the one part and the third defendant



for the other part. I am particular conscious of the defiant role that Aljan has taken in this case.

BY THE COURT

A handwritten signature in black ink, appearing to be 'Aljan', written over the text 'BY THE COURT'.