

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

Civil Case No. 19 of 2012

BETWEEN: AORE ISLAND LIMITED

First Claimants

**AND: MR. & MRS. WINKOL
MR. & MRS. MOLI BRIAN BAKEO
MR. & MRS. BRECHTEFELD
CHARLIE, JOHN ROBERT, JOHN
FREZA, HUMAI, JOE MAHURI,
LESLEY HAILA, BONG TAKI, TARI
HURI WALA, BOE WALA, MOLI
WALA and WALA WALA**

Second Claimants

AND: RACHEL VATARUL

First Defendant

**AND: WILLIE TAVUTI, PAUL SOPE,
DALON SOPE and TOKO TAVUTI**

Second Defendants

AND: THE REPUBLIC OF VANUATU

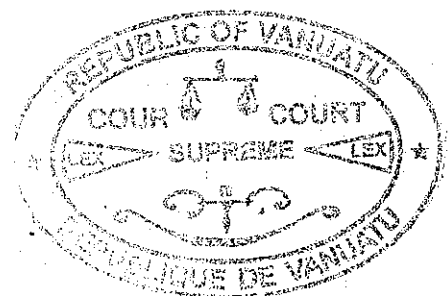
Third Defendant

Coram: *Mr. Justice Oliver A. Saksak*

Counsel: *Mrs. Marie-Noelle Ferrieux Patterson for the Claimants
Mr. Britten Yosef for the Defendants*

Date of Hearing: 12th December 2012

Date of Judgment: 29th April 2013

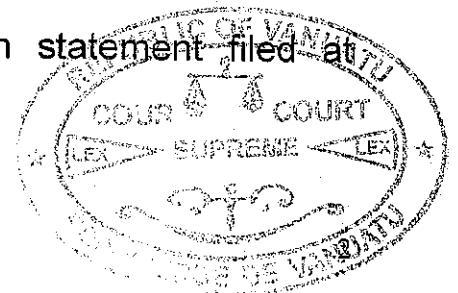


JUDGMENT

Introduction

1. In this proceeding the First Claimants filed their original claims at the Registry in Port Vila on 14th November 2011. The Claimants filed an amended claim without leave of the Court on 8th May 2012.
2. When the matter was transferred to the Court in Luganville, the First Claimants sought leave to amend their claims further. A further and separate application was made to have the Second Claimants joined as parties to the proceeding. The Court granted leave on 18th September 2012. Pursuant to that leave the Claimant filed a further amended claim on 17th October 2012. The Claimant filed a final amended claim without leave including an "amended defence" on 12th December 2012.
3. There was no objection raised by the defence counsel to the Claimants amending their Claims up to three times two of which were done without leave of the Court. However, the Court would record and point out that the filing of an amended defence to Counter-Claims of the defendants in the final amended claim is unacceptable practise and must not be repeated.
4. The State is named as the Third Defendant. The State Law Office was duly served on 17th October 2012 by Rose Banga who deposed to a statement as to service on 17th October 2012. There has been no response, defence or sworn statement filed at anytime.

The Claims And Reliefs Sought



5. The Claimants summarise their claims after paragraph 29 of their final Amended Claims as follows:-

"(i) An Order that the Second Defendants be restrained with their agents and servants from entering the Lease and the Lots of the Strata Plan within the registered Leasehold title 12/0822/014 (sic) and not return to that Land and only to use the Public Road away from the Strata Lots.

(ii) An Order that the Second Defendants be restrained with their agents and servants from intimidating, threatening or assaulting the First Claimant, its Director and family and agents and workers and the Second Claimants their servants and agents and workers and children in Aore or elsewhere.

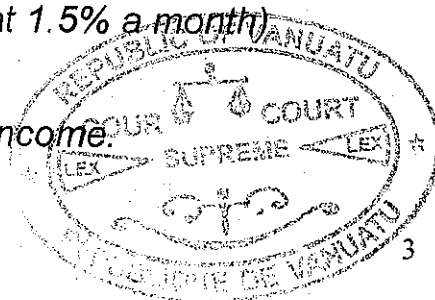
(iii) Damages:

1. Interests on the loss of sale: VT24,482,461 plus VT14,998 daily as from 8.12.12.

2. Legal costs caused by damaging actions of the Defendants as outlined above: VT1,167,553.

3. Other costs incurred (Barrett and Sinclair and Ors: VT1,660,000 plus interest at 1.5% a month)

4. Damages in lieu of loss of income.



5. Damages for the truck: VT2,397,500.

6. Damages for the cost loss of income from the sale of cattle: VT77,992.

(iv) Damages for unlawful imprisonment and assault: VT1,000,000.

(v) Mesne profits.

(vi) Aggravated damages.

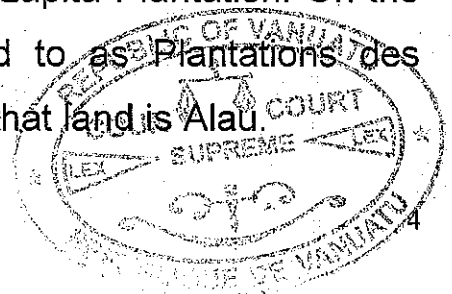
(vii) Exemplary damages.

(viii) Costs."

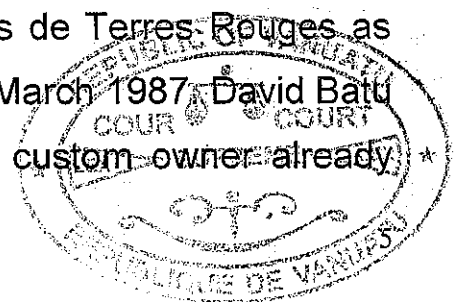
The Background Facts

5.1. The dispute which has become the subject-matter of this proceeding involves ownership of land contained in the original lease title no. 04/3033/002 which has now been renumbered as title no. 04/3033/005 situate on the western side of Aore Island. It has a land area of 298 ha and 40 ca.

5.2. The land is commonly known and referred to as Peyrolle Plantation and sometimes referred to as Lapita Plantation. On the lease documents however it is referred to as Plantations des Terres Rouges. The custom name for all that land is Alau.

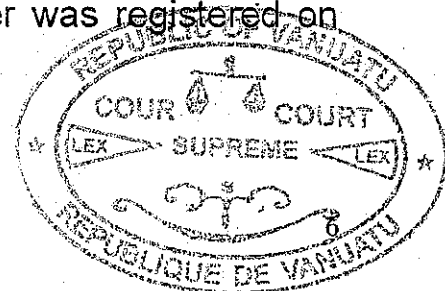


- 5.3. On 2nd June 1982 the Minister of Lands Sethy Regenvanu declared David Batu, also known as Livo, as representative of the custom owners of the Alau land comprised in old titles numbered 407, 408, 413 and 414.
- 5.4. Prior to independence on 30th July 1980 all those lands were alienated lands under exclusive ownership of Peyrolle and the French Government. But on 30th July 1980 by operation of Articles 73 and 74 of the Constitution all those lands reverted to the custom owners.
- 5.5. Sometimes in 1981 a Land Committee was set up in the absence of the Island Court Act Cap 167 to identify the custom land owner of Alau custom land. Prior to the sitting of the Land Committee, the First Defendant reached an undertaking with her younger brother David Batu Livo to represent her before the committee as her spokesman and that thereafter David Batu Livo was to be their representative until the First Defendants' sons had reached maturity and he would then hand over all the responsibilities and interests in Alau land back to them. That was agreed.
- 5.6. The Land Committee identified Rachel Vatarul as the custom-owner of Alau Lands.
- 5.7. On 3rd February 1987 David Batu Livo entered into original lease title 04/3033/002 as lessor with Plantations de Terres Rouges as lessees. This lease was registered on 23rd March 1987. David Batu Livo did so only as representative of the custom owner already



identified as Rachel Vatarul back in 1981 by the Land Committee. No considerations or premiums were made or paid at the time. The lease was an agricultural lease.

- 5.7. In less than one month later on 17th April 1987 the lease title 04/3033/002 was transferred to one Yves Jean-Pierre Desonneville on the consent of David Batu Livo. The lease remained an agricultural lease and no consideration was made on its transfer. The value of interest stated was VT2.000.000
- 5.8. On 3rd September 1991 lease title 04/3033/002 was transferred to Hibiscus Brands Ltd on the consent of David Batu Livo. The lease remained an agricultural lease with no consideration made on its transfer. The value interest stated was VT2.000.000.
- 5.9. Some five months later on 18th March 1992 the lease title 04/3033/002 was again transferred to Brian William Woon and Gregory Michael Woon on the consent of David Batu Livo for consideration of VT3,850,000. This consent was witnessed by Paul Livo Sope who presumably is one of the persons named as second defendant.
- 5.10. On 12th February 2003 David Batu Livo consented to the transfer of title 04/3033/002 from Gregory Michael Woon to Alice Shirley Woon. No consideration was made but the value of interest was stated at VT4.000.000. The lease remained an agricultural lease and no consideration was made. The transfer was registered on 17th May 2005.



5.11. Sometimes in June 2005 the Supenatavuitano Council of Chiefs met over custom ownership of Alau Lands and endorsed the decision of the Lands Committee reached in 1981 that Rachel Vatarul is the custom owner of Alau Lands on Aore. On or about 14 June 2005 the said Council of Chief wrote to the First Claimants confirming their endorsement of Rachel Vatarul as custom land owner of Alau and stating their concern at the First Claimant paying land rentals to David Batu Livo and asking specifically that they stop subdividing the title.

5.12. On 29th August 2005 Mr Jack Kilu as previous Counsel for the defendants wrote to the Director of Land Records seeking rectification based on the decision of the Land Committee as endorsed by the Council of Chiefs.

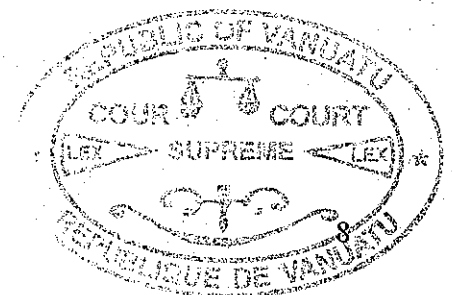
5.13. On 20th January 2006 David Batu Livo consented to a surrender of lease by Shirley Woon to create a new title as No. 04/3033/005. The lease is classified as Commercial lease. The consideration given was VT3,455,145 registered in the name of David Batu Livo as Lessor and Aore Island Ltd as Lessee. The land area had increased dramatically to 327 ha and 36 ca.

5.14. Matthew Woon registered a new lease title No. 04/3033/005 as a Commercial Tourism Lease on the same date as the surrender on 20th January 2006 in the name of Aore Island Ltd, the First Claimants.

5.15. The Minister of Lands approved the lease some seven months later on 23rd August 2006.



- 5.16. In the same year 2006 the First Claimant subdivided the title No. 04/3033/005 into 207 Lots which were finalised and registered as Strata Plan 00004. The First Claimant planned to build a major tourist resort on the 327 hectares of land.
- 5.17. In 2007 the Claimant sold three lots but on 23rd March 2007 the First and Second Defendant lodged a caution to prevent future sales and transfer of titles on the Strata Plan. The caution was in place for about 5 months until it was lifted on 23rd August 2007. Following the caution the First Claimant was unable to complete three sales of water front land.
- 5.18. On 23rd March 2008 David Batu Livo passed away.
- 5.19. On 27th November 2009 the First Defendant applied for letters of administration of the estate of David Batu Livo. The Court granted administration to Rachel Vatarul on the same date.
- 5.20. On 31st December 2009 a transmission of lease title 04/3033/005 was registered by the Director of Land Records in favour of Rachel Vatarul as administratrix of the estate of the deceased David Batu Livo.
- 5.21. In or about October 2010 a Joint Area Land Tribunal sat to hear the dispute over custom ownership of Alau land and decided in favour of Rachel Vatarul.



5.22. That decision was recognised and registered at the Office of the Lands Tribunal Unit on or about 15th November 2010.

5.23. On 9th March 2011 the Valuer General published his determination on the First Defendant's notice of forfeiture declaring it to be defective.

5.24. On 2nd November 2011 members of the First Defendant's family went into the Lapita Plantation without authority and made threats, demands and caused damage to the Claimant's truck.

5.25. The Claimants alerted and called the Police for assistance at 4.30pm on 2nd November 2011 but the Police only arrived on 3rd November 2011.

5.26. The Second Defendants breached Court Orders and the Claimants applied for committal on 18th September 2012. The Court found three of the Second Defendants guilty of contempt of Court Orders.

5.27. On 12th November 2012 the Court punished the three defendants by imposing fines as follows:-

(a) Willie Tavuti – VT15,000

(b) Dalon Sope – VT12,000

(c) Paul Sope – VT10,000

These fines were payable by 4.30 pm on 10th December 2012. In default, that each be imprisoned for one (1) month.

5.28. All fines were paid up on 7th December 2012.



Allegations By the Claimants

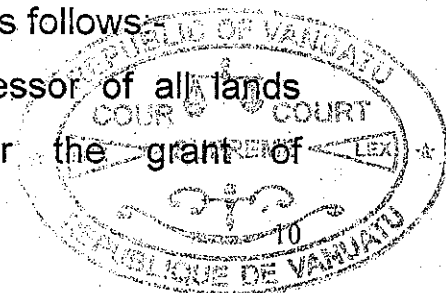
6. From the chronological facts provided above, the Claimants complain and allege against the defendants as follows:-

- (a) As a result of the caution lodged on 23rd March 2007 the First Claimant incurred loss of three sales totalling \$280,000,00.
- (b) As a result of the defendants' unlawful actions the First Claimant had suffered financial damages by having to borrow monies from the National Bank of Vanuatu at the rate of 15.25% per year from 1st August 2007. The limit was VT24,482,245 which has increased to VT40,551,070 at 21st April 2010 with interests accruing daily at VT14,998.
- (c) As a result of the Valuer General's determination on 9th March 2011 declaring the notice of forfeiture of Rachel Vatarul to be defective, the First Defendant is not a registered lessor on the Land Registry.
- (d) As a result of the defendants' actions since 2006 the Claimants have suffered damages that are specified under the Claimants' claims and reliefs at pages 3 and 4 of this judgment.

Defendants Defences And Counter-Claims

7. The defendants filed a defence and counter-claim on 8th November 2012. In summary, the Court states their defences as follows:

- (a) The First Defendant became the registered lessor of all lands within Lease Title 04/3033/005 only after the grant of



administration in 2009. Prior to this period, David Batu Livo was the registered lessor but the creation of Lease Title No. 04/3033/005 was done through fraud.

(b) The Lease agreement between David Batu Livo and the First Claimant is unconscionable and is contrary to the provision of the Land Leases Act Cap 163.

(c) The Lease was registered as a commercial tourism lease.

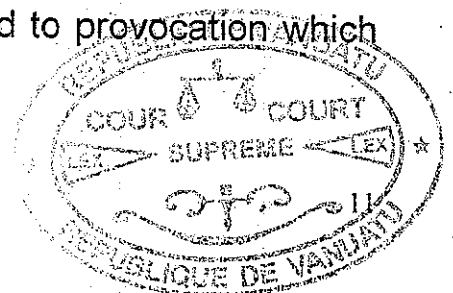
(d) The First and Second Defendants never gave consent to their land to be subdivided into strata titles.

(e) The lodging of their caution was their only avenue to make known their grievances in the hope of obtaining justice.

(f) The first defendant has been declared as custom land owner of Alau Lands on which Peyrolle Plantation is situated and that although the Court, and the Lands Department have recognised that declaration as valid, Mr Matthew Woon has failed and/or refused to do so.

(g) The First Claimant put himself into a position of risk when it dealt with David Batu Livo with knowledge that he was not the declared custom land owner of ALau Land. As such, they deny being responsible for any losses and damages claimed.

(h) Mr Matthew Woon's actions of threatening to shoot the defendants and officers of Ports and Harbour amounted to provocation which instigated arguments with him.

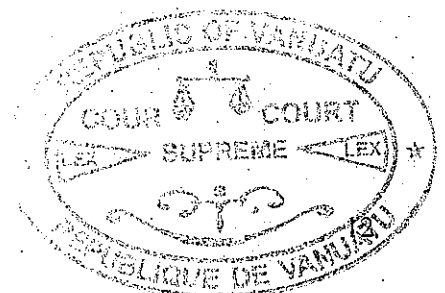


- (i) First Claimant made false representations to impress purchasers that the lease was a commercial tourism lease whereas the lease agreement speaks of strata subdivisions.
- (j) The claim for VT1,000,000 damages is unsubstantiated.
- (k) The damage to the truck is false.
- (l) The determination of the Valuer General is still subject to judicial review.
- (m) The Claimants threatened and prevented access to the Defendants and their sister Lydia Tavuti in October 2011.
- (n) The defendants never burned any machinery of the First Claimant as reported by Mr Tom Joe Botleng.

8. As regards their Counter-Claims, the defendants allege that –

- (a) They have suffered losses and damage –
 - (i) By loss of control over and access to their lands and white sandy beaches.
 - (ii) As declared custom owners they have not given their consent to subdivide their lands into strata titles.
 - (iii) The First Claimant committed fraud and mistake when entering into a leasing agreement to create leasehold title 04/3033/005.

The Defendants' Reliefs –



9. The defendants seek orders that –
- (i) Lease Title 04/3033/005 be rectified.
 - (ii) The strata title project on the Title be stopped.
 - (iii) Any transfer of Lots of buyers within the strata titles be rectified.
 - (iv) The Claimants' claims be dismissed; and
 - (v) Costs.

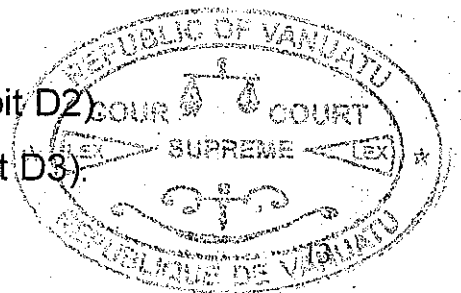
Position of the State

10. The State as Third Defendant did not file any defence or sworn statements. On 12th November 2012 Miss Jennifer Warren appeared and indicated that "the State would not take any active part but would simply abide by any orders of the Court, except as to costs." See paragraph 3 of the decision dated 12th November 2012. That was the only time the State Law Office had appeared on behalf of the State.

Evidence By Defendants

11. In support of their defences and counter-claims the Defendants relied on both oral and documentary evidence by sworn statements of:-

- (a) Lydia Tavuti Aka Lydia John dated 12th November 2012 (exhibit D1).
- (b) Bani Timbaci dated 12th December 2012 (exhibit D2)
- (c) Willie Tavuti dated 12th November 2012 (exhibit D3)



(d) Rachel Vatarul dated 12th November 2012 x 2 (exhibits D4 and D5).

(e) John Tavuti dated 27th November 2012 (exhibit D6).

These persons gave oral evidence and were cross-examined by Counsel for the Claimants.

Evidence by Claimants

12. The Claimants produced and relied on the oral and documentary evidence by sworn statements of three persons in support of their claims as follows:-

(a) Mathew Woon x 2 dated 14th November 2011 (exhibit C1) and of 4th December 2012 (exhibit C2).

(b) Ileenton Woon x 4 dated 19th April 2012 (exhibit C3 and C4) of 8th May 2012 (exhibit C5) and of 17th September 2012 (exhibit C6).

(c) Tagaro Brechtefeld dated 17th April 2012 (exhibit C7).

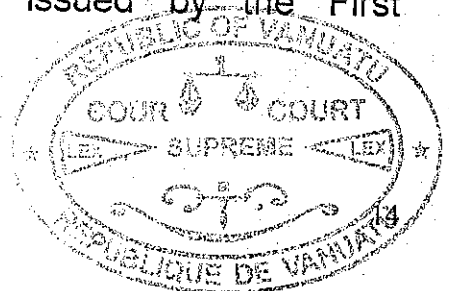
These witnesses were cross-examined by Counsel for the Defendants.

The Issues

13.1. From the Claimants' case the issues appear to be –

(a) the placement of the caution by the defendants which failed;

(b) the failed notice of forfeiture issued by the First Defendant;

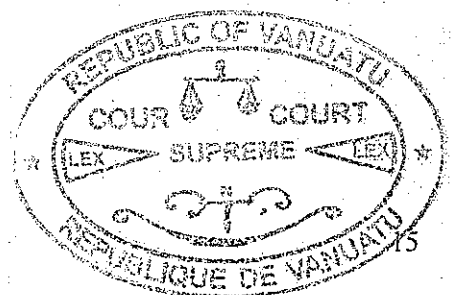


- (c) the threats and violence by the Defendants from 2006 to 2011; and
- (d) whether they have suffered losses and damages and are entitled to them.

13.2. From the Defendants' case the issues appear to be:-

- (a) Whether Lease Title 04/3033/005 was obtained by First Claimants through fraud or mistake.
- (b) Whether the lease agreement reached between the First Claimant and David Batu Livo is contrary to the Land Leases Act.
- (c) Whether Rachel Vatarul is the declared custom land owner of Alau Lands and ought to have been recognised and registered as such.
- (d) Whether as custom land owner her consent was required and necessary to be obtained by First Claimant before subdividing land into strata titles.
- (e) Whether they had authority or were entitled to lodge a caution.
- (f) Whether the First Defendant had authority to issue forfeiture notice.
- (g) Whether they lost control over their lands and white sandy beaches and suffered any losses.
- (h) Whether they are entitled to the reliefs they seek.

Discussions And Considerations

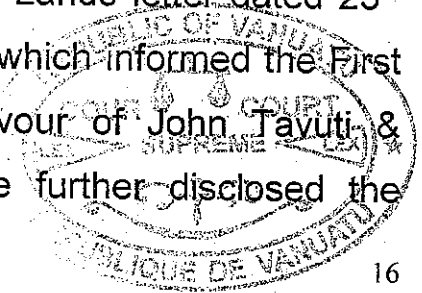


14.1. These discussions and considerations are made in light of written submissions filed by the Defendants on 7th February and on 28th February 2013 and submissions filed by the Claimants in reply on 19th February 2013.

14.2. The Court deals first with the issues from the point of view of the Claimants' as follows:-

(a) The Caution

- (i) The evidence show two separate cautions as opposed to one. At paragraph 7 of the sworn statement dated 14th November 2011 (exhibit C1), Matthew Woon deposes to a caution lodged by John Tavuti and Family on 23rd March 2007. He annexes a copy of the said caution as annexure "MW2". It is an incomplete document as the second page which should have indicated the date of its registration and stamp is not included. John Tavuti on the other hand deposes to another caution at paragraph 6 of his sworn statement dated 27th November 2012 lodged in 2006. He annexes a copy of the said caution as "JT6". It contains the name of Willy Tavuti & Family. It is dated 10th March 2006 on the second page. It is signed and witnessed by one Alick Kalmelu. However, it is not dated or registered and the Director has not signed it. It however bears the official stamp of the Lands Registry. Matthew Woon went further to disclose the Director of Lands letter dated 23rd March 2007 as annexure "MW2" which informed the First Claimant that the caution in favour of John Tavuti & Family had been registered. He further disclosed the



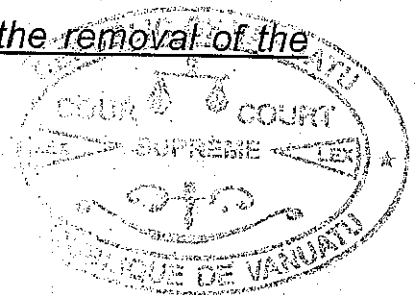
Advice of Registration as annexure "MW2" showing it was registered on 15th February 2007. He also disclosed the application for withdrawal of caution by the Director dated 23rd August 2007 as annexure "MW2". Further, he disclosed a letter dated 23rd August 2007 addressed to John Tavuti and Family informing them that their caution had been withdrawn.

- (ii) In the absence or through omission the State as Third Defendant has never been actively involved in the proceeding by filing any responses, defences and/or sworn statements by the Director of Lands. As such, it is impossible for the Court to draw any conclusions as to whether or not the "Willy Tavuti & Family" Caution still exists.
- (iii) The withdrawal of the "John Tavuti & Family" Caution by the Director of Lands on 23rd August 2007 was ultra vires the Act because (a) the Director has no automatic or direct power to withdraw a caution and (b) section 97 (3) of the Land Leases Act was abused by the Director.

Section 97 of the Act states –

"(1) The cautioner or his legal representative, may at any time apply to withdraw the caution.

(2) Any person adversely affected by any caution may apply to the Director for the removal of the caution.

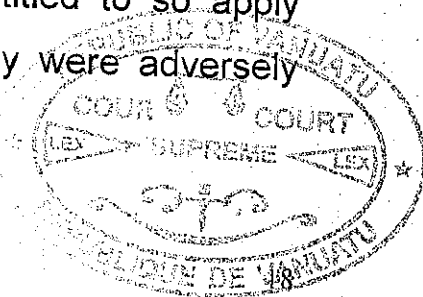


(3) The Director on his own motion, or on the application of any interested person, shall give notice to the cautioner requiring him to withdraw his caution or substantiate his claim, and if the cautioner does not comply with the notice or file with the Director a certified copy of pending Court proceedings within 30 days from the date of the notice the Director shall remove the caution from the register."

(My underlining for emphasis).

(iv) It is clear from the evidence of Matthew Woon that the Director, Jean Marc Pierre applied to himself on 23rd August 2007 to withdraw the caution. See the Application for withdrawal, annexure "MW2". It is presumed to have been issued under section 96 of the Act but that is the wrong provision as section 96 provides for Duration of Cautions. Applications for removals of Cautions are provided for by section 97 of the Act.

(v) And Section 97 (3) requires that the Director, on his own motion or on application by the First Claimant, give notice to the Tavuti Family to withdraw their Caution or substantiate their claim within 30 days. There is no evidence by the First Claimant that they applied to have the Caution withdrawn. They were entitled to so apply under Section 97 (2) of the Act if they were adversely affected by the caution.



- (vi) The Director wrote to John Tavuti & Family on the same date 23rd August 2007 as he applied to himself, purporting to give notice. The letter is stated in its full text as follows:-

"Date: 23rd August 2007.

John Tavuti & Family

PO Box 604

Port Vila

Dear Sir,

NOTICE UNDER SECTION 97(1) OF LAND LEASES
ACT NO. 4 OF 1983

Title No: 04/3033/005.

Registered Proprietor: Aore Island Limited.

With reference to your Caution dated 14th February 2007, which you applied to have it registered against the above mentioned Title, the Director of Lands now apply to have it withdrawn pursuant to Section 97(1) of the Land Leases Act Cap. 163.

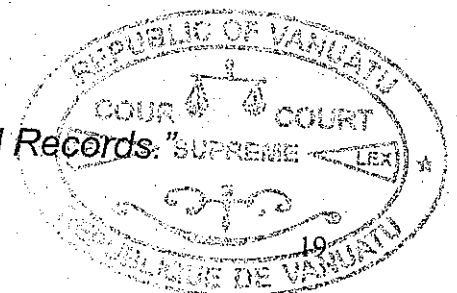
The Caution is now withdrawn from the register.

Yours faithfully,

(Signed)

Jean Marc Pierre.

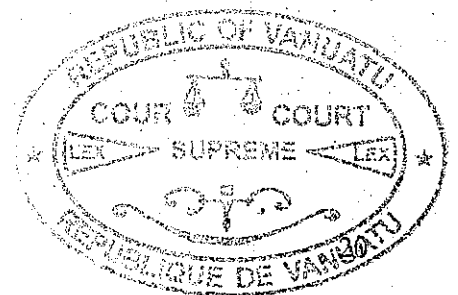
Director of Lands, Survey and Records.



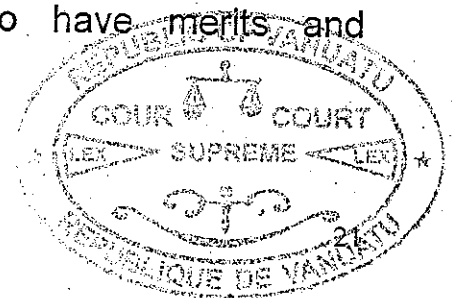
(My underlining for emphasis).

- (vii) Clearly the reference to Section 97(1) is wrong because Section 97(1) provides discretion to the cautioner or his legal representative to apply for withdrawal of a caution. The Director was not the cautioner or legal representative of the John Tavuti & Family.
- (viii) The notice should have been correctly issued under Section 97(3) of the Act which clearly requires a 30 days period. No such period was afforded by the Director. Instead, what appeared to be a notice was an automatic withdrawal. Clearly the Director had no power to do so, let alone within one day or the same day of applying.
- (ix) A question may be posed here as to who was urging the Director to take those unlawful actions? From the evidence of Matthew Woon at paragraph 7 of his statement dated 14th November 2011 (Exhibit C1), it was he himself Matthew Woon.
- (x) Having done so, the First Claimant cannot benefit by Claiming compensation under Section 97(5) of the Act, for lost sales incurred by them during the period of the Caution from March 2007 to August 2007. There will be some discussions later in the judgment about the issue of lost sales.

(b) Forfeiture



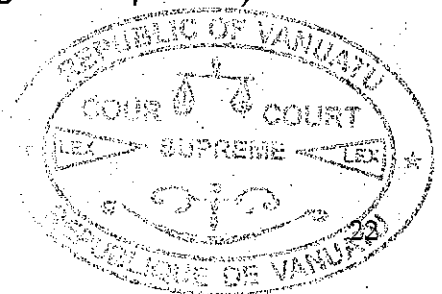
- (i) Matthew Woon's evidence by sworn statement (exhibit C1) discloses a Forfeiture Notice annexed as "MW4", issued by the First defendant dated 12th August 2010 as lessor. She annexed as "MW4" is a copy of the Determination of the Valuer-General dated 9th March 2011. The conclusions of the Valuer-General are that –
- (a) The Notice was defective in law and fact.
 - (b) The First Defendant could not be the lessor under a grant of letters of administration.
 - (c) Other Parties having interests in the lease were not served.
 - (d) There has been no rectification of the lease by substituting Rachel Vatarul in place of David Batu Livo.
- (ii) The defendants accept the First Defendant had issued a forfeiture Notice and that the Valuer-General had delivered his determination. They indicate however that the determination is capable of being challenged by way of a Judicial Review action alleging that (a) there was denial of natural justice and (b) the decision was biased. This indicates the determination of 9th March 2011 is in issue and the Court is obliged to give some considerations on it.
- (iii) The conclusions in (i) (a) and (c) above are conclusive and it appears the defendants cannot successfully challenge those. However the conclusions in (i) (b) and (d) are questionable and it appears the defendants do have merits and substance.



(iv) The Valuer-General based his conclusions in (b) on the Court of Appeal case of re Estate of John Molivono [2007] VUCA CAC 37/2007. That case lays down the clear law as to whether a person who applies for probate, whether under a will or under a grant of administration is entitled to succeed to custom land. But the other case which the Valuer-General referred to in paragraph 11 of his decision is the case of Zakias Batu Livo v. Rachel Vatarul [2010] VUCA CAC 20/2011 which he omitted to analyse in any greater detail, which had he done so, the Valuer-General would have arrived at a different conclusion.

(v) The Court of Appeal restated the position in Molivono in paragraph 10 of their judgment as follows –

“Letters of administration are not the appropriate mechanism for the passing of customary land title but that was not the nature of contention made in this case. The respondent argued that on the variety of occasions she had been declared to be the customary owner. All she was wanting to do with the letters of administration was to have the fact that they were in her brother’s name in a representative capacity recognised and for a transfer now into her name. She did not want to administer the rest of her late brother’s estate and never sought to do so. She was not asking for any determination about customary ownership because she said that was not an issue”. (my underlining for emphasis).



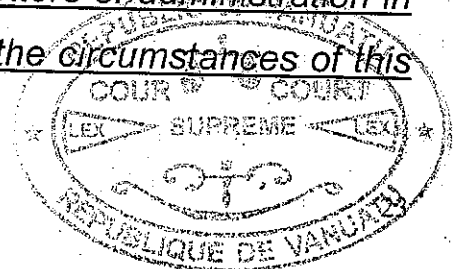
(vi) The Court of Appeal went on in paragraphs 15 – 18 as follows –

“15. It was only in the extra ordinary historical circumstances of this case that the course adopted was available to achieve the end the respondent wanted. It was predicated always on the basis of the recognition and declaration of Rachel as the Custom Owner by a Joint Land Committee of which Chief Tom Rasu was the Secretary and Chief Paul Hakwa the Chairman in 1981 which concluded that the late David Paul (sic) Livo was not a Claimant before them but only acted as a spokesman for his sister. He was to protect the land for her and on behalf of her children until they reached maturity.

16. There was a decision of the Supernatavuitano Council of Chiefs of 15 June 2005 which endorsed the 1981 decision. Finally a decision of the Area Land Tribunal in 2010 which reached the same decision as the Council of Chiefs and the Committee had previously that the respondent was the custom land owner of those lands in Aore.

17. Justice Saksak, noting that there had been no challenge to the validity of the 2010 decision within six months after its delivery on 15 November 2010, was satisfied of the respondent's position in custom.

18. It is certainly unusual to have letters of administration in respect of part of an estate but, in the circumstances of this



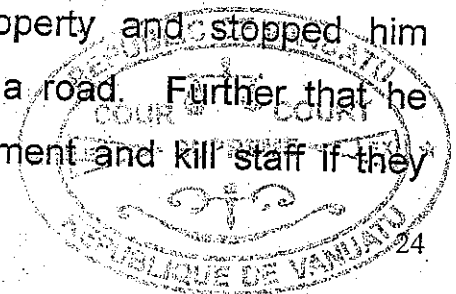
case, it is understandable because the respondent was seeking to protect only her interest"

(my underlining for emphasis)

- (vii) From those passages, it is clear the Court of Appeal being the highest Court of law in Vanuatu has confirmed and recognised that Rachel Vatarul, the First Defendant in this proceeding is the Custom Land Owner of Alau Lands over which Peyrolle Plantation is situated. As such she had an interest and was entitled to have lodged the caution through her sons John Tavuti and/or Willy Tavuti. Further she was entitled to have her name entered in the Transmission of lease dated on 9th December 2009 and registered on 31st December 2009 by the Director as Lessor instead of as the administratrix. When therefore the Director failed to do so in light of the clear declaration of her as Custom Land Owner, the Director had done so by mistake. Further when the Valuer-General ruled in his determination dated 9th March 2011 that Vatarul cannot be the lessor by a letter of administration, he was wrong in law to have done so. It is therefore essential and timely that the situations resulting from those errors be rectified immediately. And I so rule.

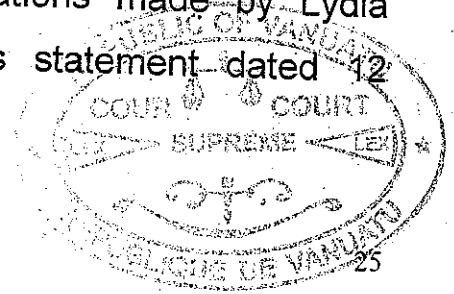
(c) Threats And Violence By Defendants' Since 2006 – 2011

- (i) Mathew Woon deposed to an incident in April 2006 in his statement dated 14 November 2011 at paragraph 4 that Willy Tavuti went into his property and stopped him clearing land and constructing a road. Further that he threatened to burn down equipment and kill staff if they



continued working. Illeenton Woon deposed to an incident on 2-3 November 2011 in her statement dated 8th May 2012 that the defendants had taken over their property by force and caused fear to the children, women and men included as Second Claimants. None of the Second Claimants confirmed the allegations made by Mr and Mrs Woon.

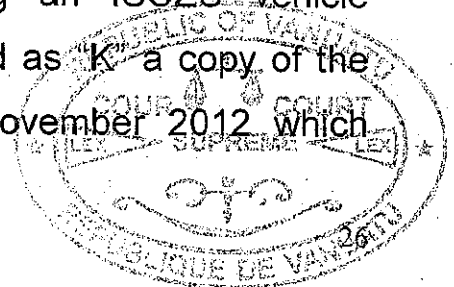
- (ii) In their defence the defendants state that they were provoked by the actions and attitude of Mathew Woon and of Tagaro Brechtefeld.
- (iii) Lydia Tavuti in her statement dated 12 November 2012 (Exhibit D1) that (a) the First Claimant's agents had put a lock on the gate to prevent them having access to the other side to get into town for shopping in October 2011 and, (b) Tagaro Brechtefeld had a gun and became abusive and started firing the gun into the air to scare her, her children and husband off.
- (iv) Bani Tambaci deposed to incidents beginning in 2008 when Mathew Woon had become aggressive, abusive and threatening to officers of the Department of Ports and Harbour and annexes a report as "BT1" to his statement dated 12th December 2012 (exhibit D2).
- (v) Willie Tavuti confirms the allegations made by Lydia Tavuti and Bani Timbaci in his statement dated 12 November 2012 (exhibit D3).



(vi) I hesitate to accept the evidence of Mr and Mrs Woon without any confirmation by the Second Claimants. I however accept the evidence of the defendants showing some degree of provocation, threats, abuses, aggressiveness and/or arrogance by agents of the First and Second Claimants which indicate that the Claimants have come to Court with dirty hands, seeking restraining orders which are equitable reliefs. For that reason the reliefs for restraining orders sought by the Claimants at paragraph 5 (i) of the Judgment is declined and is accordingly dismissed.

(d) Damages

(i) Mathew Woon deposed to the damages he has incurred from paragraphs 44 – 49 of his statement dated 4 December 2012 (exhibit C2). He annexed as "L" and "M" copies of Bank statements showing interest rates from 1 January 2006 to 30 November 2012. He also annexed as "N" copies of invoices from his lawyers totalling VT1,167,553. He also annexed as "O" copies of invoices by Barrett and Partners showing fees outstanding from 31 March 2010 to 31 October 2012 at VT1,114,266 at 1.4% per month. He also annexed as "P" copies of Price List of Lots sold and unsold. He further deposed to the second defendants requesting keys to vehicles and imprisoning of women and children and driving an ISUZU vehicle causing damage to it. He annexed as "K" a copy of the Quotation for repairs dated 27 November 2012 which

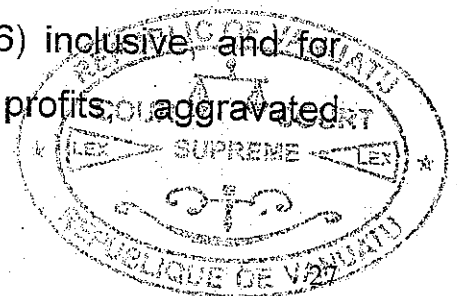


related to the damage occurring in 2008 for the sum of VT2,397,500 (paragraphs 32-33 – exhibit C2). There is no evidence showing the actual cost of repairs which was invoiced and paid by First Claimant.

- (ii) Only Illeenton Woon confirmed unlawful imprisonment and threats by the Defendants on 2 November 2011 in her statement dated 8 May 2012 (exhibit C5). But she has not been able to identify specifically which defendants were involved. She further deposed to Totto Tavuti driving a vehicle and hitting the main gate on 10 June 2012 with Pierro Moses and Leslie Aile in her statement dated 17 September 2012 (exhibit C2). She does not say whether this was the vehicle for which a claim for VT2,397,500 in damages as of repairs.
- (iii) Totto Tavuti, Pierro Moses and Leslie Aile are not named as defendants to this proceeding.
- (iv) In regard to damages sought for loss of income from sale of cattle of VT77,922, I find no evidence in support of this claim.

Conclusions

15. From the analysis of the evidence of the Claimants and the findings reached, the Court reaches the conclusion that all claims for damages made in paragraph (iii) (1) – (6) inclusive, and for unlawful imprisonment and assault, mesne profits, aggravated



damages and exemplary damages are not substantiated and must be dismissed.

Counter-Claim By Defendants

16. The Court deals with the defendants' Counter-Claims in the following manner –

(a) Whether Lease Title 04/3033/005 was obtained through fraud or mistake?

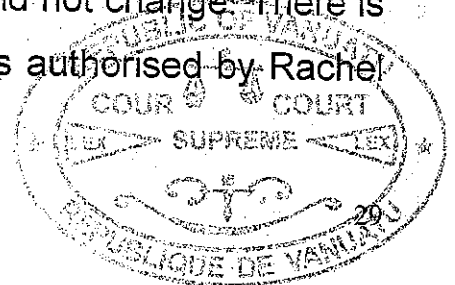
(i) The accepted fact is that Mathew Woon registered a new Lease No. 04/3033/005 as a Commercial tourism lease on 20 January 2006. David Batu Livo gave consent to surrender of lease on the same date 20 January 2006 for a consideration of VT3,455,145. The mistake made was that the new lease was registered without the Minister first approving it. It is also the fact that the approval by the Minister was given only on 23rd August 2006, some 7 months later. This shows a clear error had been made. The evidence of Mathew Woon in his statement dated 14 November 2011 (exhibit C1) annexes a copy of the Lease Title No. 04/3033/005 as "MW1" disclosing the preceding factual details.

(ii) As regards the allegation of fraud there is in evidence a letter dated 14 June 2005 by Supernatavuitano Council of Chiefs to the First Claimant informing them that (a) Rachel Vatarul was the declared custom owner of Alau land and (b) demanding in the clearest term that the First Claimant stops subdivision on the title. This letter is annexed as "JT4" to the



sworn statement of John Tavuti (exhibit D6). It appears the First Claimant did not take heed of the information and the demands of the Chiefs.

- (iii) Clause 6 of the Lease dated 20 January 2006 provides for Custom Owners. Clause 6.1 states –
- “The Lessor hereby declares, warrants and confirms to the Lessee he is duly the Custom Owner of the Leased Land according to the law and under the Constitution of the Republic of Vanuatu and as the Custom –Owner he is entitled to create the leasehold interest in the Leased Land under this Lease”.*
- (iv) That is a blatant lie and dishonesty by David Batu Livo who knew as early as June 1982 when the Land Committee sat, that he was not a claimant, and he spoke only as spokesman for Rachel Vatarul and her sons at the time.
- (v) By inference Mathew Woon knew about all this but he neglected to exercise reasonable restraint. As such he substantially contributed to the blatant dishonesty of David Batu Livo on 20 January 2006 to obtain Leasehold Title 04/3033/005. The area of land covered in this title is 327 hectares and 40 acres whereas the previous title 04/3033/002 covered an area of only 298 hectares and 40 acres. Despite the difference in size, the amount of consideration given by the Claimant did not change. There is no evidence that David Batu Livo was authorised by Rachel



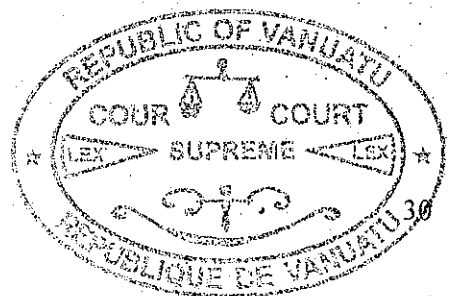
Vatarul to consent to the extra 29 hectares and 4 acres of land being leased out.

- (vi) I am therefore satisfied that Title 04/3033/005 was obtained by the First Claimant through fraud and mistake and must be rectified accordingly.

(b) Whether the lease agreement reached between the First Claimant and David Batu Livo is contrary to Section 38 of the Land Leases Act Cap 163? (the Act)

- (i) The clear evidence is that Leasehold Title 04/3033/005 is a commercial tourism lease.
- (ii) Section 38 of the Act states:
"Every lease shall specify –
(a) The purpose and use for which the land is leased; and
(b) The development conditions, if any"
- (iii) The Schedule to the lease (see MW1 – Exhibit C1) provides:
(The purpose and use for which the land is leased are the development conditions, if any, in addition to those set out in any Rule under the Act, Must be set out below).

A. The purpose and use which the land is leased is all or any of residential purposes, commercial tourism purposes and agricultural purposes at the election of the Lessee.



B. There are no development conditions in addition to those set out in any Rule under the Act.

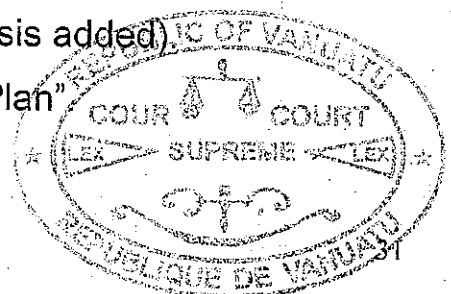
C. See Annexure A for further conditions.”

(iv) Annexure A contains the following clauses –

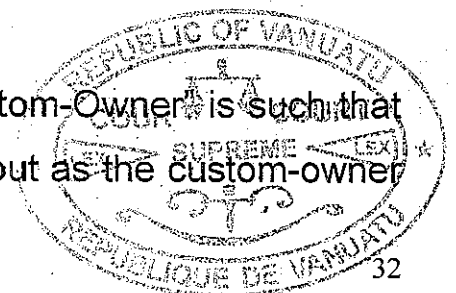
- “Clause 1 - *Term Commencement*
- Clause 2 - *Payment of Rent*
- Clause 3 - *Rent Review (as amended)*
- Clause 4 - *Nil*
- Clause 5 - *End of Term – Market Value or New Lease*
- Clause 6 - *Custom – Owners*
- Clause 7 - *Agreements by the Lessor*
- Clause 8 - *Re-entry Provisions*
- Clause 9 - *Registration of Lease*
- Clause 10 - *Determination of Disputes*
- Clause 11 - *Governed by Republic of Vanuatu Laws*
- Clause 12 - *Strata Title Provisions*
- Clause 13 - *First Generation Sales (as amended)*
- Clause 14 - *Definitions.*

(v) Clause 14 provides for definitions of –

- (i) “Commercial Lot means a Lot which is not used primarily for residential or accommodation purposes.”
- (ii) “Custom-Owners means the recognised legal custom-owners of the Leased Land according to all the laws, including without limitation, the Constitution of the Republic of Vanuatu.” (emphasis added)
- (iii) “Lot means a lot in the Strata Plan”



- (iv) "Strata Plan means any strata plan or strata plans to be registered over the Leased Land pursuant to the Strata Titles Act including without limitation, a strata plan of re-subdivision to subdivide any Lot".
- (v) Strata Titles Act means the Strata Titles Act 29 of 2000 of the Republic of Vanuatu as amended from time to time".
- (vi) In Rachel Vatarul's evidence by sworn statement dated 12 December 2012 (Exhibit D5) at paragraph 7, she deposes to the concerns of Sakius Batu Livo, son of the late David Batu Livo about the dishonest dealings of Mathew Woon with his father about Lease Titles 04/3033/002 and 04/3033/005. She annexes a sworn statement by Sakius Batu Livo as "RV3 (c)". Paragraph 7 of that document shows dishonesty and force used against David Livo to sign lease documents in relation to Lease Titles 04/3033/002 and 04/3033/005. Paragraph 8 shows false promises by Mathew Woon. Paragraph 9 shows failure by the First Claimant not paying premium pursuant to signing of the lease agreement in Sydney, Australia.
- (vii) Mathew Woon did not challenge the inadmissibility of those evidence or rebut them. As such they are admissible to question the validity of the new lease 04/3033/005.
- (viii) The definition of the term "Custom-Owner" is such that when David Livo held himself out as the custom-owner

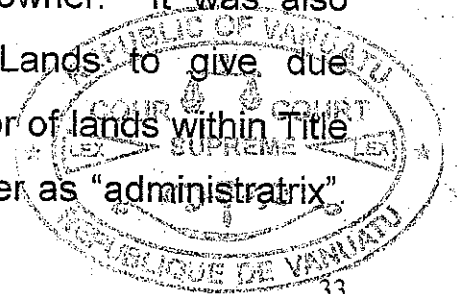


of those lands in question when in fact and law he was not recognised by a competent land tribunal, he had acted dishonestly. That action amounted to fraud which now has an adverse effect on the validity of the lease agreement in relation to Lease Title 04/3033/005.

- (ix) From those analysis, I am satisfied and I accept the defendants' counsel's submissions that the lease agreement in relation to Lease Title 04/3033/005 was made in breach of Section 38 of the Act. I therefore reject the Claimants' submissions in relation to that issue.

(c) Whether Rachel Vatarul is the declared Custom-Owner of Alau Lands and ought to have been recognised and registered as such?

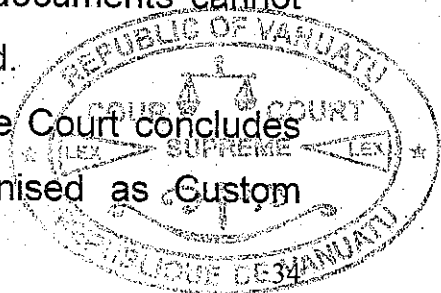
- (i) This Court takes judicial notice of the decision of the Court of Appeal in Civil Appeal Case No. 20 of 2011 Zakius Batu Livo v. Rachel Vatarul which confirms this Court's recognition of Rachel Vatarul as the only legally recognised Custom-Owner of the lands which are the subject matter of this proceeding.
- (ii) Following those recognitions it was encumbered upon the First Claimant to give due recognition of Rachel Vatarul as the recognised legal custom land owner. It was also encumbered on the Director of Lands to give due recognition and register her as Lessor of lands within Title 04/3033/005 instead of registering her as "administratrix".



Those mistakes and omissions ought now to be rectified.
And I so rule.

(d) Whether Rachel Vatarul's Consent was required and necessary to be obtained by the First Claimant before subdividing land into Strata Titles?

- (i) Rachel Vatarul has given evidence in her sworn statement dated 12 December 2012 (exhibit D5) that she was never consulted nor made aware of any dealings by David Batu Livo and the First Claimant. Further she states she did not give her consent at any time to the First Claimant or to David Batu Livo to agree to subdivisions. Further that everything done by David Livo was done behind her back.
- (ii) Mathew Woon deposes to a Lands Tribunal decision dated 17 October 2006 (Annexure "S" – Exhibit C2).
- (iii) That is a mysterious decision. It originated from the Lands Department and the maker is unknown. It is a decision by a Land Committee which is not recognised by the Court according to the Court of Appeal decision in Valele v. Touru [2004] VUCA3. Further that decision is superseded by the decision of the Lands Tribunal made on 20th October 2010 which is the final decision of a competent land tribunal confirming Rachel Vatarul as the true custom land owner of all lands within lease title 04/3033/005. For those reasons the documents cannot be admissible evidence and it is rejected.
- (iv) In light of all those factual evidence the Court concludes that Rachel Vatarul has been recognised as Custom



landowner of all those lands within Title 04/3033/005 and her consent was required to be obtained before any transfers or creation of a new lease or any subdivision into strata titles. That consent was required under Section 36 of the Act.

(e) Whether the defendants were entitled to lodge a caution?

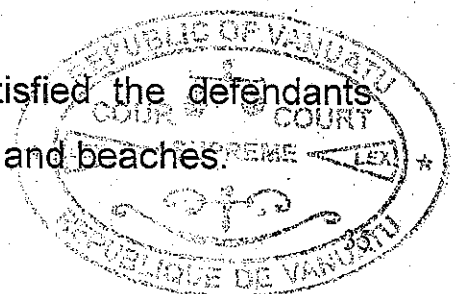
- (i) For reasons canvassed in relation to the issue of Forfeiture under (b), this issue is answered in the affirmative.

(f) Whether the defendants had authority to issue a forfeiture notice?

- (i) The answer is in the affirmative for consideration made in relation to the Forfeiture issue in (b)

(g) Whether the defendants lost control over their lands and white sandy beaches?

- (i) John Tavuti deposes to losing their valuable beaches at paragraph 14 of his sworn statement dated 27 November 2012.
- (ii) Mathew Woon's statement (Exhibit C1) annexes as part of annexure "MW3" a plan of Lease Title which confirms that virtually the entire coast lines have been subdivided into strata titles. Only at the tip of the point is there allowed a 'green space'.
- (iii) From those evidence I am satisfied the defendants have lost control over their lands and beaches.



(h) Whether they (defendants) are entitled to the reliefs they seek in their Counter-Claims.

(i) From the evidence before the Court the defendants have sought and cried out for justice for a very long time and have been denied such for also a very long time. In my opinion justice can only be seen to be done if the defendants are granted the reliefs they seek from the Court. This issue is therefore answered in the affirmative.

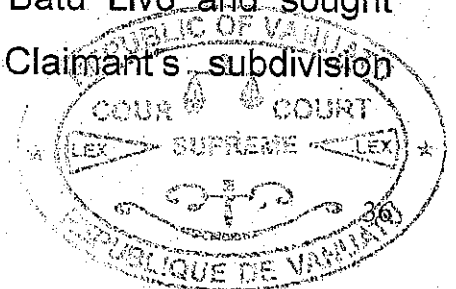
17. Submissions By Defendants

(h) In their written submissions the defendants have raised five issues as follows : -

“1. That David Batu Livo had breached his fiduciary duty when he decided to dispose of the First Defendant Rachel Vatarul’s land and sell without her consent.

2. That late David Batu Livo did not seek the consent of First Defendant, Rachel Vatarul when he engaged with Mathew Woon, Director of the First Claimant in creating land lease title no. 04/3033/005 purposely for strata title project (land subdivision).

3. The defendants were being provoked by the illegal action of the First Claimant with late David Batu Livo and sought various means to stop the First Claimant’s subdivision



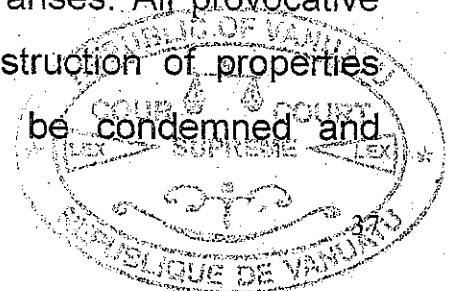
project, as they are fearing that their land will be sold out to third parties.

4. That the contract for land lease title 04/3033/005 has breached relevant section of Land Leases Act and is therefore null and void and is void ab initio.
5. That land lease title no. 04/3033/005 was being created by Fraud and Mistake and ought to be rectified retrospectively."

(ii) I have read carefully the detailed and comprehensive legal arguments and submissions made by Counsel for the defendants in respect to the five issues raised. The Court congratulates and appreciates the extensive research and work put into those submissions and commend Counsel for his efforts and commitment. I accept those submissions in their entirety.

(iii) On the basis of preceding discussions of evidence and considerations thereof, all the five issues are answered in the affirmative.

(iv) On the issue of provocative actions by the Claimants which gave rise to the actions by the defendants as some sort of revenge, the Court should clarify that Courts do not condone actions which are disproportionate to the degree of provocation that initially arises. All provocative actions involving violence and destruction of properties wilfully and maliciously ought to be condemned and

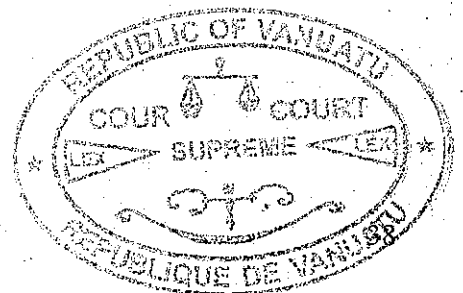


perpetrators of them should be punished appropriately according to law, but only if criminal charges have been brought. In this case sadly none of that has happened.

(v) The Court records however that the defendants or at least three of them namely Willie Tavuti, Dalon Sope and Paul Sope were fined by this Court on 12 November 2012 for their unlawful actions after October 2011 which were in contravention of lawful orders of the Court. These periods are therefore outside of the scope of the Claimants' claims against the defendants and are therefore not relevant.

(vi) On the issue of unconscionable conduct of Mathew Woon and the First Claimant, I accept that the case of Commercial Bank of Australia Ltd. V. Amadio [1983] HCA 14, (1983) 151 CLR 447 is a persuasive authority which presents good law on this issue and I adopt it to hold on the basis of the overwhelming evidence before me that the First Claimant or its agent or Director was guilty of unconscionable conduct when he dealt with David Batu Livo to create and obtain his consent, instead of the consent of Rachel Vatarul to register Lease title 04/3033/005. I therefore accept the maxim of equity which states that:

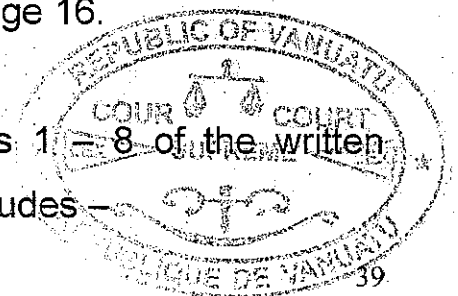
"Equity will not allow a statute to be used as a cloak for fraud".



- (vii) I accept Counsel's submissions that the cases relied on by the First Claimant of Ratua v. Dai [2007] VUCA 28; Kalotiti v. Kaltapang [2007] VUCA 25 and Mariango v. Nalau VUCA 15 have no relevance to this case.
- (viii) Finally I accept Counsel's submission that the case of Solomon v. Turquoise Ltd. [2008] VUSC is authority for his submission that indefeasibility of title can be defeated retrospectively. The judgment of the trial judge in this case was upheld by the Court of Appeal on appeal in Civil Appeal Case No. 20 of 2008 Turquoise Ltd. V. Philip Kalsuak and Others.

18. **Submissions by Claimant**

- (i) The Claimants' Counsel filed written submissions on 19 February 2013 in response to the defendants' written submissions filed on 17 February 2013. I have read and considered those submissions carefully in light of all the evidence before me and conclude that all arguments made by Counsel at bullet points on page 1 and at the top of page 2 are untenable and are rejected for reasons and findings made under Discussions and Considerations in paragraph 14 of this judgment commencing at page 16.
- (ii) On the facts stated from paragraphs 1 – 8 of the written submissions on pp2-3 the Court concludes –

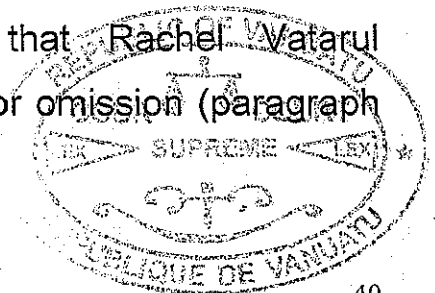


(a) In relation to Strata lease – paragraphs 1, that since June 2005 the First Claimant had been demanded by the Chiefs to stop dealing with David Batu Livo and subdividing the land because he was not the custom land owner. However the First Claimant was adamant and ignored all plights of the defendants through the Council of Chiefs and even by John Tavuti and through their caution. He proceeded with the strata subdivisions and sale. As such he took great risks and if he has suffered any losses or damages as claimed, they were at his own making and only they (First Claimant) are liable for and are responsible to make good any such losses or damages, not the defendants.

(b) In relation to the recognition of David Batu Livo since 1981, (paragraph 2) it is accepted but, only on the basis he was spokesman and representative of custom owner and nothing more. See paragraph 5.5, page 5 of this judgment.

(c) In relation to the First Claimant having no knowledge of any fraud, mistake or omission (paragraph 3) the Court has found on the evidence to the contrary and therefore the argument presented is untenable and is rejected.

(d) In relation to the contention that Rachel Watarul contributed to the mistake, fraud or omission (paragraph



4), the Court has found on the evidence to the contrary and therefore the contention is untenable and is rejected.

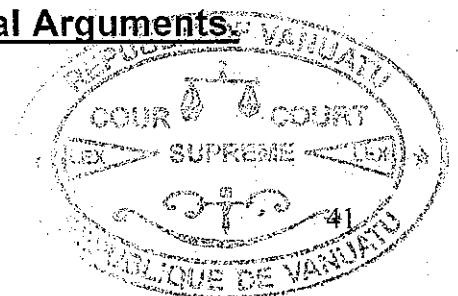
(e) In relation to the contention in paragraph 5 that the strata lease cannot be renegotiated, the contention is untenable and is rejected. The Court has found clear evidence of the lease being entered into through force or undue influence which calls the validity of the lease into question, and the credibility of the evidence of Mathew Woon.

(f) In relation to the damages and contention under paragraph 6, the Court has found there to be insufficient evidence to substantiate them. Therefore those contentions are untenable and are rejected.

(g) In relation to the contention in paragraph 7, it is absurd and is rejected. The Court can draw only one possible inference and that is that if the First Claimant accepts the gate is his and is the only way to access his property, then in all probability only they are entitled to lock it or ensure it is locked.

(h) In relation to the contention in paragraph 8, it is untenable and is rejected. The boy was not identified and named as a defendant. And there is no evidence he acted as agent of the defendants.

19. Claimants' Responses to Defendants' Legal Arguments.

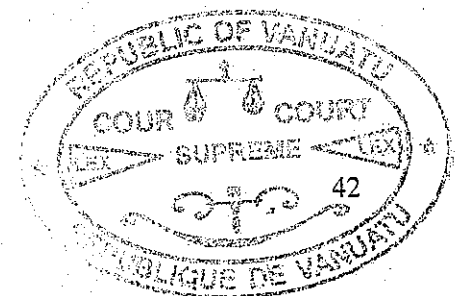


(a) In relation to the responses to the First Legal Argument in paragraphs 9 – 15 inclusive, these are untenable and are rejected by the Court. The case of Central London Property Trust Ltd v. Trees House Ltd [1947] cited and relied on by the Claimants is good law and is consistent with the passage of Modern Equity: Hanbury & Martin 15th Edition 1007 (quoted under paragraph 11). However in Rachel Vatarul's case it is not applicable, because in 1981 at the hearing before the Joint Land Committee Mrs Vatarul made very clear representation that as the only Claimant, David Livo was only her spokesman and that he would represent her and her sons' interests in those lands only until they reached maturity. This Court and the Court of Appeal have endorsed those representations and there can be no unambiguity about them.

(b) In relation to the responses to Legal Argument No. 2 in paragraph 16, the Court on the evidence has found to the contrary and therefore this contention is untenable and is rejected.

(c) In relation to the responses to Legal Argument No. 3, in paragraphs 17 – 22 those contentions are untenable and are rejected.

(d) In relation to the responses to Legal Argument No. 4, in paragraphs 23 – 24 the Court has found on the evidence to the contrary and therefore those contentions are untenable and are rejected.

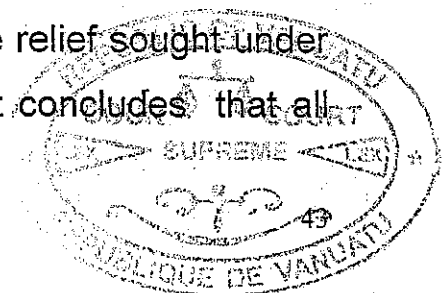


(e) In relation to the responses to Legal 'Argument No. 5 in paragraph 25 the Court has found on the evidence there was fraud and mistake committed by David Batu Livo and the State through its employees at the Lands Department and that the First Claimant had knowledge and substantially contributed to it by omitting to do anything to stop the strata subdivisions subsequent to creating the new lease title 04/3033/005. Those contentions are untenable and are rejected.

(f) Finally the Claimants' contention that the First Defendant has no right to act as lessor under a probate case as an executor according to Molivono case [2007] is misconceived and is not tenable and is rejected. The Claimants' pleadings have recognised her as lessor yet they prevented her from being recognised as such by taking unreasonable steps to have her cautions removed, which removal the Court has found and declared unlawful. Further on the basis of the Molivono case the First Claimant convinced the Valuer-General (though wrongly) to hold that Rachel Vatarul could not be lessor through administration contrary to the Court of Appeal ruling in the more recent case of Sakias Batu Livo v. Rachel Vatarul [2011] VUCA 20.

20. Conclusions

(a) From all the preceding analysis, discussions, considerations findings, reasons and rulings except for the relief sought under paragraph 5 (ii) of the Judgment, the Court concludes that all



claims by the Claimants fail and are hereby dismissed in their entirety.

(b) On the other hand, the Court is satisfied on the balance of probabilities that the defendants have established their claims by admissible evidence and the Court hereby grants judgment in their favour on their Counter-Claims.

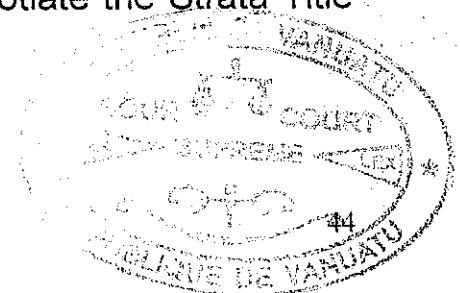
(c) It is the view of the Court, however that the Strata Title Project should not be stopped but should be re-negotiated by the First Claimant with Rachel Vatarul.

Final Orders

21.(a) The Second Defendants, by themselves their agents, servants, representatives or relatives be hereby restrained from intimidating, threatening, assaulting the First Claimants, its Director, families, agents, workers and the Second Claimants, their agents, servants and relatives (including wives and children) either on Aore Island or elsewhere.

(b) The Third Defendant by its servants, agents or representatives rectify the register forthwith by deleting "David Batu Livo" and substituting the name "Rachel Vatarul" as lessor of Lease Title 04/3033/005.

(c) The First Claimant be at liberty to re-negotiate the Strata Title Project with Rachel Vatarul.



(d) All transfers of Lots within the Strata Title Project be rectified accordingly.

(e) The Defendants be entitled to only 80% of their costs of and incidental to the action on the standard basis as agreed or taxed.

DATED at Luganville this 29th day of April 2013.

BY THE COURT


OLIVER A. SAKSAK

Judge

