

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

Civil Case No.120 of 2008

BETWEEN: DOMINIQUE DINH

Claimant

AND: FRANK KALPOI

First Defendant

AND: VANUATAP TOURS LIMITED

Second Defendant

AND SAND AND SALT LIMITED

Third Defendant

AND: REPUBLIC OF VANUATU

Fourth Defendant

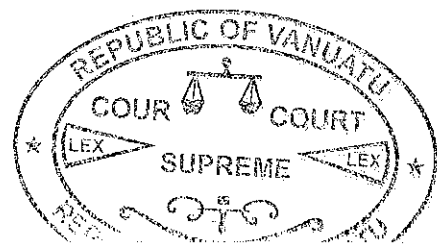
Coram: Vincent Lunabek CJ

Counsel: Mr. Jack Kilu for the Claimant
Mr. Edward Nalyal for the First and Second Defendants
Mr. John Malcolm for the Third Defendant
Ms. Florence Williams of SLO for the Fourth Defendant

JUDGMENT

Introduction

1. In these proceedings, Dominique Dinh says that his interest as lessee of leasehold land at Pango was fraudulently and/or mistakenly taken from

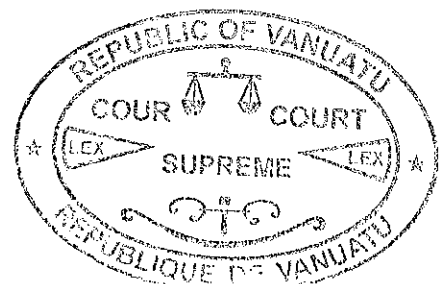


him. He seeks rectification of the Land Register reinstating him as the registered proprietor of the lease.

2. The current registered proprietor of the lease, Sand and Salt Limited, the third defendant, says its registration was without fraud or mistake and that it should be confirmed as the registered proprietor. Westpac Bank was joined in these proceedings as an interested party claiming it was the mortgagee of the leasehold land. It supports the claimant's case. But it says if the claimant is not the registered proprietor then Westpac are entitled to be indemnified by the Government of Vanuatu for any loss they have suffered. This indemnity is sought because Westpac, depending upon this Judgment, may no longer have the security of this land for their loan.
3. The Government of Vanuatu as the Department of Lands denies there has been any fraud or mistake in dealing with the land. They say no rectification is required nor any indemnity is appropriate given they have made no mistake.

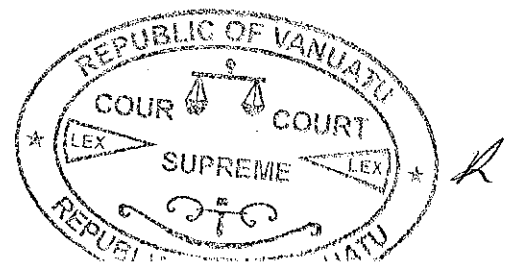
The Parties and Background Facts

4. On 20th of March 2000 Mr. Kalpoi, who is now deceased, as lessor, leased to Dominique Dinh, the land at Pango Point in lease number 12/0844/037. Mr. Dinh had hoped to develop the land in seven adjoining leases (including 037) which he held as lessee. Westpac Bank advanced Mr. Dinh VT476.000.000 in 2003. They believed the advance was secured by a mortgage over all seven titles through registration of the mortgages against the leasehold interests.



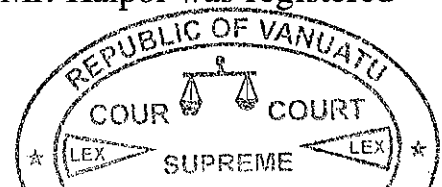
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5. There is no dispute in these proceedings that Mr. Dinh was the lessee of the land under lease 037 up until 2008. Mr. Dinh had decided in the long term that he would surrender the 037 lease so that two new leases could be created from the 037 land. He therefore prepared documentation for presentation to the Department of Lands proposing to surrender the 037 lease for the specific purpose of issuing two new leasehold titles of which he would continue to be the registered lessee.
6. However the Department of Lands treated the surrender documents of the 037 lease as the surrender of any interest in the 037 land by Mr. Dinh. Two new titles were issued 224 and 225 replacing 037. The lessor was Mr. Kalpoi the first defendant but no lessee was noted on the two new titles. Mr. Kalpoi then leased the two new titles to Vanuatap Tours Limited the Second defendants. As I have noted he was able to do so because the Department of Lands had treated the surrender of the 037 lease as a surrender of any interest in the land by the lessee Mr. Dinh. Vanuatap Tours Limited was owned by Mr. Kalpoi and his father.
7. Mr. Dinh says that the transfer from Mr. Kalpoi to Vanuatap Tours Limited was fraudulent. He says that both Mr. Kalpoi and his father knew that Mr. Dinh held the lease and Mr. Dinh had not agreed to transfer it or surrender it to anyone.
8. Vanuatap Tours Limited then transferred their leasehold interest in the land, now consisting of the two titles 224 and 225, to Sand and Salt Limited the third Defendant for VT 10.000.000 for each lease. Sand and Salt maintains, it had no knowledge of any fraud or mistake in the



transaction and therefore should be confirmed as the registered lessee of the two titles.

9. Westpac were joined to this proceeding as an interested party. They lent significant funds to Mr. Dinh. They believed the loan was secured by a mortgage over the 037 lease. However their mortgage was not registered against the 037 lease title. They say they did all that was required as mortgagee of leasehold 037 to protect their interest. They presented their mortgage for registration to the Department of Lands but through mistake or negligence the Department of Lands failed to register their mortgage against leasehold 037. Westpac therefore say their rights have been compromised by both the fraudulent activities of the First and Second Defendants and the errors of the Department of Lands. Westpac submits that Mr. Dinh's interest as the lessee and the Bank's interest as mortgagee should all be reinstated together with the title 037.
10. Failing reinstatement Westpac submits the failures by the Department of Lands to register the mortgage means Westpac is entitled to be indemnified by the Government pursuant to the Land Leases Act for any loss Westpac may have suffered.
11. Subsequently the first defendant Mr. Kalpoi has died. He was not represented at trial nor was Vanuatap Tours Ltd.
12. The following facts of this case were accepted at trial. There is no dispute that between 2000 and 2008 Mr. Dinh was the lessee of the 037 land. There is no dispute that in 2008 the Registrar of Lands canceled lease 037 and issued two new leases for the land being lease 224 and 225. It is accepted that after the issue of two new leases Mr. Kalpoi was registered



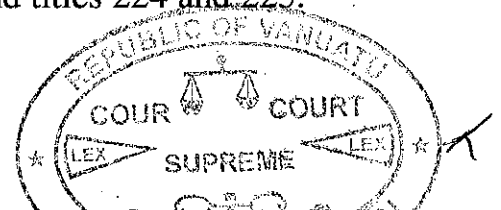
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as the lessor and Vanuatap Tours was registered as the lessee. Vanuatap is owned by Mr. Kalpoi senior and his son. Vanuatap Tours limited transferred lease 224 and 225 to Sand and Salt Limited. Sand and Salt Limited paid VT 10.000.000 for each lease.

Issues for Determination

13. The issues therefore that arise in this case are:

- A. Was the surrender of lease 037 and the transfer of the two new leasehold titles for 224 and 225 to Vanuatap Tours Limited by fraud or by mistake?
- B. If the answer to A is no then an order for rectification cannot be made with respect to the transfer to Vanuatap Tours. In such circumstance Sand and Salt Limited are the lessees of the two titles and their titles cannot be disputed.
- C. If the answer to A is yes then did Sand and Salt Limited have knowledge of the fraud and or mistake when Vanuatap Tours Limited transferred the leases to them?
- D. If the answer to C is no then the Claimants claim for rectification must fail.
- E. If the answer to C is yes then the Claimant's claim for rectification will succeed, subject to the exercise of a further discretion by the court.
- F. If the Claimant's claim for rectification succeeds then Westpac are entitled to be restored as Mortgagee under lease 037 and any replacement leases issued with respect to the land comprising lease 037.
- G. If the Claimant's claim fails then Westpac has lost its mortgagee rights with respect to the land lease in 037 and titles 224 and 225.

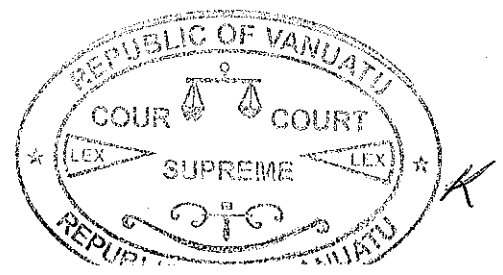


H. If Westpac loses its mortgagee security does it have a cause of action for indemnity against the Government of Vanuatu because of the actions of the Registrar of Lands?

I. If Westpac has a successful claim for indemnity against the Government what is Westpac's loss?

14. I note that in its original statement of claim the claimant had included damages claims (compensation) with respect to each of the defendants as well as seeking rectification of the Land Register. In its amended statement of claim of 26th August 2009, the relief claimed in paragraphs 1 and 2 of the prayer for relief is declaration and rectification. In paragraphs 3 and 4 the first, second and fourth Defendants are sued claiming punitive or exemplary damages only. There is no claim against the first and second defendants for compensatory damages should the declaration and rectification causes of action fail. There is no claim for indemnity costs against the fourth defendant arising from its alleged failures pursuant to (section 101 of the Land Leases Act.) to keep an accurate Land lease Register.

15. The first issue is therefore whether there was a fraudulent transfer of lease 037? I am satisfied that the surrender of lease 037 and the creation of two new leases in Vanuatap Tours' name as lessee was obtained by fraud. I consider that the evidence established that at no time did Mr. Dinh ever intend to surrender his leasehold interest in the land in the 037 lease. He had a large scale development in mind which involved seven adjoining leases at Pango Point. The 037 lease was one of the seven leases. Mr. Dinh had borrowed money from Westpac Bank for these purchases. He had mortgaged his leasehold interests to Westpac.

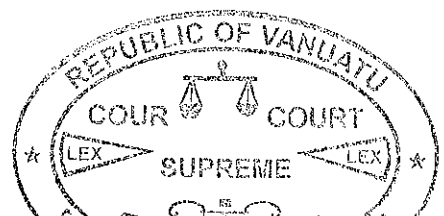


16. In 2008 Mr. Dinh provided a surrender and consent form to the Department of Lands. The intention of that document was to give notice that he intended to surrender lease 037 so the two new leases could be issued for the same land in Mr. Dinh's name.

17. As Counsel for Mr. Dinh observed there are two types of surrenders of lease provided for in the Land Leases Act. The first is a surrender to facilitate a subdivision of the land. This is recognized by section 12 of the Land Lease Act. The surrender is provided "for the purposes of the lessee subdividing his lease into more than two plots". Self-evidently when there is such surrender the lessee retains his rights with respect to the land. He is entitled to be registered as the lessee with respect to the new leases.

18. Section 49 of the Act anticipates quite a different surrender. There, a lessee is surrendering absolutely his interest in the land. Once surrendered the lessor may re-lease the property to another. Typically the lessee surrendering the lease (assuming the lease has not expired) could expect payment to do so. The lessee may be surrendering a valuable asset. The conveyance forms which trigger these different lease surrenders are different. One notes the surrender is for the purpose of subdivision and the lessee will regain ownership. The other is an absolute surrender.

19. It seems that Mr. Dinh may have chosen the wrong form, one that related to the section 49 of the Land Leases Act rather than section 12 when he filed the documents with the Department of Lands. However it is evident in the body of the form where the detail of Mr. Dinh's transactions is noted that what was intended were surrender for the purpose of

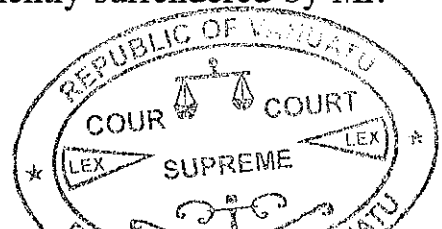


subdivision and the creation of new leases. The consent to surrender form provided by Mr. Dinh states that the “consent is to surrender the above title 037 and to subdivide into more than two plots.” This language follows consistently the language of section 12.

20. In my view the fact that, as the Department of Lands noted, the form used was not fully and correctly completed, does not assist the Department of Lands. Mr. Dinh’s intention from the document filed was clear. There was nothing to suggest that Mr. Dinh ever intended to surrender the leasehold interest absolutely. If the surrender form had been read carefully by the Department employees it would have been clear. This was surrender for Subdivision. There was no evidence of any contract with any lessor or any new lessee that Mr. Dinh was surrendering the lease or of any consideration for doing so.

21. I am satisfied that if the document had been read it would have been evident that this was a section 12 surrender. Further Mr. Dinh knew he had a mortgage from Westpac which he believed was secured over the 037 lease. He would have known that he could not surrender the lease without Westpac’s consent. While Westpac would have consented to subdivision surrender, returning the land to Mr. Dinh as lessee with two titles, they would hardly have agreed to surrender their security over the land for no compensation or other consideration.

22. It is difficult to know exactly how the Department of Lands came to surrender the 037 lease. It is probable that they misread or misunderstood the intent of Mr. Dinh’s lease surrender document. They presumably mistakenly thought the lease was being permanently surrendered by Mr.



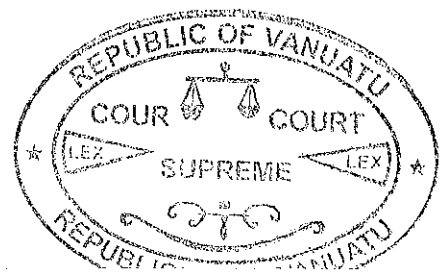
Dinh. This was wrong. It is a mistake that should not happen given the intent of the document was clear if it had been properly read.

23. Mr. Kalpoi and Vanuatap Tours without question knew that Mr. Dinh had not sold Vanuatap his leasehold interest in lease 037. This land had a valuable lease. There were no negotiations between Mr. Dinh, Mr. Kalpoi and Vanuatap Tours for the surrender of the lease. No payment was made by them, no contract was entered into. Mr. Kalpoi and the Vanuatap Tours would have known that transferring Mr. Dinh's interest to Vanuatap Tours was dishonest and fraudulent. What appears to have happened therefore is that after the Department of Lands mistakenly registered the surrender of leasehold 037, Mr. Kalpoi and Vanuatap Tours took fraudulently advantage of the Department's mistake to have Vanuatap Tours replace Mr. Dinh as lessee of the land.

24. I am therefore satisfied that the answer to the question A is that the first and second defendants acted fraudulently when Vanuatap Tours became the registered proprietors of leases 224 and 225.

25. I therefore do not need to consider question B. I now turn to question C, that is whether Sand and Salt Limited knew of Vanuatap's fraudulent transfer of the lease to them or whether Sand and Salt Limited acted fraudulently in obtaining the leasehold interest with regard to leases 224 and 225.

26. I am satisfied that Sand and Salt Limited obtained the lease of 224 and 225 without knowledge of any fraud or mistake and without contributing to the fraud.



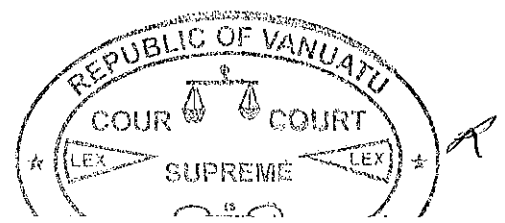
27. Section 100 (1) of the Land Leases Act [CAP 163] provides that the Supreme Court may rectify a land register by cancellation or amending an entry if a lease is obtained by fraud or mistake.

28. Section 100(2) provides that there should be no rectification of the title of a proprietor who is in possession of the land and has acquired an interest in the land for valuable consideration unless he knows of the fraud or mistake, or caused the fraud or mistake, for which rectification is sought, or substantially contributed to the fraud or mistake by his neglect or default.

29. The Claimant's case is that Sand and Salt Limited through their Director Mr. Michael Thompson knew about the fraud or mistake which gave rise to the registration in favour of Vanuatap's Tour. In the alternative, the claimant says Sand and Salt Limited substantially contributed by their neglect to the events which gave rise to the fraud. They say Sand and Salt Limited cannot resist the rectification application.

30. The claimant's submissions in support of his section 100 (2) claim focused on Sand and Salt Limited's actions and what their lawyers should have done to check the Land Registry documents relating to Mr. Dinh's interest in the land.

31. There is no evidence that Sand and Salt Limited had any direct knowledge of any fraud. The claimant says a proper check of the Land Registry documentation by Sand and Salt Limited relating to the land would have shown the fraudulent and mistaken nature of the transaction involving the first and second defendants. They claim that Sand and Salt

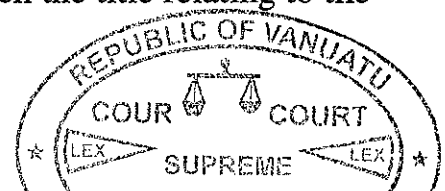


Ltd therefore should have had knowledge of the fraudulent actions of the first and second defendants if they had properly followed standard conveyance practice. Their failure to follow this practice meant Sand and Salt Ltd by their neglect and default allowed the fraud to happen. Thus Sand and Salt Ltd could not resist rectification by reinstatement of the 037 title in Mr. Dinh's name.

32. There is no suggestion in the evidence that Mr. Thompson knew there was something suspicious about the transactions or that he had actual knowledge of fraud or mistake. The claimant's submissions focus on the claim that some documents in the land registry office if searched may have raised concern about the transactions or that a careful reading of the various conveyance documents should have raised suspicions by Sand and Salt Ltd about the interest of Vanuatap Tours.

33. The claimant's case is therefore that by a failure to search the land registry documents relating to the transfer of the lease to Mr. Dinh in 2000 and then the surrender of his leasehold interest in 2008 and to investigate the transfer of the lease to Vanuatap Tours Limited, there was neglect or failure and this negligence substantially contributed to the fraud or mistake by the first and second defendants.

34. At no level did Mr. Thompson and Sand and Salt Ltd contribute at all to the fraud and mistake which allowed the removal of Mr. Dinh as lessee and the registration of Vanuatap Tours as lessee. Sand and Salt Ltd played no part in that transaction. That transaction occurred well before Sand and Salt Limited's involvement in the lease. In any event I do not consider Sand and Salt Limited and Mr. Thompson were required as part of the obligation of prudent conveyance to research the title relating to the



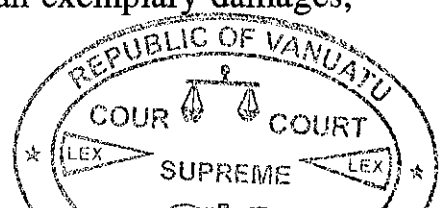
lease back to Mr. Dinh's interest to see if the subsequent transactions were legitimate. Vanuatap Tours were the registered lessee. Sand and Salt Limited were entitled to rely upon that registration to show who the registered lessee was. There was nothing in my view about that registration interest that on the face of it required enquiry. Mr. Thompon and Sand and Salt Limited had no relationship with Mr. Dinh. Their relationship was with Vanuatap Tours.

35. I am therefore satisfied in terms of section 100 (2) that Sand and Salt Limited were:

- a. In possession of the leased land. This does not require, as the claimant submitted, that Sand and Salt Limited are in constant physical possession of land, the subject matter of the lease.
- b. That Sand and Salt Limited paid valuable consideration for the land.
- c. For the reasons given, Sand and Salt Limited had no knowledge of the fraud or mistake, or caused the fraud or mistake or substantially contributed by neglect to the fraud or mistake in consequence of which the rectification is sought.

36. I therefore reject the claimant's action for rectification. I am satisfied that Pursuant to section 100(2) of the Land Leases Act, the Lease Register should not be rectified and the current registration of the 224 and 225 leases remain.

37. The result of this conclusion is that the claimant has lost its lessee interest with respect to the leases 224 and 225 and Westpac Bank has lost its mortgage security on the land. As I have noted Mr. Dinh did not bring alternative proceedings seeking damages other than exemplary damages,



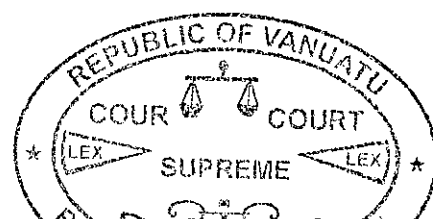
against Mr. Kalpoi or Vanuatap Tours. Nor did Mr. Dinh bring an indemnity claim under section 101 of Land Leases Act. No evidence was called at trial to support a claim for exemplary damages. No submissions were made by the claimant at the end of the case which would justify an order of exemplary damages. That application is refused.

Westpac Bank Claim

38.I turn to Westpac Bank's claim for indemnity. The question is whether Westpac is entitled to indemnity for any losses pursuant to section 101 of the Land Leases Act arising from the damage it says it has suffered as a result of refusal to order rectification. Westpac applied for an order under section 103 of the Land Leases Act for an indemnity award because of what it says was a mistake by the Department of Lands in failing to register its mortgage in respect to lease 037.

39.The issue can be simply put in this way. Westpac says it provided a mortgage document to the Department of Lands for registration relating to lease 037. The Department of Lands wrongly failed to register the document against Mr. Dinh's then leasehold interest. If the mortgage had been registered then it would not have been possible for the 037 lease to have been surrendered without Westpac Bank's consent. Mr. Dinh would then have remained the lessee and Westpac Bank would have maintained its security on the land.

40.The Department for Lands' case is that the evidence could not satisfy the Court the lease relating to the mortgage 037 was tendered for registration with the Department for Lands. If the mortgage was not tendered then the



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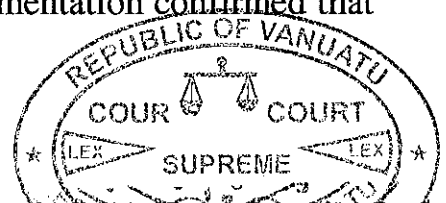
fault was Westpac Bank's and their solicitors and the Department for Lands did not have to indemnify Westpac.

41. The Department of Lands raised two other submissions respectively, (a) a claim that the 037 lease was intentionally surrendered by Mr. Dinh. I have already considered and rejected this claim.

(b) A question about what should happen after the surrender. This issue does not arise given my conclusions with respect to (a) above.

42. I am satisfied on the balance of probabilities that the evidence establishes the Westpac mortgage was tendered for registration with the land registry office and that the failure to register the mortgage was that of the Department for Lands. In this, I substantially accept the evidence of Westpac and that of their solicitors Ridgeway Blake. In particular the evidence establishes that Westpac through its agents tendered for registration a collateral mortgage with respect to lease 037 securing up VT 476.000.000 on the 16th of April 2004. That mortgage should have been registered by the Department of Lands against the 037 lease but it was not.

43. The evidence in support of the claim by Westpac that the mortgage was tendered for registration came from Mariana James of Westpac Bank together with Mr. Garry Blake and Mr. Kenzine Kambii of Ridgeway Blake a firm of lawyers in Port Vila. I have no reason to doubt the evidence of Mr. Blake and Mr. Kambii that along with a number of documents the collateral mortgage relating to lease 037 together with the relevant fee was tendered to the Department of Lands for registration. The solicitor's records confirm the presentation of the documents for registration. The Department of Lands own documentation confirmed that



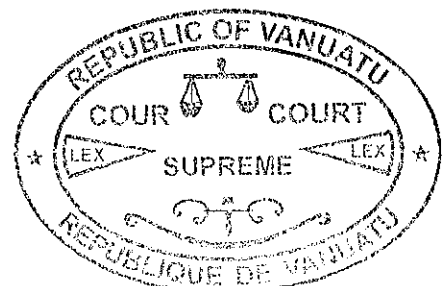
the mortgage had been tendered for registration. There is no reason to doubt that the mortgage wasn't in registrable form and the relevant fee paid.

42. The failure to register the mortgage was as a result of mistake or negligence by the Department of Lands. As a result Westpac Bank lost its security with respect to lease 037, Westpac Bank is therefore entitled to an indemnity from the Department of Lands for any loss it may have suffered pursuant to its 5103 Land Leases Act application.

43. An enquiry as to damages will now be needed to identify what, if any, loss Westpac Bank has suffered. It is not immediately apparent what Westpac's loss might be. The immediate effect of the failure to register the mortgage is a reduction in the value of Westpac Bank's security. That may not matter if the loans made by Westpac Bank to Mr. Dinh remain adequately secured over other assets. No doubt Westpac Bank will wish to consider these matters.

Concluding Summary

- a) The application for rectification by the Claimant is refused.
- b) The action seeking exemplary damages by the claimant is dismissed.
- c) The application by Westpac Bank for indemnity for any loss suffered as a result of the loss of registration of their mortgage with respect to lease 037 is granted. An inquiry as to the loss suffered by Westpac will be required. This Order for indemnity is against the Republic of Vanuatu, Fourth Defendant.



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Costs

44. Sand and Salt Limited are entitled to costs against the claimant. They should file an appropriate memorandum of costs within 14 days from the date of this judgment, and the claimant has 14 days thereafter to respond.
45. Westpac Bank is entitled to costs against the fourth defendants, they should file an appropriate memorandum of costs within 14 days from the date of this judgment, and the 4th defendants have 14 days thereafter to reply.
46. The claimant is entitled to costs against the first and second defendants in the circumstances. Mr. Dinh should file a memorandum of costs if he seeks costs against them. The First and the Second defendants will respond by 14 days thereafter.

Dated at Port-Vila, this 17th day of December, 2014.

BY THE COURT

Vincent Lunabek
Chief Justice

