

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

Civil Case No. 101 of 2010

BETWEEN: ETMAT BAY ESTATE LIMITED
Claimant

AND: MAGNA LIMITED
First Defendant

AND: DIRECTOR OF LAND RECORDS
Second Defendant

AND: LINO SANIEL
Third Defendant

AND: HARRY NATNAUR
Fourth Defendant

Coram: Justice D. V. Fatiaki

Counsel: R. Sugden for the Claimant
N. Morrison for the First Defendant
J. Ngwele for the Second Defendant
J. Tari for the Third and Fourth Defendants

Date of Judgment: 4 July 2014

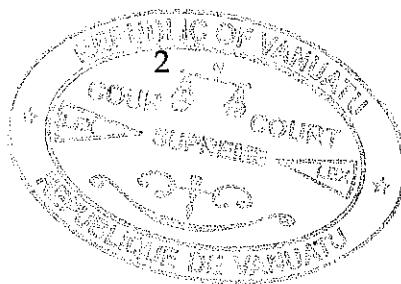
JUDGMENT

1. The Claimant **Etmat Bay Estate Limited** ("*Etmat*") seeks an order under **Section 100 (1)** of the **Land Leases Act** [Cap 132] ("*the Act*") to rectify leasehold title No. **12/0941/001** ("*the lease*") by the cancellation of the registration on 11 June 2010 of a transfer of the lease to the first defendant, **Magna Limited** ("*Magna*"). The Supreme Court claim also seeks damages for fraud, but the damages claim was not pressed at trial.
2. Etmat and Magna are local companies incorporated in Vanuatu. The second defendant is the Director of Lands, Survey and Records appointed under the Act ("*the Director*"). The third defendant **Lino Saniel** ("*Saniel*") was at all material times a Senior Officer in the Department of Lands, Survey and Records. The fourth defendant **Harry Natnaur** ("*Natnaur*") was until 11 June 2010 the registered lessee of the lease, and had been so since 2005. The lease was in respect of an allotment of land at **Etmat Bay** ("*the land*").



THE FACTUAL BACKGROUND

3. The following central facts are either admitted or clearly established by the evidence:
- By a written agreement dated 28 August 2009 ("*the Etmat contract*") Natnaur agreed to transfer the lease to Etmat for VT8 million;
 - Pursuant to the Etmat contract, Natnaur provided Etmat with a signed transfer ("*the Etmat transfer*") and associated documents necessary to obtain registration of the transfer. Etmat paid the required stamp duty and registration fee and lodged the Etmat transfer for registration with the Department of Lands on 24 November 2009;
 - In May 2010 Saniel was conducting a private business as **Saniel Consulting and Real Estate**. Natnaur consulted Saniel in his capacity as a real estate agent about a proposed sale of the lease he intended to make to **Eric Kerres** ("*Kerres*") for VT5 million. Saniel prepared a transfer of lease for signature by Kerres. Saniel met Kerres on the land and informed him that there would be no problem in him purchasing the lease. However, on about 28 May 2011 Kerres withdrew from the negotiations;
 - By May 2010 one of the lessors of the lease, **Leimas Kalsarap** had died. When preparing the documents to effect the proposed sale of the lease to Kerres, Saniel had drawn up and had executed a document by which the family of Leimas Kalsarap purported to authorise Ms Makete Natnaur, the daughter of the deceased, to give consent to the transfer in place of her late mother;
 - After Kerres withdrew from negotiations, Natnaur, with the assistance of Saniel, negotiated to transfer the lease to Magna for VT10 million. A transfer of lease to Magna was signed on 8 June 2010. A consent to the transfer was also signed on 8 June 2010 by **Ms Makete Natnaur** and by the other lessor, **Ray Ngui**;
 - On 10 June 2010 the transfer of the lease to Magna along with the necessary associated documents was lodge for stamping and registration. The appropriate fees were paid;
 - On the very next day 11 June 2010 the transfer to Magna was registered at 9.00 am (the time when the registry opened);



- Three years earlier, on 3 July 2007, Etmat had lodged a caution against dealings with the lease to protect its interest under earlier dealings it was then having with Natnaur;
- On 29 June 2010 Natnaur received a letter from the Department of Lands, Survey and Records posted on 26 June 2010, in the following terms.

"09 June 2010
 Etmat Bay Estate Limited
 P O Box 554
 PORT VILA

Dear Sir,

NOTICE UNDER SECTION 97 (3) OF LAND LEASES ACTO NO 4 OF 1983

Title No: 12/0931/011

Registered Proprietor: **Harry Natnaur in trust for Mabau Eliuk Family**

With reference to your Caution dated **03rd July 2007**, which you applied to have it registered against the above mentioned Title. **The Director of Lands, Survey & Records** and now apply to have it withdrawn pursuant to Section 97 (3) of the Land Leases Act Cap 163.

The caution is now withdrawn from the register.

Yours Faithfully,

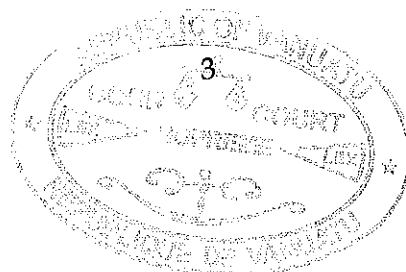
(sgd)

Michael MANGAWAI
Director of Lands, Survey & Records

The letter was accompanied by another document signed by the Director dated 8 September 2008 (*ie*: 2 years earlier) which purported to give Etmat Notice under Section 97(3) requiring Etmat to withdraw its caution or substantiate its claim.

4. On 26 September 2011 Natnaur and Saniel were jointly arraigned on the following charges before the Supreme Court in a private prosecution brought on behalf of Etmat:

"COUNT 1: ATTEMPTING TO OBTAIN MONEY BY DECEPTION CONTRARY TO SECTIONS 130B(1) AND 28 OF THE PENAL CODE – CAP 135



Between the date of 20 May, 2010 and 28 May, 2010 at and near Port Vila HARRY NATNAUR and LINO SANIEL attempted to dishonestly obtain the sum of five million three hundred and eighty-nine thousand vatus (Vt5,389,000) from Eric Kerres by deception contrary to Sections 130B(1) and 28 of Cap 135.

COUNT 2: OBTAINING MONEY BY DECEPTION CONTRARY TO SECTION 130B(1) OF THE PENAL CODE CAP 135

On a day unknown prior to 10 June, 2010 HARRY NATNAUR and LINO SANIEL obtained the sum of TEN MILLION VATU (VT10,000,000) from Magna Limited or the right for HARRY NATNAUR to be paid that sum, by falsely pretending to Magna Limited that HARRY NATNAUR had the legal right to sell to it, the lease having registered title 12/0931/01.

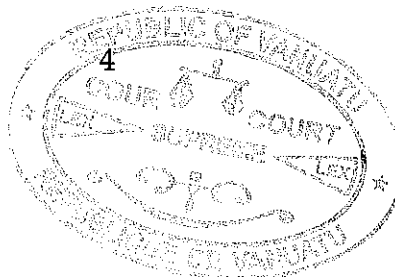
COUNT 3: FRAUDULENTLY ISSUING OR PROCURING THE ISSUE OF A REGISTERED TRANSFER OR REGISTERED LEASEHOLD TITLE 12/0931/011 TO MAGNA LIMITED CONTRARY TO SECTION 109 (2)(a) OF CAP 163

On or about 11 June 2010 LINO SANIEL a senior Lands Registration Officer at the Department of Land Records, and HARRY NATNAUR, then the registered proprietor of 12/0932/011, with intent to fraudulently deprive ETMAT BAY ESTATE of the benefit of its transfer of the same registered title that HARRY NATNAUR had previously sold to it and that was lodged for registration in November 2008, issued or procured the issue of a registered transfer by HARRY NATNAUR of the same title to MAGNA Limited that had been lodged for registration on 10 June 2010."

5. At the conclusion of the Prosecution case Saniel plead guilty to each Count. Natnaur plead not guilty and, after trial, was acquitted.

THE PLEADINGS

6. Etmat pleads that the registration of the Magna transfer was "obtained by fraud and mistake", in particular:
- the Director failed to ascertain that the Etmat transfer had been lodged for registration before the Magna transfer;
 - there was no valid lessors' consent to the Magna transfer;
 - the withdrawal of Etmat's caution was in breach of the Act.
7. Magna denied that the registration of the Magna transfer was obtained by fraud or mistake and, in any event, pleaded that at all times it was a bona fide purchaser for value without notice.



8. In his defence, the Director pleaded that the Republic was not vicariously liable for the conduct of Saniel to the extent that it might be found that he acted outside the course of his duties, or to the extent of his alleged fraud, breach of duty or breach of trust. The Director pleaded that he acted in good faith and on the basis of information supplied.
9. Saniel admitted in his defence that he was a Senior Officer in the Land Record Section of the Department of Lands, Survey and Records at the relevant time but said that there was no delegation by the Director to him to deal with the Magna transfer. He admitted that through his real estate business he quoted a fee for providing necessary documentation to transfer the lease and he also used his senior position in the Department of Lands to obtain the rapid registration of the transfer to Magna. He otherwise denied the allegations made against him in the Supreme Court claim.
10. Natnaur in his defence pleaded that Etmat had never paid him the deposit stated in the Etmat contract. He said that he went to check on the registration of Etmat transfer at the Department Lands, and was informed that the Etmat transfer document was not fully completed. He said that a clerk gave him the registry file so that he could have the Etmat transfer completed. He delivered the file to **Michael Jessop** (the proprietor of Etmat).
11. Further, he admits that in May 2010 he and Saniel began negotiations with Kerres about the lease, and that when Kerres withdrew, he and Saniel negotiated with Magna to transfer the lease to Magna. He admitted that the Magna transfer was lodged for registration and was registered on 11 June 2010. He admitted that the Magna transfer was registered without the necessary consent of Leimas Kalsrap, but pleaded that the Department of Lands had advised the family as to the appointment of a representative to consent in her place. Finally, he denied that the registration of the Magna transfer was obtained by fraud or mistake.

DETERMINATION OF THE ISSUES

12. The trial extended over three days. The principal spokesmen for Etmat (**Michael Jessop**) and Magna (**Ray Ernst**), the Director, Saniel, Natnaur and other deponents who had filed sworn statements, gave evidence and were cross-examined. Each party then filed written submissions. The written submissions serve best to identify the issues canvassed at trial. The submissions address the following questions that were identified by the parties at the conclusion of the trial:

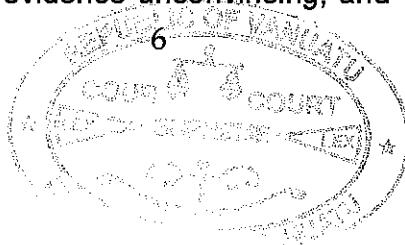
- Did Saniel commit fraud against Etmat?



- Did Natnaur commit fraud against Etmat?
 - Was Etmat's caution lawfully removed?
 - Was the Magna transfer when registered on 11 June 2010 consented to by Leimas Kalsrap?
 - Is Magna a bona fide purchaser for value without notice
 - Does Section 100 (2) of the Act have application in this case?
 - Were any mistakes made within the Land Registry Office that resulted in the registration of Magna's transfer?
 - As between Etmat and the Director, should Etmat's application to amend to include relief under Section 101 be allowed, and if so, what order should be made?
13. I shall address each of these questions in turn, and one other question that was raised by Magna's counsel in the final submissions.

FRAUD BY SANIEL

14. The Etmat case alleges that Saniel used his position within the Department of Lands to process the unusually quick registration of the Magna transfer and that he was responsible for fraudulently removing the caution and processing the registration of the Magna transfer ahead of the Etmat transfer.
15. It was accepted at trial that the extraordinary event occurred, of a clerk in the Department of Lands releasing the original registry file to Natnaur. Mr Jessop said he received the file from Natnaur in April 2010. He obtained advice that the Etmat transfer was properly executed and in order, and he then returned the file to Saniel. Saniel accepted that the file was returned to him, but said he simply passed the file to the section of the Department of Lands responsible for registration.
16. He said he did not handle the file thereafter as he was then working in a different section of the Department. Saniel denied that he played any part in the registration of the Magna transfer. During his cross examination he made a strenuous but ultimately vain effort, to distance himself from the events surrounding the registration of the Magna transfer. I found this evidence unconvincing, and I do not believe his denials.



His plea of guilty to the third count in the criminal charge against him is plainly inconsistent with his denials in cross examination.

17. There was also a "*caution*" on the file in the Department of Lands which should have prevented the registration of the Magna transfer. It was removed by someone to make the registration of the Magna transfer appear regular. The overwhelming probability is that Saniel used his position as a senior officer to fast-track the Magna transfer, and that he was the "*insider*" responsible for removing the caution in order to achieve the quick registration of the Magna transfer.
18. That the "*caution*" was removed indicates that the file was examined to check for relevant transactions on the title as far back as 2007. When Mr Jessop returned the file to Saniel in April 2010 the Etmata transfer was in it, and when the Director filed a sworn statement in these proceedings, he produced a copy of the Etmata transfer. The Etmata transfer must have been in the file on 11 June 2010 and was there to be seen. I find that Saniel deliberately "*shut his eyes*" to the existence of the Etmata transfer in order to achieve the registration of the Magna transfer ahead of it.
19. The evidence is overwhelming that through the "*fraud*" and breach of duty by Saniel the registration of the Magna transfer was obtained.

FRAUD BY NATNAUR

20. Once it is accepted that registration of the Magna transfer was obtained by the fraud of Saniel, additional proof of fraud by Natnaur is not necessary for Etmata to make out its case under Section 100(1).
21. However fraud by Natnaur is not so obvious. Natnaur well knew that the Etmata transfer had been lodged for registration and was awaiting this event at the Department of Lands. Although it was plainly dishonest of Natnaur to enter into the Magna contract to sell the leasehold interest which he had already sold to Etmata, it is difficult to see how that fact, in any relevant way, led to the Magna transfer obtaining prior registration.
22. The process of registration was not under Natnaur's control and had the requirements of the Act and had the duties of the officers of the Department been properly observed, the Magna transfer would not have been registered ahead of the Etmata transfer. In terms of causation, whilst the registration of the Magna transfer could not have occurred had Natnaur not himself acted dishonestly but, the real and effective "*cause*" of the Magna transfer obtaining registration was not the "*double-selling*" of the lease but the actions of Saniel within the Lands Department.



REMOVAL OF THE ETMAT "CAUTION"

23. The authenticity of the document dated 8 September 2008 which purported to give notice to Etmat under Section 97(3) warning of removal of its "caution" was accepted by the parties at trial, but, even accepting that it is genuine, there is no satisfactory evidence that it was ever served on Etmat. Mr Jessop says that Etmat never received such a notice.
24. The practice of the Department of Lands is to serve removal Notices under Section 97(3) by registered post addressed to the party filing the caution, and the Department maintains an "outgoing mail" register as proof of postage. The Director in his evidence, in this case, accepted that there is no entry for the postage of a removal Notice to Etmat on or about 8 September 2008. On the evidence I find that Notice to remove the Etmat caution was not given to Etmat 30 days in advance of its removal as required by Section 97(3). The improper removal of the Etmat caution was a factor that undoubtedly contributed to the priority registration of the Magna transfer.
25. If the fraudulent behavior of Saniel is disregarded, it would nevertheless follow that the registration of the Magna transfer was obtained by mistake, - the "mistake" being an erroneous belief on the part of officials in The Lands Department that the removal Notice had been duly and properly given under Section 97(3) in September 2008 which permitted the removal of the Etmat caution 2 years later on or about 9 June 2010.

CONSENT TO ETMAT TRANSFER

26. In light of the findings of fraud, or alternatively, mistake that led to the Magna transfer obtaining prior registration, it is not necessary to determine this question, nor do I think that it is possible to do so on the evidence. Succession in custom is determined by custom, not by a will or by the Queen's Regulation. It may be that Ms Makate Natnaur is the successor in title and the proper person to give consent but who became the successor in title in custom to the interest of the Leimas Kalsrap was not explored at trial.
27. There was also discussion at trial whether consent to the Etmat transfer was properly given. If I may say so, this seems a complete "red herring". It was not a relevant issue raised by the pleadings. It is not a point that has ever been raised on the lessors' behalf, and if consent was in any respect wanting, it can readily be cured without the Etmat transfer losing its priority.



IS MAGNA a BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE?

28. **Ray Ernst** gave evidence that he was "*the man on the ground*" in Vanuatu for the proprietor of Magna. He conducted all the necessary inquiry, searches and negotiations to obtain the Magna transfer. He says he had no notice of any kind that could have alerted him to the fact that the lease had already been sold to Etmat, or that Etmat had lodged a transfer for registration. No evidence from any other source has been led to question this evidence.
29. I have no hesitation in finding that Magna had no knowledge of fraud by Saniel or of any mistake in the Department of Lands in consequence of which the Magna transfer obtained registration. Magna acquired its transfer for valuable consideration. It paid VT10 million. I find that Magna was a bona fide purchaser for valuable consideration without notice.

IS MAGNA PROTECTED UNDER SECTION 100(2)?

30. Magna has pleaded that it is a bona fide purchaser for valuable consideration, but it has not pleaded that it is "*in possession*" of the lease. The protection given to a registered proprietor under Section 100(2) is dependent on three criteria - (a) the registered proprietor must be "*in possession*"; (b) the proprietor must have acquired the interest "*for valuable consideration*"; and (c) the proprietor must have had no knowledge of the relevant omission, fraud or mistake and not caused or contributed to the omission, fraud or mistake by his neglect or default.
31. The requirement that the proprietor be "*in possession*" was considered in depth in the "*Turquoise*" litigation. At first instance Solomon v Turquoise and others, Civil Case 163 of 2006, and in the Court of Appeal in Turquoise v Kalsuak [2008] VUCA 22. These decisions collectively hold that being "*in possession*" refers not merely to the legal right to possession but to actual physical possession. In the case of a company registered as proprietor, the taking of physical possession will be carried out by its servants or agents.
32. In this case the only servant or agent of Magna in Vanuatu at the relevant time was Mr Ray Ernst. He does not claim to have taken physical possession of the land at any time, let alone in the period between registration of the Magna transfer on 11 June 2010 and when the question of fraud or mistake was first raised, that being the relevant time for deciding if the proprietor was "*in possession*": (see: Turquoise v Kalsuak (ibid) in the penultimate paragraph of the judgment).



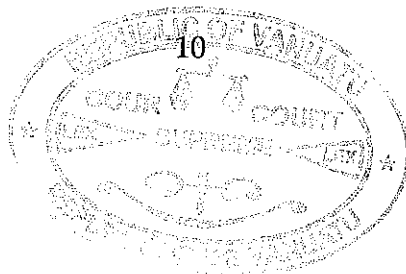
33. The evidence led by Etmat also tends to negate the possibility of Magna being "*in possession*" as, according to Mr Jessop, the only real access way to the land is through land that belongs to Etmat.
34. I hold that Magna was not "*in possession*" of the land within the meaning of Section 100(2) of the Act and therefore the section does not protect Magna against an order for rectification.

WERE THERE "MISTAKES" IN THE LAND REGISTRY?

35. In the circumstances of this case, the finding that the registration of the Magna transfer was obtained by fraud leaves little room for there to be any contributing "*mistake*" on the part of the Department of Lands. Whatever systems were or should have been in place to prevent a transfer being wrongly registered ahead of another or in spite of a caution, become largely irrelevant when a senior officer IN the Department fraudulently disregards all "*in-house*" checking procedures.
36. However, assuming there was no fraud by Saniel, then for the registration of the Magna transfer to have occurred there would have been the "*mistake*" already discussed concerning the improper removal of the Etmat "*caution*".
37. Further, and more importantly, there would have had to have been a fundamental mistake in the registry which led to the registering of the Magna transfer ahead of the Etmat transfer. Whether the mistake was from legal ignorance on the part of the staff conducting the registration, or because of an oversight in not recognising the Etmat transfer, or for some other system failure is not to the point. The registration of the Magna transfer ahead of the Etmat transfer would not have occurred unless there was a "*mistake*" in the due administration of the registration processes.

ADDITIONAL QUESTION UNDER SECTION 100(1)

38. In its final submissions Magna contends that the exercise of the power of the Supreme Court under Section 100 (1) to order rectification is a discretionary power and in the circumstances of this case, the discretion should not be exercised in favour of Etmat because its representative had been guilty of "*oppressive behaviour*" towards Natnaur.
39. Magna bases its argument on the decision of the Court of Appeal in ANZ (Vanuatu) Ltd. v Gougeon [1999] VUCA 15. That decision concerned the priority to be given to



competing equitable claims by innocent persons affected by fraudulent activity, in that case, between the claim of Madame Laille to have the land register rectified under Section 100, and the claim of ANZ to register a mortgage over the leasehold title. The Court of Appeal ultimately held that there was no reason in principle to give the equity of one party a different quality that elevated its entitlement to priority over the equity of the other party, and that the “*first in time*” principle should be applied.

40. In the course of its reasons, the Court of Appeal said:

“There is not some absolute, immutable and inflexible straight jacket which defines an equitable right for all cases in all circumstances”

41. And later in its reasons added:

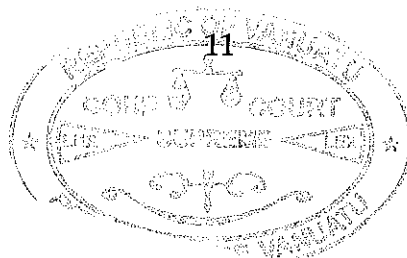
“We are not satisfied that equity is constrained by some immutable system of categorization or pigeon holing. A number of decisions have recognized the importance of weighing the particular circumstances of individual case”.

42. Drawing on these observations and, by analogy with the circumstances of the Gougeon case, Magna submits that it was an entirely “*innocent party*” who paid a full price in good faith for the land in contrast to Etmat whose conduct, it is alleged, was oppressive to the vendor (ie to Natnaur). The “*oppressive conduct*” is said to arise from Etmat’s failure to pay in actual cash all that was due under the Etmat contract to Natnaur, and by Mr Jessop’s failure to explain to Natnaur the terms of the Etmat contract relating to payment of the deposit and the balance of the purchase price. I do not accept this submission.

43. In the present case the issue is not between competing equities or “*non est factum*”. The question is – whether Magna is entitled to an indefeasible title, or whether the Act permits the register to be rectified.

44. Whether Section 100(1) conditions the exercise of the Court’s power to order rectification on the exercise of a discretion, and if so, what facts will relevantly influence the exercise of the discretion, raises questions of statutory interpretation.

45. The word “*may*” in Section 100(1) presumptively vests a discretionary power but the word must be understood in its context. Here the power in Section 100(1) is qualified by Section 100(2). The word “*may*” can be sensibly understood in this context as doing no more than recognizing that there will be occasions brought about by Subsection (2) where the power in Section 100(1) cannot be exercised. However, the construction of Section 100 has not been fully argued in this case, and it is not



necessary to further consider the point as I consider Manga's argument in any event fails on the facts.

46. An allegation that Magna would be entitled to a favourable exercise of a discretion under Section 100(1) in the event that fraud or mistake was found was not raised in the pleadings, and did not become an issue until raised belatedly in the written submissions filed by Magna after the evidence had concluded.
47. The allegations of "*oppressive behavior*" were not put to Mr Jessop during his cross examination. The cross examination of Natnaur by Magna's counsel asked questions about the fairness of Etmat deducting from the deposit, specific items of past expenditure set out in the Etmat contract and said to have been made by Etmat to or on behalf of Natnaur. Mr Jessop should, in fairness, have been given the opportunity to explain these items if anything were to be made of them. Unfortunately he was not.
48. Etmat's counsel in opening the case said that the Etmat contract was not the only agreement between Natnaur and Etmat, but it was the first that Natnaur had honoured. He said that the terms of the contract reflected monies already paid out to Natnaur previously, in an effort to implement an agreement reached in 2005.
49. If it were material to Magna's case to establish that Etmat, through Mr Jessop, had been guilty of "*oppressive behavior*" in relation to the payment of monies under the Etmat contract, then it would be important to know more about the payments that had been made in the past dealings between Etmat and Natnaur. These matters were not explored by Magna's counsel in the cross-examination of Mr Jessop. Absent any explanation from Mr Jessop, the few answers elicited by Magna's counsel from Natnaur in cross examination about monies set-off against the deposit and purchase price fail to establish "*oppressive behavior*".

APPLICATION TO AMEND THE CLAIM

50. The final issue is between Etmat and the Director and concerns Etmat's belated application to amend its pleadings to claim an "*indemnity*" under Section 101 of the Act. This application was opposed without reason by the Director, other than because of its lateness. The right under Section 101 is to an indemnity from the Government against loss suffered by rectification of the register. The Director did not represent the Government in these proceedings. The Government is not a party to the action. The proposed amendment was misconceived. On the findings I have made, the question of an indemnity to Etmat does not arise in any event.



CONCLUSION

51. For the above reasons, I consider that Etmat has established that the registration of the Magna transfer was obtained by fraud and mistake. I consider Etmat is entitled to an order under Section 100(1) rectifying the register. The order of the Court will be that the Land Leases Register be rectified by the cancellation of the registration of the transfer to Magna Limited of registered leasehold title No. 12/0931/011 effected on 11th June 2010.
52. On the question of costs, as Etmat has succeeded in the action it is entitled to an order for its costs against the defendants to be assessed on the standard basis. However, as the Court has determined that the Magna transfer was improperly registered through the fraud of Saniel, I consider Magna and the Director are both entitled to recover their costs of the action, including the cost which they are called upon to pay to Etmat, from Saniel, assessed on the standard basis.

DATED at Port Vila, this 4th day of July 2014

BY THE COURT



D. V. FATIAKI
Judge.

