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

Civil
Case No. 15/138 SC/CIVIL

BETWEEN: **Rolland Orah**
Claimant

AND: **Stuart Titek**
First Defendant

Kuma Isaiah Titek
Second Defendant

Republic of Vanuatu
Third Defendant

Andrew Thomas Butlin and **Robyn Wendy Lloyd**
Fourth Defendants

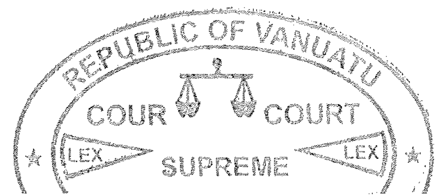
Date of Trial:	18 and 19 September, and 18 October 2019
Before:	Justice G.A. Andrée Wiltens
In Attendance:	Mr R. Sugden for the Applicant
	Mr G. Takau for the First Defendant
	No appearance for the Second Defendant
	Mr L. Huri for Third Defendant
	Mr N. Morrison for the Fourth Defendants
Date of Decision:	13 December 2019

JUDGMENT

A. Introduction

1. Lenur Island is located just off the south-west coast of Malekula. After the Minster of Lands ("the Minister") issued Lease 04/1712/001 in respect of the island in November 2007 to Mr Stuart Titek, that lease was promptly on-sold to Mr Butlin and Ms Lloyd.

2. Those transactions are challenged as having occurred by mistake or fraud and are accordingly sought to be set aside under the provisions of the Land Leases Act, Cap 163 with the land



returning to the original custom owners. The Republic of Vanuatu is joined as a defendant for the role it played in the registration of the transactions. Mr Kuma Titek is named as a party, due to being recorded as the lessor on behalf of Family Titek. He took no steps to participate in the case. Mr Kuma Titek is Mr Stuart Titek's relative.

B. Background

3. On 13 June 2007, Mr Stuart Titek obtained a Registered Negotiator's Certificate ("RNC") – to develop the 10 hectares of land shown to comprise Lenur Island.

4. On 8 November 2007, an Agreement for Sale and Purchase ("S&P Agreement") was entered into between Mr Stuart Titek as vendor and Mr Butlin and Ms Lloyd as purchasers. A yet to be registered lease over Lenur Island was the subject of the agreement at a price of VT 21 million.

5. On 12 November 2007, Mr Butlin sought to instruct Mr N. Morrison of the Port Vila firm Ridgway Blake as his solicitor to handle the transaction. He emailed Mr Morrison and attached a copy of the S&P Agreement. Mr Butlin advised that the required deposit had already been paid to the Real Estate Agent, and further, that settlement was due on 20 December 2007.

6. On 12 November 2007, Mr Stuart Titek signed a 75-year lease over Lenur Island – the land in question was now more accurately described as 84 acres, the equivalent of almost 35 hectares.

7. On 13 November 2007, Mr Morrison emailed Mr Butlin accepting his instructions and indicating the time frame to complete the transaction was possible.

8. On 20 November 2007, Mr Glen Craig (the Real Estate Agent) wrote to Mr Morrison requesting permission to use the deposit funds to register the lease and pay incidental costs including the initial VT 1.5 million premium on behalf of Mr Stuart Titek.

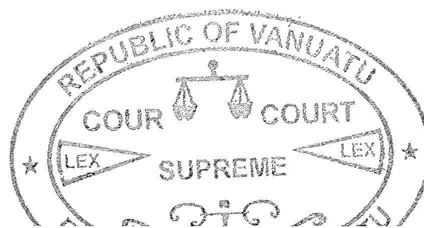
9. On 20 and 21 November 2007, Mr Morrison sought instructions from Mr Butlin, who responded with some queries. Eventually it was agreed the deposit funds could be so used, and Mr Morrison attended to those matters.

10. On 22 November 2007, the Minister signed the lease on behalf of the contesting custom owners, with a premium of VT 1.5 million attached. At this time, the Minister also signed a Consent to Transfer the lease from Mr Stuart Titek to Mr Butlin and Ms Lloyd, with a premium of VT 21 million attached.

11. On 3 December 2007, the lease was registered – the lessor being the Minister; and the lessee being Mr Stuart Titek.

12. On 6 December 2007, Mr Morrison corresponded to Mr Butlin advising that he held the lease and the signed Transfer; and suggested making the necessary arrangements to complete the transaction.

13. On 19 December 2007, the transaction was settled, and as a result Mr Stuart Titek received the premium of VT 21 million, less some costs.



14. On 7 February 2008, Mr Butlin and Ms Lloyd signed the Transfer of the lease.

15. On 10 March 2008, Mr Stuart Titek signed the Transfer of lease.

16. On 10 June 2009 the Transfer of the lease from Mr Stuart Titek to Mr Butlin and Ms Lloyd was registered.

17. On 10 September 2010, the Farun Black Sand Joint Custom Lands Tribunal determined and declared Family Titek as the custom owners of Lenur Island.

18. On 26 January 2011, the name of the lessor was rectified so that the lease recorded the lessor as Kuma Isaiah Titek on behalf of Family Titek, no longer the Minister.

19. On 30 April 2012, the South West Malekula Area Land Tribunal named different custom owners, including Mr Rolland Orah.

20. On 10 February 2014, Mr Kuma Titek filed an application for Judicial Review seeking to quash the 30 April 2012 orders.

21. On 19 December 2014, by consent, the matter was remitted back to the Custom Area Land Tribunal to determine the true custom owners. That determination remains outstanding.

C. <u>The Claim</u>

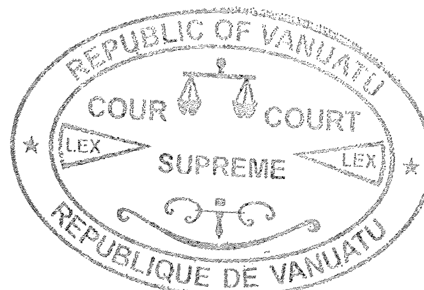
22. Mr Rolland Orah claimed to be the custom owner of Lenur Island. He maintained that this claim is well known. He was not consulted prior to the Lease being issued by the Minister and stated that had he been he would have objected. He sought rectification of the Lease as the original issuance was by mistake or fraud; and he pointed to a large number of defects in the process which usually accompanies such an issuance.

23. Mr Rolland Orah further alleged that the State was involved in the wrongful processing of the lease.

24. Finally, he alleged that the on-sale to Mr Butlin and Ms Lloyd took place in such circumstances that it is plaib they knew or were on notice that further inquiries were required prior to the Transfer being registered.

25. It was also submitted that the nature of the completion of the S&P Agreement was such that Mr Butlin and Ms Lloyd's solicitor must have known the transaction was fraudulent, and that therefore the purchasers had constructive knowledge of the problems inherent in Mr Stuart Titek passing good title. Accordingly, it was submitted that Mr Butlin and Ms Lloyd should not be able to use the protection that a *bona fide* purchaser for value is able to claim under Section 100(2) of the Land Leases Act.

26. Mr Rolland Orah sought rectification of the lease title back to the custom owners.



D. The Defences

27. Mr Stuart Titek maintains he did nothing out of the ordinary or wrong. He claims to be the custom owner of Lenur Island. He obtained a RNC; and when that was issued he sought a lease and this was granted it by the Minister. He on-sold the lease in the usual way. He denies any fraud or mistake is involved in the transaction.

28. The State relies on the statutory defence available to it of simply reacting to information supplied and acting on that information in good faith. It relies on the provisions of section 9 of the Land Leases Act, which sets out the basis for this defence and on section 24, which releases the Director from the obligation of making inquiry into transactions that appear at face value to be unexceptional.

29. Mr Butlin and Ms Lloyd deny all allegations of mistake or fraud. They deny any knowledge of the processes involved in the conveyance of titles in Vanuatu and claim that their title should be maintained. They also brought a counter-claim for the alleged loss of opportunity to sell the lease due to this intervening litigation.

E. The Law

30. The onus of proof lay with the Claimant, and the standard of proof required was on the balance of probabilities.

(i) Statute

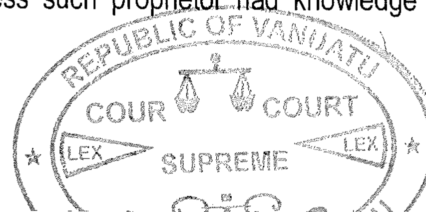
31. The Land Reform Act, Cap 123 provides in section 8(1)(b) that the Minister is given general management and control over all unoccupied disputed land; and in section 8(2)(b) the power to conduct transactions in respect of such land, including the granting of leases in the interests of and on behalf of the custom owners. In section 8(2)(c) the Minister is constrained to take all necessary measures to conserve and protect the land on behalf of the custom owners.

32. Section 9 of the Land Leases Act, Cap 163 provides that the Director of the Lands Department is indemnified from all actions or proceedings in respect of acts done or omitted to be done in good faith in the exercise of the Director's powers under the Act.

33. Section 23 of the Land Leases Act provides protection for purchasers. This sets out that those dealing or intending to deal for valuable consideration with a proprietor of a registered interest is not required to (i) inquire or ascertain the circumstances in or the consideration for which the proprietor or any previous proprietor was registered, or (ii) see to the application of any consideration, or (iii) search any register kept under previous law.

34. Further, section 24 of the Land Leases Act exonerates the Director from making enquiries on behalf of others in relation to any factual aspects of registrable transactions.

35. The Land Leases Act enables the Court, pursuant to section 100(1) to rectify the register of leases of land by cancelling or amending the register where it is satisfied the registration has been obtained, made or omitted by fraud or mistake. Subsection (2) provides that the register shall not be so rectified so as to affect the title of a proprietor who is in possession and acquired the interest for valuable consideration, unless such proprietor had knowledge of,



caused or substantially contributed to the omission, fraud or mistake of which rectification is sought.

(ii) Cases

36. The issues canvassed in this case have previously been raised in previous cases. In particular, the following authorities are of assistance:

- *Roqara v Takau* [2005] VUCA 5; this is an example of the Minister omitting to take into account a material factor when deciding to issue a lease;

- *Ifira Trustees Limited v Family Kalsakau and Others* [2006] VUCA 23, in particular two passages setting out the Minister's responsibilities under section 8 of the Land Reform Act:

  "When Parliament grants a power to make decisions, the decision maker must undertake the task conscientiously and independently weighing all matters which are relevant and ignoring those which are irrelevant and the decision maker must faithfully apply fair and proper processes and procedures."

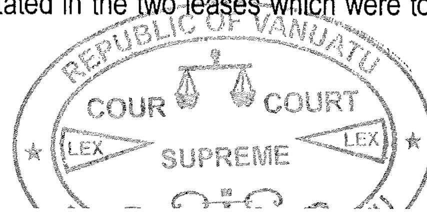
  Section 8, as an example, is not a licence for a Minister to make any decision that he likes about the care and control of disputed land pending the resolution of that dispute. A Minister exercising this power can only reach a proper and lawful conclusion after he has weighed and assessed all matters which are relevant."

- *Solomon v Turquoise Limited* [2007] VUSC; again looking at the Minister's powerswhere the Court stated:

  "What it does mean is that when exercising those powers, the Minister must consult the disputing owners and must carefully consider their abuse and the reasons for them before acting. This is part of the Minister's duty to follow a fair and proper process and to act only after he has weighed and assessed all relevant matters."

  This was upheld by the Court of Appeal as being a correct statement of the law in *Turquoise Limited v Kalsuak and Others* [2008] VUCA 22.

- *Monvoisin and Poilapa v Mormor and Others* Civil Appeal Case no. 18/1935; this is the most recent examination of this area of the law by the Court of Appeal which neatly summarises a number of aspects that have been raised in this case. In the result, the Court of Appeal confirmed the lower Court's decision that the lease be cancelled and the land lease register rectified. The Court noted:
  "...the uncontested position is that the Minister did not consult with the disputing custom owners, and therefore failed to take into account their wishes. The Minister failed to take into account that the normal checks conducted by the Department of Lands had not occurred. He plainly failed to consider the adequacy of the premium stated in the two leases which were to



the extreme disadvantage of the custom owners. Those matters justified setting aside the Minister's decision to grant the leases. Registration of the lease was therefore obtained in the mistaken belief that the Minister's decision was made according to law."

"Further, there is the admission of the Republic that the normal processes and procedures of the Lands Department were not followed...The registration of the leases without the processes and procedures being followed was a further mistake that led to their registration."

F. Evidence

37. The chronology set out earlier was uncontested. Indeed, there were few areas of factual dispute. I will now discuss the significant factual disputes.

(i) Dates

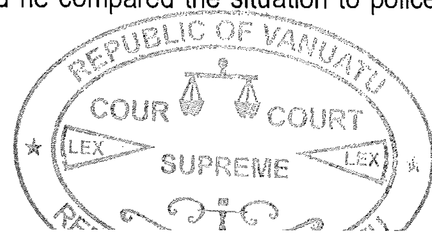
38. Firstly, the issue that most concerned the parties at trial was when Mr Butlin had first gone to Lenur Island. The Claimant suggested that Mr Butlin had been to Lenur Island in March 2005, March 2006 and mid-2007; and that he was aware of the contesting custom owners by dint of having been shown documentation to that effect and asked in no uncertain terms to cease building on the island and to leave as he was trespassing. Mr Butlin denied that, stating that he had not been to Lenur Island prior to his purchase of the lease.

39. A number of the witnesses for the Claimant as to this aspect of the case were unimpressive. They gave no evidence regarding what it was that enabled them to be able to recall the times they claimed Mr Butlin had visited Lenur – events which were said to have occurred some 12 or 14 years previously.

40. For this evidence to be given real weight, some memory-triggering events were required e.g. it was a month after my 25th birthday. Instead, there were a series of witnesses who baldly said the visits had occurred, without any elaboration as to their ability to recall those events and in particular to accurately date them. There was no evidence of any note-keeping by any of the witnesses to enable them to refresh their memories - another means to have strengthened their evidence.

41. By way of contrast Mr Butlin was able to state his position with supporting Passport entries, his history and in particular details from his son of flights to Vanuatu, as well as his work records in Australia to support his version of events. He claimed he was able to state with certainty that he first travelled to Lenur Island, with his son, in early 2008. Even Mr Sugden's vigorous and repeated cross-examination on the point did not cause Mr Butlin to change his account in any way. Mr Morrison's cross-examination of the Claimant's witnesses regarding this aspect of the case was more effective in that he extracted admissions of some uncertainty of recollections from witnesses.

42. I was unimpressed by the fact that the sworn statements (and therefore the evidence in chief) of witnesses Mr John Massingbel and Mr Remo Massing were identical - save for their names at the commencement and their signatures at the end of their statements. Mr Sugden sought to justify this on basis of difficulty of communication, and he compared the situation to police



officer statements in criminal matters. The two situations cannot be compared. In civil trials, the obligation of counsel is to present, in written form, the evidence of each witness – not to present that which another person may have been able to recall. The duplication of evidence in this manner is most unhelpful to the Court in attempting to assess credibility and accuracy.

43. In addition, a number of other witnesses simply attached the statement of Mr John Massingbel and then simply stated they agreed in part – e.g. Mr Remo Massing, Mr Rex Graham, and Mr Jesse Massingbel. Similarly, Mr Tino Edward appended to his sworn statement the statement of his brother Mr Taylor Edward, and then agreed with tracts of it. While convenient, the short-term gain to counsel acting is off-set by the difficulty this presents to the Court in assessing what weight should be given to that evidence. Each witness should make a sworn statement in his/her own right, setting out their independent recollection to assist the Court to best resolve the dispute between parties.

44. There was additional evidence given, presumably to bolster the allegation that Mr Butlin had been to Lenur Island prior to early 2008, by Mr Kenery Henery and Mr Abong Marcellin. I found their evidence to be of little assistance. Conversely, the evidence of Mr Kalo Nathaniel called by the Fourth Defendants was helpful. His evidence dovetailed with that of Mr Butlin with reference to various visits to Lenur Island. I accepted Mr Nathaniel's evidence. Ms Lloyd's evidence was also helpful in that she touched on the timings of visits and confirmed both Mr Butlin and Mr Nathaniel's accounts.

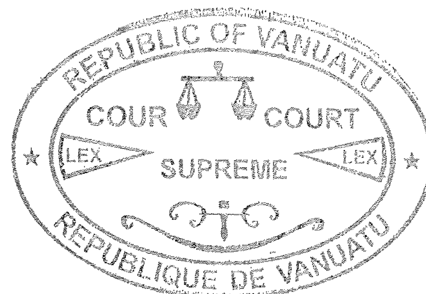
45. Regardless of statement duplication, I accepted the evidence of Mr Butlin that he purchased the lease to Lenur Island sight unseen – that he had not been to visit Lenur Island prior to early 2008. It then follows from this finding that there is no evidence Mr Butlin was aware of the fact that the custom land owners were in a dispute as to the true owners of Lenur Island.

(ii) <u>Service</u>

46. Secondly, there was a significant body of evidence relating to an alleged attempt by Mr Butlin, in June 2016, to avoid being personally served with this Claim. Mr Butlin disagreed – he maintained that only his Christian names were called out to him, not his full name; and that is the reason he did not respond. I have no need to determine this issue, as Mr Butlin accepts he was duly served. Whether that proved more difficult than needed is not relevant to the matters for determination. Consideration of this issue impacted only slightly on my overall assessment of the credibility of the various witnesses.

(iii) <u>Immigration Status</u>

47. Thirdly, much the same considerations apply to the contention that Mr Butlin was, in 2009, sailing along the coast of various islands and selling goods, allegedly in breach of his immigration status. Whether this allegation was correct or not, went only to the credibility of the witnesses who gave evidence on this aspect. The complaints regarding this allegation by Mr Alfred Orah the Claimant's son, while doing him little credit, merely demonstrated to me his frustration with the situation he found himself in. Emphasis was placed on this evidence by counsel. However, I found it of little assistance in determining the issues at hand in this dispute regarding land.



(iv) The Central Issue

48. The main area of contention, which dominated the trial, centred on Mr Butlin's knowledge, actual or implied, of the true nature of the series of transactions which over a very short period of time resulted in his acquisition of the lease relating to Lenur Island. There is no doubt that Mr Butlin had no previous experience of the process involved in purchasing leases of land in Vanuatu; or that he employed a senior solicitor who was a partner in a prominent Vanuatu legal firm to oversee his interests in completing the transaction.

49. The steps taken to create the lease and the manner in which it was ultimately transferred to Mr Butlin and Ms Lloyd's names were accordingly all important. In particular their knowledge of these steps was important to my decision. These are the aspects I shall consider next..

(a) Claimant

50. Mr Maxine Korman was the Minster for Lands at the time of this series of transactions. He approved Mr Stuart Titek's CRN. He was instrumental in the creation of the lease to Mr Stuart Titek, and he signed the Consent to Transfer the lease to Mr Butlin and Ms Lloyd.

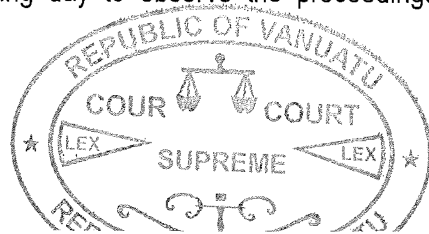
51. Mr Korman's sworn statement accepted that he had signed the lease for Lenur Island on behalf of the disputing custom owners in favour of Mr Stuart Titek, the son of Mr Jacklyn Reuben Titek (a previous Minister of Lands). Mr Korman stated that the lease was presented to him by Lands Department officers, but that he was not shown any CRN nor any evidence of meetings to determine ownership or of any other steps indicating there was a dispute as to custom ownership. Mr Korman stated that he realised at the time that the lease had been "...wrongly processed" by Lands officers, but alleged that Mr Jacklyn Titek "...pressurised me to sign".

52. Mr Korman stated that he believed it to be very beneficial for leases to be issued for land in the outer islands to enable private investor development, and to create employment and infrastructure. He considered it a valid use of his power to issue leases for that purpose under section 8 of the Land Reform Act. Mr Korman stated that he had "...acceded to the insistence" of Mr Reuben Titek in signing the lease, even though he knew it had been wrongly processed.

53. In cross-examination, Mr Korman retracted part of his sworn statement. He accepted that he had seen a CRN - shown to him by Mr Reuben Titek. He stated that he had warned Mr Titek that it was disputed land and had told him to sort it out with the custom owners. When asked why he signed the lease if ownership was disputed Mr Korman told the Court that it was the law; the Government could sign on behalf of custom owners "...for development purposes". He further related that he had signed probably over 100 leases a year for development purposes – he could particularly recall this 2007 lease as he knew the area, and numerous custom owners had come to the Lands Department with prospective developers. He revealed that he had actually gone and visited the island.

54. In re-examination, Mr Korman told the Court that "development purposes" meant improvements to the land for the benefit of Vanuatu; and he considered Lenur Island to particularly lend itself to tourism and housing.

55. I noted that Mr Korman attended Court on every sitting day to observe the proceedings, displaying a close interest.



56. Mr Jean Marc Pierre was employed at the Department of Lands, Land Records and Land Surveys at the relevant time. He has been the Director and is familiar with the processes required. At the time, in order to be able to obtain a lease, an applicant was required to first obtain a RNC, irrespective of the class of land involved. In the case of Lenur Island, classified as rural land, the application would have had to have been investigated by the Rural Land Development Committee. This investigation would involve an inquiry as to who was the custom owner, or if disputed, the various claimants. This would have been done by the sending out of a particular form, known as the "Kastom Ona Blong Graon". Once this form was returned, with details regarding the ownership of the land concerned, the Committee would have considered the RNC request, and advise the Minister whether or not to grant it.

57. Where ownership of land was disputed and a RNC had been issued, there would then be a negotiation between the RNC holder and departmental officers as to the terms of the lease which would include a registered survey. Part of the process involved establishing if the disputing custom owners approved of the terms of the proposed lease, as the Minister was required to take the views of custom owners into account.

58. In cross-examination Mr Pierre stated that this process he had outlined was required to be strictly followed in order for a lease to be granted. He confirmed there was a check-list of the steps required, which was used by staff to indicate to the Minister that all was in order for the lease to be issued. Mr Pierre confirmed that on occasions leases were issued when those due processes had not been followed. That had occurred, despite the safeguards in place, by a direct approach being made to the Minister, without the matter first going through the Ministry's checks. Leases issued in such circumstances had been rectified.

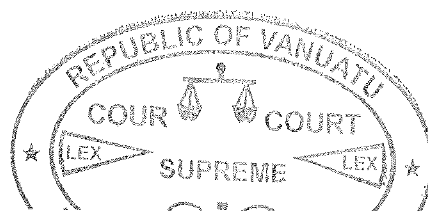
(b) <u>First Defendant</u>

59. Mr Stuart Titek confirmed in his evidence that he had first met Mr Butlin in January 2008; and had first met Ms Lloyd in September 2019. He also confirmed being the son of Mr Jacklyn Reuben Titek, a former Minister of Lands.

60. In his sworn statement, Mr Stuart Titek stated that in 2007-8 he approached the Lands Department regarding a CRN in relation to Lenur Island. He was advised there were two families claiming ownership – his family and one other. There had been no declaration made of the rightful ownership, and therefore the Minister was able to act in the interests of the custom owners. He stated that he had obtained the consent of the two disputing parties to apply for a lease; and further that he had followed all the procedures required by the Lands Department and the Minister.

61. In cross-examination Mr Stuart Titek stated that the application for the lease was made not by him, but on his behalf. He stated that the lease document was drawn up by a real estate agent, not the Lands Department and not his brother Mr Peter Titek. He realised that there was a check list of matters that needed to be done in order for a lease to issue. He agreed the checklist recorded his brother Peter as the person who had prepared the lease. The checklist also recorded that the claimants to the land had not been identified.

62. He agreed that the checklist showed the value of the land as VT 10,488,000; and that a premium of VT 1.5 million was required to be paid for the issuance of the lease. He confirmed also that the lease and the Consent to Transfer were signed on the same day, namely 22



November 2007. The Transfer required a premium of VT 21 million to be paid to him. He denied knowing that the differential in premiums of VT 19.5 million, meant that the custom owners had been deprived of their proper entitlement.

63. Mr Stuart Titek claimed a lack of knowledge regarding how he paid for the premium of VT 1.5 million, stamp fees and registration costs, and the annual rent. He maintained that First National, the real estate company involved in the on-sale to Mr Butlin and Ms Lloyd, dealt with all of that. He denied that the deposit paid by Mr Butlin and Ms Lloyd was used to pay those expenses, even when taken to the exhibits that clearly demonstrated this to be so.

(c) <u>Third Defendant</u>

64. Mr Paul Gambetta was the Lands Department Director. His evidence was to the effect that the registrations had been undertaken in good faith on the basis of what the Department had been advised by others. He appended the relevant Lands Department documents to his second sworn statement. He agreed with the steps in the process of issuing a new lease as described by Mr Pierre.

65. In cross-examination, Mr Gambetta confirmed that if enquiries had been made in 2007 as to who was/were the custom owner(s) of Lenur Island, the Department's information was that ownership was disputed and staff would have been able to name all the claimants.

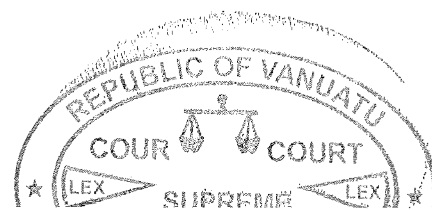
66. Mr Gambetta confirmed that in order to be given a CRN the applicant would have had to set out his plans for the land and indicate the proposed employment for local citizens – the application form requires such comprehensive information to be supplied. There is no evidence that Mr Stuart Titek had done this. Mr Gambetta confirmed also that if the application had indicated that an immediate on-sale was contemplated, the application would have been declined – he relied on the Supreme Court case of *Takau v Carlot* [2001] VUSC 134 as authority.

67. Mr Gambetta confirmed the correct process involved the sending out of a Kastom Ona Blong Graon form for the local Chiefs to identify the various persons claiming custom ownership in order that that their consent to a lease being issued could be verified.

68. Mr Gambetta identified numerous matters in relation to Mr Stuart Titek's CRN application which he considered indicated that it had not been properly issued. It is not necessary to list them as this was not challenged by any other party.

69. Mr Gambetta further considered that the Department's internal checklist recorded a number of aspects which should have alerted the Minister to not issue the lease. For example, the fact that the custom owners had not been identified was noted, but somehow the checklist also recorded that the custom owners had consented to the issuing of a lease. Mr Gambetta considered it unusual and therefore worthy of note by the Minister that the Department had not prepared the lease.

70. Mr Gambetta considered the VT 1.5 million first premium was too low considering the Department's valuation of the land at over VT 10 million. More significantly, he stated that it was highly improper for the lease with a premium of VT 1.5 million to be executed by the Minister knowing it was to be immediately on-sold for VT 21 million. The lease was to be



issued only in the best interests of, and for the benefit of, the disputing custom owners. What occurred here, he thought, was not in their best interests.

(d) Fourth Defendants

71. Mr Butlin was the main participant in the transaction to purchase Lenur Island. Ms Lloyd's name appeared on the title, but she had little to do with the arrangements around the purchase of the lease. Both however, gave evidence.

72. Mr Butlin produced 5 sworn statements which he said were all true and correct. Mr Sugden objected to parts of those statements as being hearsay and/or self-serving as well as speculative. Mr Sugden was correct, and I took these objections into account when evaluating Mr Butlin's evidence.

73. Mr Butlin's first sworn statement records the initial purchase of the lease. Mr Butlin claimed he was a *bona fide* purchaser for value. The statement also details Mr Butlin's subsequent reluctant decision to sell the land due to his quiet enjoyment of the property having been disturbed by Mr Rolland Orah and others. His counter claim was based on public statements by Mr Rolland Orah that Lenur Island would never be sold and that such public statements interfered with all Mr Butlin's attempts to find a suitable prospective buyer.

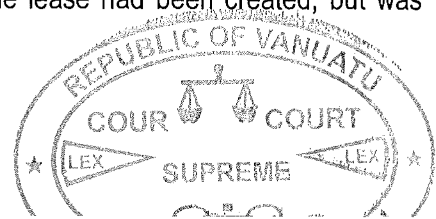
74. Mr Butlin's second sworn statement deals with his visits to Lenur island. I have already indicated I accept Mr Butlin's evidence that he first went to the island in January 2008 with his son. The details provided in this sworn statement support the accuracy of Mr Butlin's claim in this regard. This second sworn statement also provides further limited details to support the counter claim.

75. Mr Butlin's third sworn statement contradicts the evidence of Mr John Massingbel, in particular, but other persons also dealing with the allegations that Mr Butlin had been on Lenur Island in March 2005, March 2006 and also the occasion of a visitation by locals. On this visit the locals had made it known to Mr Butlin that he was trespassing and that ownership of the land was disputed. Mr Massingbel had said this occurred in March 2006 – Mr Butlin attempted to show that it was in fact 3 years later. Mr Butlin also counters the suggestion that he was on Lenur Island in July 2007. Extensive documentary evidence supports Mr Butlin's contentions.

76. Mr Butlin's fourth sworn statement responds to the allegations that he attempted to avoid service, as well as further respond to the allegations that he visited Lenur Island prior to January 2008 – this is in response to further evidence filed by the claimants. Mr Butlin produced further documents, which were of assistance. In this statement Mr Butlin stated his major concern was to obtain good titles to Lenur Island, and he relied on his lawyer for this. He stated he is and was not aware of any irregularities in the purchase process. He reiterated he was a *bona fide* purchaser for value.

77. Mr Butlin's fifth sworn statement dealt with Customs issues relating to his boat Solar Amity in 2014. It took matters no further.

78. In cross-examination, Mr Butlin advised he first came into contact with Mr Craig on 6 November 2007. He signed the S&P Agreement on 11 November 2007, and dealt with that via facsimile. Mr Butlin stated that he was advised by Mr Craig that the lease had been created, but was



going through stamping and registration. Mr Butlin stated that he had not sighted the lease prior to signing the S&P Agreement. and indeed stated that he first saw the lease on 21 November 2008. He agreed that he had completed the purchase without first seeing the lease. He explained that he had engaged a partner in a law firm and trusted the process.

79. Mr Butlin was cross examined about what he knew of the lease terms. Mr Butlin responded that he knew the lease was for 75 years and that the annual rent would be 2% gross of developments. He knew a premium was involved, but didn't know what that was for, nor did he inquire about that as he trusted his lawyer. When asked if he suspected fraud Mr Butlin responded: "No. In my communication, with Nigel [his lawyer] there was no indication of anything wrong – had there been, I'd have been out of the deal".

80. Mr Butlin was told by Mr Craig that Mr Stuart Titek was the custom owner. He had previously told Mr Craig that he did not want to buy if there was dispute over ownership – Mr Craig had advised him that there was no such dispute.

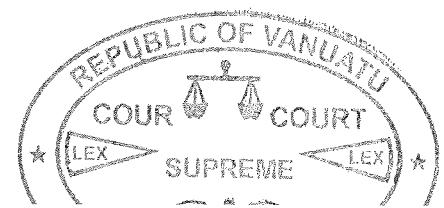
81. Mr Butlin was cross-examined about why he had bought Lenur Island sight unseen. He explained there was urgency, as another prospective purchaser was interested and for Mr Butlin to be successful, the transaction needed to be promptly completed. That haste explained why Mr Butlin did not carry out more diligence and relied on his legal advisor to protect his interests. Mr Sugden tried at length to extract concessions from Mr Butlin about when he first went to Lenur Island and what he knew of the dispute regarding ownership. Mr Butlin remained unshaken.

82. Mr Sugden became more insistent in his questioning, suggesting that Mr Butlin had knowingly facilitated Mr Stuart Titek's fraud on the true custom owners. That was flatly rejected, as was the more extreme suggestion that Mr Craig was party to a conspiracy with Mr Stuart Titek and Mr Butlin to defraud the custom owners. It was suggested that Mr Butlin had completed the transaction in short time to put himself in the category of a *bona fide* purchaser for value. That too was denied with the telling answer: "I only know about that from you and this trial. I wish I hadn't bought the place. If I'd been warned, I would have given away the A$20,000 [deposit]. I'm wealthy. I don't need this. There is no plan. I'm not so foolish."

83. Mr Craig, in his sworn statement, confirmed his first contact in Mr Butlin was by-email on 6 November 2007. He also confirmed that he had first introduced Mr Butlin to the Titek family in January 2008 at a Restaurant in Vila.

84. In cross-examination Mr Craig confirmed his initial instruction to sell Lenur Island were from Mr Peter Titek in 2006. Mr Craig did not have any concerns naming the vendor as Mr Stuart Titek, as he was to be the lessor. He denied any suggestions of wrong doing or any knowledge of impropriety.

85. The cross-examination of Mr Craig was not helpful. He was an important witness for the Claimant, but he was not tackled on significant aspects with which he was able to assist the Court. Instead the questioning proceeded on the assumption that the on-sale was fraudulent and obviously so to anyone involved. When that was denied, unhelpful assertions were made to demonstrate otherwise, with the whole process devolving into an accusatory line met with stone-walling and avoidance. Further, this was done without consideration to record-keeping. Accordingly, the notes of evidence relating to this part of the trial are somewhat sparse.



G. Evaluation of Main Witnesses

86. The credibility and accuracy of witnesses' evidence is not to be assessed on how the witness appears in Court. Clues which might be relied on to gauge such matters are not obvious simply based on appearance or conduct. Observation of such conduct is a necessary part of the process of evaluation, but only a small part. What is far more significant is to look for consistency. I looked for consistency within a witness' account, and also when comparing that account with the accounts of other witnesses and the accounts with documentary exhibits. I also had regard for the inherent likelihoods of what had allegedly taken place. On that basis I formed certain views of the main players who appeared before me.

87. I have already dealt with the more peripheral witnesses when dealing with parts of the evidence. I do not repeat my views in respect of them. I am dealing in this section with the witnesses whom I considered had a real role to play in the Court's determinations.

88. Mr Korman was not a witness who engendered trust. I formed the view his evidence should be relied on only when supported by other reliable evidence. His motive for conducting himself in the manner he has admitted to is cause for referral to the Public Prosecutor in order for a determination as to a prosecution for breaches of the Penal Code and/or the Leadership Code. Whether he acted dishonestly or corruptly is a matter for further consideration, but I did not consider him to be a reliable witness.

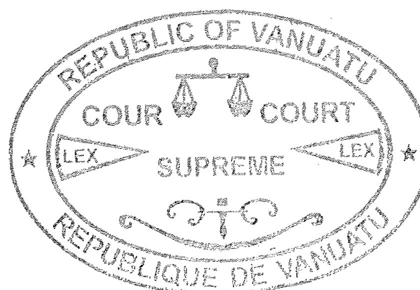
89. The evidence of Mr Pierre was most helpful in explaining the various steps that had to be completed in order for a new lease to be created. He was a thoroughly believable witness.

90. I did not find Mr Stuart Titek to be a compelling witness. His evidence was inherently inconsistent, as well as inconsistent with the evidence of other witnesses which I accepted. His evasion of questions was indicative of someone not telling the Court the entire truth. I determined that I could accept his evidence only where there was independent support for what he told me. His conduct too, is to be referred to the Public Prosecutor.

91. While Mr Crimson Bani's evidence was of interest, it mainly related to subsequent events and not the critical matters in terms of addressing the issues here in dispute.

92. Mr Gambetta was an excellent witness, making concessions where appropriate and obviously doing his best to assist the Court. I believed him to be a witness of both accuracy and truth. His evidence regarding information Lands Department staff would have told any enquirer was not consistent with the evidence of Mr Stuart Titek. I accepted the evidence of Mr Gambetta as to this.

93. Mr Butlin was a very impressive witness. He had the assistance of records made at the time, which he used to good effect in repelling the numerous allegations thrown at him. I believed him to be an honest and accurate witness. His evidence dovetailed with exhibits and the evidence of other witnesses in a way that was compelling and not in any way suggestive of being complicit in order to tell a united account. Many of his responses to Mr Sugden's attacks had a real ring of truth to them, and I did not gain the impression that he was evading recalling with truthful accuracy.



94. Mr Craig was not as significant a witness as I had understood he would be. When faced with a barrage of accusation he seemed to retreat. It is difficult to be critical of Mr Craig for responding to personal attacks as he did. I concluded that Mr Craig's evidence should be relied on where supported by other reliable evidence.

H. Discussion

(i) Issuance of lease

95. If the Lands Offices processes have not been strictly complied with, the obligation of the Minister was to decline to sign the lease. Only where applications for a lease have followed the correct procedures should a lease be brought into existence. Mr Korman's conduct is accordingly incomprehensible.

96. Mr Korman gave no evidence of the benefits that would devolve to the custom owners from his issuance of the lease. Indeed given what occurred subsequently he actually deprived custom owners of a VT 19.5 million premium, and, wrongly, the benefit of that amount was given to his friend's relative, Mr Stuart Titek.

97. The initial issuance of the lease by Minister Korman was clearly done by mistake or fraud.

(ii) Consent to Transfer of lease

98. In signing the Consent to Transfer the lease on the very same day as the lease itself, the Minister has clearly erred in his duty towards the custom owners – a group whose interests he was statutorily compelled to protect. Instead, Mr Korman allowed Mr Stuart Titek to enjoy a VT 19.5 million profit from the transaction which was at the cost of the custom owners. Mr Korman dealt with only a hundred leases per year, so the possibility of his being so busy or distracted by other matters can be safely put to one side. I believe that Mr Korman was aware of what he was undertaking when he executed the Consent to Transfer.

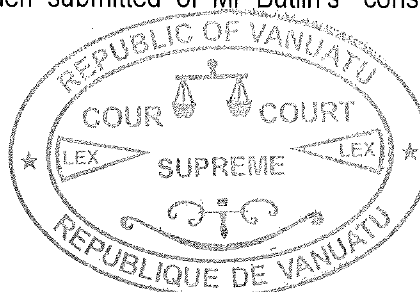
99. The Court cannot be seen to support such cavalier actions. Mr Korman's acts were unlawful and seem to show a lack of proper concern - they are therefore liable to rectification.

(iii) Transfer to Mr Butlin and Ms Lloyd

100. My earlier findings make it apparent that Ms Lloyd was but peripherally involved in the transaction.

101. Mr Butlin had no prior knowledge of any dispute regarding ownership of Lenur Island. I accept his evidence that if he had been aware of such dispute, he would not have completed the purchase.

102. The protection of section 100(2) of the Land Leases Act therefore protects the good title of Mr Butlin and Ms Lloyd, unless the notion Mr Sugden submitted of Mr Butlin's "constructive knowledge" has application.



103. Mr Sugden pointed to the following matters as being collectively indicative of Mr Butlin's knowledge that the transaction was tainted and the lease therefore liable to be rectified:

- Despite supposedly being concerned regarding the true ownership of Lenur Island, Mr Butlin completed the purchase without first visiting the island or making any inquiries as to this himself;

- Mr Butlin's first demonstrable interest in purchasing Lenur Island was on 6 November 2007, the date he e-mailed Mr Craig; and yet Mr Butlin signed the S&P Agreement on 8 November 2007 demonstrating undue haste;

- Mr Butlin had not seen the terms of the lease he was purchasing prior to signing the S&P Agreement, again demonstrating haste and a contrast to Mr Butlin's statements to the effect that he would like to have seen the lease prior to committing himself to the purchase;

- Mr Butlin had been told that Mr Stuart Titek was the rightful owner of the land. Despite that, Mr Butlin apparently saw nothing wrong with the custom owner first signing a lease to himself, thereby costing unnecessary conveyancing fees, and only then transferring the lease to Mr Butlin and Ms Lloyd;

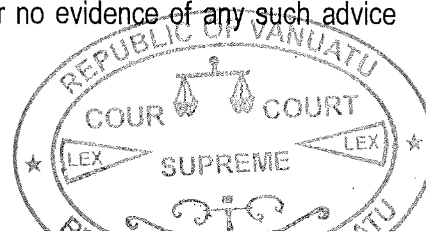
- Mr Butlin asked Mr Morrison to "press" for a copy of the terms of the lease, but Mr Butlin did not see a copy of the lease until after the purchase been completed and only after another nine months had passed – that suggested Mr Butlin's evidence was inconsistent. Mr Sugden also attached blame for this delay to Mr Morrison, as Mr Morrison had demonstrably obtained a copy of the lease as at 6 December 2007 but he had not made that available to Mr Butlin despite that being requested;

- Mr Butlin agreed that the funds he had paid as the purchase deposit were able to be disbursed to enable Mr Stuart Titek to (i) be registered as lessor, and (ii) pay the initial VT 1.5 million premium to the Custom Owners Trust Account; and

- Mr Butlin's self-claimed naiveté was simply not credible – Mr Sugden pointed to Mr Butlin's background as being indicative of someone far better versed in the world of business.

104. All those submissions have been previously dealt with on an individual basis, and I do not accept the overall conclusion that Mr Sugden invited me to draw of Mr Butlin presenting himself to the Court in a calculated way in order to be able to claim the protection of the Land Leases Act. I reject the submission that Mr Butlin was aware that there were real or significant issues regarding the title.

105. Finally, there is a need to deal with Mr Sugden's submission that Mr Morrison must have realised the transaction was fraudulent and he should have accordingly advised Mr Butlin of that fact and put an end to the contract. There is however no evidence of any such advice



being offered. Further, if the fraud was so obviously apparent the question needs to be asked as to why the original Claim and the First Amended Claim made no mention of such obvious matters. It is only in the final iteration of the Claim, filed shortly before the case was due to be heard, that this proposition is articulated.

106. Mr Sugden's response, when this was put to him, is that the full picture only became clear following the completion of disclosure, which had been significantly delayed. I do not accept this apparent lack of clarity. The bare allegation of fraud on the custom owners could be easily discerned from documents relating to the transaction publicly available.

107. Mr Sugden did not have any authority for his proposition that Mr Morrison's knowledge was attributable to Mr Butlin. His Latin maxim *qui facit per alium facit per se* can only have application if the one doing the act through another has the necessary knowledge to be responsible for the act done. In this instance, there is no evidence that Mr Butlin had Mr Morrison's attributed knowledge. Accordingly, this principle is of no assistance to Mr Sugden's proposition.

108. In summary, Mr Butlin and Ms Lloyd have not been shown to be anything other than *bona fide* purchasers for value.

109. Accordingly, their title to Lease 04/1712/001 is protected by section 100(2) of the Land Leases Act.

I. <u>Counter Claim</u>

110. Although pleaded, and briefly dealt with in the sworn statements by Mr Butlin, this aspect of the case has not been advanced at trial by either the Fourth Defendants nor defended by the Claimant.

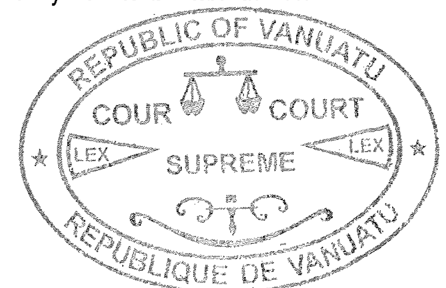
111. Although Mr Morrison in his final submissions suggested a re-listing for conference to pursue the counter claim, I am not so minded. This matter does not merit yet further Court time and expense. The parties had the opportunity at trial to canvas the counter claim issues but chose not to do so. Accordingly, I dismiss the counter claim for want of evidence to support it. The reality is that while this case has proceeded through the court process, the value of the property has likely increased – resulting in little or no actual loss to Mr Butlin and Ms Lloyd.

J. <u>Result</u>

112. The Claim seeks only rectification of title in respect of the registration and transfer to Mr Butlin and Ms Lloyd.

113. Despite the irregularities inherent in the issuance of the lease and the immediate approval of the transfer of title, the claim fails and is dismissed.

114. Costs ordinarily follow the event. Accordingly, Mr Rolland Orah is to pay costs on the standard basis to Mr Butlin and Ms Lloyd. If those costs cannot be agreed they are to be taxed. The costs are to be paid within 28 days.

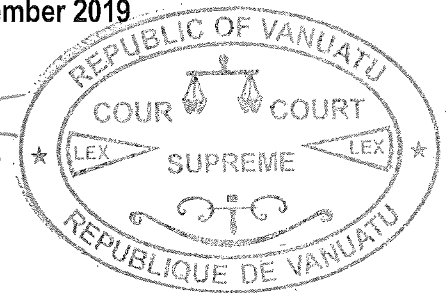


115. The Claim as against Mr Stuart Titek has been made out. Accordingly he is to pay half Mr Rolland Orah's costs at the standard rate. If the costs cannot be agreed they are to be taxed. The costs are to be paid within 28 days.

116. The Claim as against Mr Kuma Titek has not been made out. However, Mr Kuma Titek has taken no part in this case, and he is therefore not entitled to costs.

117. The Claim as against Republic of Vanuatu has not been made out in the sense that the Ministry of Lands has not been demonstrated to have acted improperly in the processes of registration. What has been made out against the Republic is the misconduct by the Minister, for which the State is vicariously responsible. It therefore follows that the Republic of Vanuatu should also pay half Mr Rolland Orah's costs. If the costs cannot be agreed they are to be taxed. The costs are to be paid within 28 days.

Dated at Port Vila this 13th day of December 2019
BY THE COURT



Justice G.A. Andrée Wiltens