

**IN THE COURT OF APPEAL OF  
THE REPUBLIC OF VANUATU**

*(Civil Appellate Jurisdiction)*

**Civil Appeal Case No. 32 of 2007**

**BETWEEN: RATUA DEVELOPMENT LIMITED**  
Appellant

**AND: MATHEW NDAI & EDWARD SUMBE** 30 NOV 2007  
First Respondents

**AND: NELSON SESE & SILAS SESE**  
Second Respondents

**AND: DIRECTOR OF LAND RECORDS**  
Third Respondent

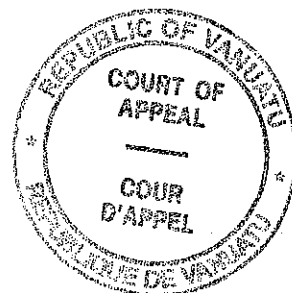
**AND: TOM JOE BOTLENG**  
Interested Party

**Coram: Chief Justice Vincent LUNABEK  
Justice J Bruce ROBERTSON  
Justice Jon von DOUSSA  
Justice Hamlison BULU  
Justice Christopher TUOHY**

**Counsel: Mr. Blake for Appellant  
Mr. Laumae for First Respondents  
No appearance for Second Respondents  
Mr. Jenshel and Ms. Harders for Third Respondent  
Mr. Sugden for Interested Party**

**Date of Hearing: 22 November 2007**

**Date of Judgment: 30 November 2007**



# JUDGMENT

## Introduction

1. This is an appeal against a decision of Saksak J. given on 19 March 2007 in which he refused to order the removal of a caution lodged by the First Respondents and noted on the register in respect of the Appellant's Lease No. 04/3321/001 of Ratua Island near Santo.

## Background

2. A copy of the caution was not before Saksak J but has been placed before us. It is on the printed form, LR Form 19. The caution provides:

*"TITLE(S) No(s). 04/3321/001*

*To: Director of Land Records*

*TAKE NOTICE that I/We (full names)*

*Trans Melanesian Lawyers*

*PMB 9073*

*Vila*

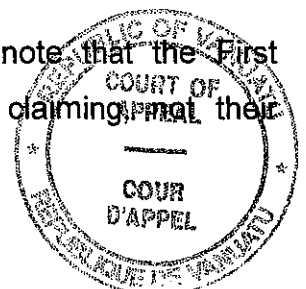
*Tel: 40284*

*Claiming in respect of the above-mentioned title (state by reference to the appropriate subsection in the Act the grounds on which the claim is founded and the nature of the interest claimed).*

*- Custom ownership right by Mathew Ndai and Nelly Molbarav and Sumbe*

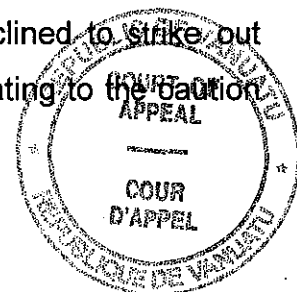
*HEREBY FORBID the registration....."*

3. Putting aside the substantial validity of the caution, we note that the First Respondents should have been named as the persons claiming that their



lawyers, and no reference was made to the appropriate subsection of s. 93 (1) of the Land Leases Act ('the Act'). The Director should have rejected the caution on those grounds alone. A caution effects a substantial detriment to the rights of a registered lessee. It should only occur when the statutory regime is strictly complied with.

4. The claim filed by the First Respondent in this proceeding to support the caution seeks an order under s. 100 of the Act that the register in respect of the lease be rectified by cancelling registration of the lease on the basis that registration was obtained by fraud or alternatively by mistake. The fraud alleged is that the First Respondents are the identified custom owners of Ratua Island and they did not consent to and sign the lease which was signed by the Second Respondents as lessors. The mistake alleged is that of the Minister of Lands at the time in approving the lease in the belief that proper administrative processes had been observed when they had not; and by the Minister and the Third Respondent ("the Director") in approving and registering the lease in ignorance of a prior identification of the First Respondents as custom owners by a previous Minister.
5. The application before Saksak J was primarily for an order striking out the claim on the grounds that the First Respondents did not have standing to challenge the lease; and alternatively for an order directing the First Respondents to lodge a claim in the Lands Tribunal for determination of their customary rights before challenging the lease. The application for removal of the caution was made only in written submissions and was obviously ancillary to the primary application.
6. Consistently with that, the argument and the judgment in the Court below revolved around whether the real issue in the claim was the customary ownership of the land, whether or not the First Respondents have a reasonable cause of action and whether they have standing. These issues were decided in the First Respondents favour and accordingly Saksak J declined to strike out their claim. There was apparently no separate argument relating to the caution

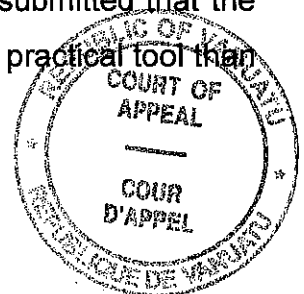


and no separate discussion of it in the judgment. It is evident that all concerned saw its removal or otherwise as consequential upon the strike out decision.

7. The Appellant appealed against both the refusal to strike out the claim and the refusal to order removal of the caution but withdrew the former at the hearing before us. Thus the focus of the appeal now is on an issue which was not separately argued in the Court below and in respect of which there is consequently no specific reasoning in the judgment appealed from.

### Submissions

8. Mr. Blake's submission was that the expression "*interest in land*" in s. 93 (1) (a) referred only to the interest of a lessee in land. The Act is a system for registration of the leasehold interest only and it is only that interest which may be the subject of a dealing under the Act. He contrasted that with the interest of a lessor which cannot be dealt with under the Act. He submitted that the Act is not concerned with the interests of custom owners and that to give a wide meaning to "*interest in land*" so as to include the underlying interest of a custom owner would be against the scheme of the Act, would lead to grave practical difficulties and would undermine the indefeasibility of title the Act is intended to confer on lessees.
9. He also argued that the wording of s. 93 (1) shows that the interests which are intended to have the benefit of cautions are those which are capable of registration.
10. He submitted that if the justice of the case of a custom owner or other person challenging the validity of a registered lease requires, the Court is available to restrain dealings with the lease and the use of the land. He submitted that the ability for the Court to make such orders is a more flexible and practical tool than a caution for achieving a just result.



11. The submissions of Mr. Kabini, Mr. Sugden and Mr. Jenshel all supported the proposition that the caution is sustainable and it is appropriate to deal with them together. They argued that "*interest in land*" in s. 93 (1) (a) should be given a wide meaning to include the interest of a custom owner in the land in respect of which a lease has been registered under the Act. They pointed to the definitions of "*interest*" and "*land*" in s. 1 to support that interpretation and placed much emphasis on Parliament's use of the words "*any*" and "*or otherwise*" as demonstrating an intention to include the widest possible range of interests.
12. It was also argued that a wide interpretation so as to extend protection to the interest of custom owners was required by Article 74 of the Constitution at least in situations where the custom ownership is not in dispute in terms of Article 78.

### Discussion

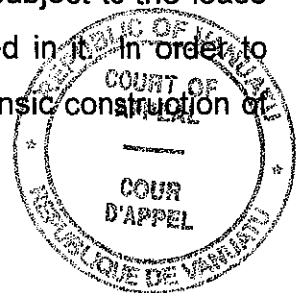
13. The crucial provision is s. 93 (1) of the Act which provides:

93. (1) Any person who-

- (a) claims any interest in land under an unregistered instrument or otherwise;
- (b) claims a benefit under a trust affecting a registered interest;
- (c) claims a licence affecting a registered interest; or
- (d) has presented a bankruptcy or winding up petition against the proprietor of a registered interest;

may lodge with the Director a caution in the prescribed form forbidding the registration of any person as transferee of, or any instrument affecting, that interest, either absolutely or conditionally.

14. The essential issue is whether s. 93 (1) (a) of the Act should be interpreted as conferring the right to lodge a caution affecting a lease register upon a person who claims that he is the rightful custom owner of the land subject to the lease but by fraud or mistake of some sort is not the lessor named in it. In order to answer that question it is necessary to consider both the intrinsic construction of



s. 93 (1)(a) and its place in the scheme of the Act as a whole. It is appropriate to start with the latter.

15. The Act creates in Vanuatu a "*Torrens*" systems of land registration similar to the systems which have operated with conspicuous success in terms of simplicity and certainty of land tenure in New Zealand, most of the Australian states and territories and elsewhere for well over 100 years. In one striking respect, however, the Vanuatu Act is unique: it applies to leasehold estates or interests in land only. This feature is the source of the difficulty in this case.
16. The Act is an integral part of the land legislation enacted in Vanuatu shortly after Independence in order to establish by statute the system of land tenure for Vanuatu which is mandated in Chapter 12 of the Constitution. The most important of these interrelated enactments are the Alienated Land Act (Cap. 145), the Land Reform Act (Cap. 123) and the Land Leases Act itself. They all flow from and reflect the provisions of Chapter 12 particularly Articles 73, 74, 75, 79 (1) and 80 which are set out below.

#### **LAND BELONGS TO CUSTOM OWNERS**

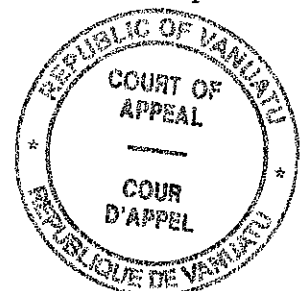
73. All land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants.

#### **BASIS OF OWNERSHIP AND USE**

74. The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu.

#### **PERPETUAL OWNERSHIP**

75. Only indigenous citizens of the Republic of Vanuatu who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of their land.



## LAND TRANSACTIONS

79. (1) Notwithstanding Articles 73, 74 and 75 land transactions between an indigenous citizen and either a non-indigenous citizen or a non-citizen shall only be permitted with the consent of the Government.

...

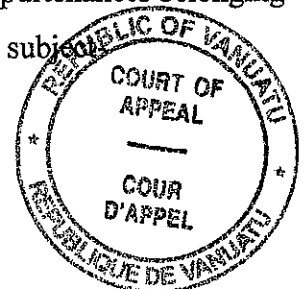
## GOVERNMENT MAY OWN LAND

80. Notwithstanding Articles 73 and 74 the Government may own land acquired by it in the public interest.

17. The result of those Articles is that only indigenous citizens and the Government may own land in Vanuatu. There is, however, nothing in the Constitution to prevent land being leased to other persons, indigenous or non-indigenous, citizen or non-citizen or for such leasehold estates to be sold, mortgaged or otherwise dealt with by their proprietors. Indeed, immediately after Independence, Parliament passed the legislation referred to above to enable that to happen and in particular to provide the opportunity for non-indigenous persons who held freehold titles over land before Independence to acquire leasehold titles over that land. However, the only persons who can be lessors are indigenous citizens who are custom owners or the Government.
18. The essential feature of any Torrens system is the indefeasibility of the title of the registered proprietor. Indefeasibility of title is enshrined by the provisions of Part 4 of the Act relating to the effect of registration. The primary provision is s. 15:

## RIGHTS OF PROPRIETOR

15. The rights of a proprietor of a registered interest, whether acquired on first registration or subsequently for valuable consideration or by an order of the Court shall be rights not liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all rights, privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject



(a) to the encumbrances and to the conditions and restrictions shown in the register;

(b) unless the contrary is expressed in the register, to such of the liabilities, rights and interests as are declared by this Act not to require registration and are subsisting:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as trustee.

Essential corollaries are ss. 18 and 23:

### **ENTRIES TO CONSTITUTE ACTUAL NOTICE**

18. Every proprietor acquiring any registered interest shall be deemed to have had notice of every entry in the register relating to the interest and subsisting at the time of acquisition.

### **PROTECTION OF PERSONS DEALING IN REGISTERED INTERESTS IN LAND**

23. (1) No person dealing or proposing to deal for valuable consideration with a proprietor of a registered interest shall be required or in any way concerned-

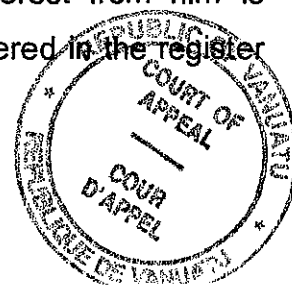
(a) to inquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor was registered; or

(b) to see to the application of any consideration or any part thereof; or

(c) to search any register kept under any previous law.

(2) Where the proprietor of such an interest is a trustee, he shall in dealing therewith, be deemed to be the absolute proprietor thereof and no disposition by such trustee to a bona fide purchaser for valuable consideration shall be defeasible by reason of the fact that such disposition amounted to a breach of trust.

19. The effect of all these provisions is that the register is everything. The title of the registered proprietor and anyone acquiring any interest from him is protected against any adverse claims or interests not entered in the register "except as provided in (the ) Act".





20. This is the basic purpose and effect of the Act. However because the register is everything, it is necessary for provision to be made to protect those claiming an existing interest in the title which is liable to be defeated by registration of an interest acquired for valuable consideration from the registered proprietor. This function is provided by the provisions in the Act relating to cautions contained in Part 14.

21. The broad features of this Part of the Act are:

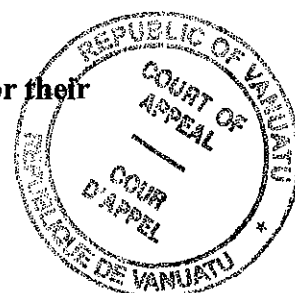
- a) Persons having certain specified claims have the right to lodge a caution which is then noted on the register (s. 93). Once the caution is entered on the register everyone dealing with the registered proprietor is deemed to have notice of it (s. 18)
- b) Subject to specific exceptions, no change in proprietorship or other dealing affecting the interest in relation to which the caution is lodged may be registered (s. 94)
- c) A process is provided for cautions to lapse or for their continued validity to be challenged through Court proceedings (ss. 96, 97, and 98).

Similar caution (sometimes called caveat) sub-systems are an integral and necessary part of Torrens systems in other jurisdictions.

22. The system of registration and protection of title created by the Act applies to one type of estate in land only, the leasehold estate. That is evident from both the short and long titles of the Act:

### LAND LEASES

**To provide for the creation and disposition of leases of land, for their registration and for matters connected therewith.**



23. Several of the definitions in s. 1 are also relevant:

"lessee" means the proprietor of a lease or his successor in title;

"lessor" means the person who has granted a lease or his successors in title;

"proprietor" means:

(a) in relation to a registered lease the person named in the register as the proprietor thereof; ....

"the register" means the leaf of the Land Leases Register kept in respect of a registered lease;

"to register" means to make an entry in the Land Leases Register under this Act and

"registered", "unregistered" and "registration" shall be construed accordingly;

24. Section 4 provides:

#### **THE LAND LEASES REGISTER**

4. (1) The Land Leases Register shall comprise a register maintained in both the English and French languages in respect of each lease required to be registered by this Act.

(2) Each register shall be divided into three sections as follows-

(a) the property section, containing a brief description of the lease together with particulars of its appurtenances; and

(b) the proprietorship section, containing the name, postal address in Vanuatu of the proprietor and a note of any caution or restriction affecting his right of disposition; and

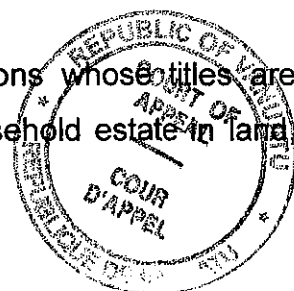
(c) the encumbrances section, containing a note of every encumbrance affecting the lease required by this Act or any other law, to be registered.

Section 14 is also important:

#### **INTEREST CONFERRED BY REGISTRATION**

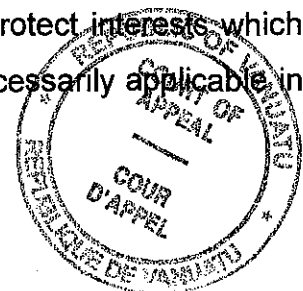
14. Subject to the provisions of this Act, the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease together with all implied and expressed rights belonging thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

25. It is self-evident from these provisions that the persons whose titles are registered and protected are the proprietors of the leasehold estate in land

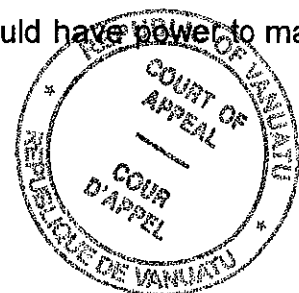


that is, the lessees. The Act does not provide for registration of the interests of custom owners of land (most custom land in Vanuatu is not even subject to leases). Nor does it in any way seek to regulate the custom ownership of land.

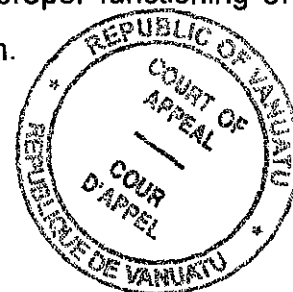
26. There is indeed no specific place for the identification of lessors in the register. Although we assume that their names are recorded as part of the brief description of the lease in the property section of the register, it is clear that the property section is intended to record and identify the details of the lease not the lessors. It follows that the Land Leases Register does not purport to and does not declare the custom ownership of the land subject to a registered lease. There is no Torrens system in respect of those to whom the land belongs, namely the custom owners.
27. Against that background, we turn to consider this caution. The right claimed is "*custom ownership*". As stated above, that is not a right which is capable of registration or of obtaining the protection of indefeasibility under the Act.
28. Mr. Jenshel's argument that the right claimed is capable of supporting a caution is based on a literal interpretation of the first part of s. 93 (1) (a) in isolation. It overlooks the second part of s. 93 (1) which provides that a claimant "*may lodge with the Director a caution in the prescribed form forbidding the registration of any person as transferee of, or any instrument affecting, that interest*". This makes it clear that the interest which is claimed must be one which is transferable and registrable under the Act. A right of custom ownership is not transferrable or registrable under the Act. In this respect, the Act is more restrictive than the equivalent provisions in some other jurisdictions which do not contain the qualifications in the last part of the subsection: cf. s. 137 Land Transfer Act (NZ). Because of that difference, authorities from jurisdictions which permit cautions to protect interests which can never become registrable under the Act are not necessarily applicable in Vanuatu.



29. We are satisfied that the phrase "*any interest in land*" in s. 93 (1) (a) must be read as meaning "*any interest in a registered lease*" ie. any interest in land under the Act . The words "*or otherwise*" have an important function because equitable rights in respect of a leasehold interest can certainly arise other than under an unregistered instrument e.g under a contract for sale and purchase not itself capable of registration (see s. 22 (5)), perhaps the most common use for a caution. To read s. 93 (1) (a) in the way contended for by the respondents would be to allow cautions to be used in a way which is quite inconsistent with their purpose and the scheme of the Act, and indeed would significantly derogate from the indefeasibility of the lessee's title which is the primary object of the Act. We are therefore satisfied that the caution in this case cannot be sustained.
30. There was some suggestion in argument that a custom owner who is making a claim under s. 100 (1) for cancellation of registration of a lease has an interest in the registered lease. We do not think that is so. The possibility of obtaining a Court order to overturn a leasehold title which, pursuant to ss. 14 and 15, has already vested indefeasibly in its proprietor, cannot properly be described as an "*interest*" in that leasehold title in terms of the definition in s. 1 or the general meaning of the word "*interest*" as it relates to land.
31. That is not to say that there is no remedy available to a person claiming to be the custom owner of land in respect of which a lease naming someone else as lessor has been or is about to be registered. In a case where the title of the registered proprietor of the leasehold interest is not protected by s. 100 (2) of the Act, a custom owner claiming to be the party who should be the lessor may have available to him a remedy by way of cancellation of the registration of the lease which shows another party as the lessor. In proceedings to enforce such a remedy, the Court would have power to make interim orders having an effect similar to a caution.



32. In cases where the title of the registered proprietor of the leasehold interest is protected by s. 100 (2) of the Act, the lease cannot be cancelled, but rectification could nonetheless be ordered under s. 100 (1) by requiring the removal of the person wrongly named as lessor, and the substitution of the true custom owner.
33. The appeal is allowed. The caution lodged by the First Respondents under No. 1812/2005 and registered on 26 October 2005 shall be removed from the register forthwith. We are aware that at least one other caution has been registered against the title by the Interested Party under No. 503/06. It is even more defective on its face than the one which is formally subject to this appeal. But even if it did properly state the true nature of the Interested Party's claim (ie. as a claimed custom owner of the land seeking cancellation of registration of the lease under s. 100 (1)), it would not for the reasons set out above be a claim capable of supporting a caution under s. 93. Although we cannot formally order its removal, the mechanisms exist in ss. 97 and 98 for the parties to achieve that result.
34. In all of this we are not unmindful of the problems which exist and which we anticipate will escalate when leases are registered having been granted by people asserting that they are the custom owners and thus able to be lessors but where there is serious dispute and challenge as to their position. It is not going to disappear and requires action. Using processes created to deal with lessee rights and interests to cover the problems of lessors is unsustainable.
35. This case is the second with which we have dealt in this sessions which has demonstrated that the Director has been significantly failing to scrutinize cautions lodged to ensure that the prescribed form is properly completed and that a claim of the type required by s. 93 (1) is made. The caution provisions are an important and integral part of the Act. The proper functioning of the system requires that they are rigorously complied with.



36.

The Appellant is entitled to its costs on a standard basis payable by the First Respondent, the Director and the Interested Party in equal shares. All of them opposed the appeal.

Dated at Port Vila, this 30<sup>th</sup> day of November, 2007

BY THE COURT

  
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Hon. Chief Justice V LUNABEK

  
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Hon. Justice B ROBERTSON

  
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Hon. Justice J Von DOUSSA

  
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Hon. Justice H BULU

  
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Hon. Justice C TUOHY