

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Civil Appellate Jurisdiction)

CIVIL APPEAL NO. 02 OF 2012

BETWEEN: NITCHIKU (VANUATU) LIMITED
Appellant

AND: THE REPUBLIC OF VANUATU
First Respondent

AND: BOETARA TRUSTEES LIMITED
Second Respondent

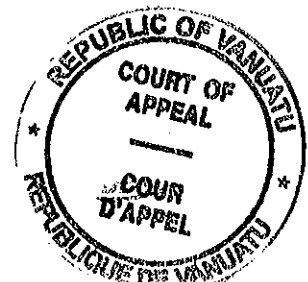
Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice von Doussa
Hon. Justice Fatiaki
Hon. Justice Young
Hon. Justice Spear
Hon. Justice Aru

Counsel: Mr Dane Thornburgh for the Appellant
Mr Frederick Gilu for the First Respondent
Mr Felix Laumae for the Second Respondent

Hearing: 24 April 2012
Decision: 4 May 2012

JUDGMENT

4 May 2012

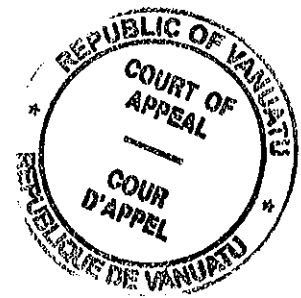


Introduction

1. This is an appeal against a decision of a Judge of the Supreme Court who refused to order rectification of the Land Leases Register by reinstating the boundaries of the land comprised in Land Lease title 04/2643/007 (the leasehold title) to those shown on the leasehold title before the Director of Land Surveys purported to correct an error in the survey plan which formed part of the registered lease by excluding a portion of the land originally included in it.

2. The relevant historical events giving rise to the purported correction are as follows:-
 - a) On 6th November 1986 the Santo Land Council leased to Societe De Investment De Pacific (SIDP) on behalf of the custom owners some 1,400 hectares of land, most of which formed part of pre-Independence title 479. The leased area included some 30 hectares of land within pre-Independence title 486. The land in title 486 was known in pre-Independence times as Zone Maritime Palekula IV. The boundaries of the land so leased were delineated in a survey plan which formed part of the registered lease. The boundaries of one portion of the land, being the portion which formed part of the pre-Independence title 486, ran to the mean high water mark. The Zone Maritime Palekula IV had been a coastal strip of land running from the mean high water mark to a "*sinuous line parallel to and 404 links above high water mark*", the description used in a decision of the Joint Court of the New Hebrides dated 2nd June 1951.

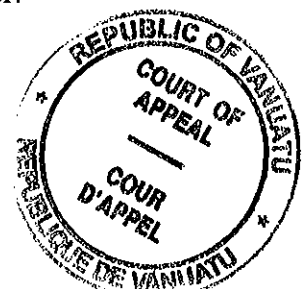
The terms of the lease recognized that the rights of the lessee ran to the high water mark. Clause 13 of the lease permitted the lessee to use the beach and reef fronting the demised land for picnicking and to take fish for personal consumption.
 - b) On 4th February 1987 the SIDP obtained registration of the leasehold title.
 - c) On 2nd April 1987 the appellant, Nitchiku (Vanuatu) Ltd (Nitchiku) purchased the leasehold title and applied for registration of the transfer. The transfer was registered the same day. Nitchiku was a purchaser for value. It moved into possession of the land, and has occupied it ever since, undertaking activities of an agricultural nature on the land.



- d) On 28th February 1988 the Santo Land Council transferred administration and payment in relation to the leasehold title to the declared custom owners who are now represented by the respondent Boetara Trustees Ltd.
- e) In about 2005 the custom owners asserted that the land within pre-Independence title 486 Zone Maritime Palekula IV, had been incorrectly included within the leasehold title. Thereafter the custom owners through Boetara Trustees Ltd sought in a variety of ways to have the Zone Maritime Palekula IV land returned to them. Nitchiku maintained the position that it was a bona fide purchaser for value of all the land included within the survey plan forming part of its registered lease.
- f) On 20th December 2007 the Director of Land Surveys gave written notice to Nitchiku of his intention to correct an error in the survey plan pursuant to s. 11 of the Land Leases Act [Cap 163]. Eventually on 9th February 2009 the survey plan was altered at the direction of the Director so as to exclude from the lease the coastal strip formally part of the Zone Maritime Palekula IV. The amended survey plan showed that the land area, the subject of the lease, had been reduced by approximately 30 hectares.

Contention of the parties

- 3. Nitchiku issued proceedings in the Supreme Court seeking to have the amended register rectified so as to return the survey plan forming part of the lease to its original boundaries. The application was made under s. 100 of the Land Leases Act. Nitchiku alleged that the registration of the altered survey plan had been made by fraud or mistake. The nature of the fraud or mistake alleged was not clearly articulated in the pleadings, neither was the fact that Nitchiku was asserting that as a bona fide purchaser for value its title as registered before the correction, was indefeasible. However the submissions made during the trial of the proceedings made this position clear.
- 4. The respondents on the other hand contended that the Zone Maritime Palekula IV land had been included in the original lease in 1986 in error and that the Director, following the right process, had exercised his power in s. 11 of the Land Leases Act to correct the error in the survey plan forming part of the land leases register.



5. At trial, and before this Court, counsel for Nitchiku, besides relying on the indefeasibility of title argument, contended that the Director had not followed the procedures laid down in s. 11 in that due notice in advance of making the change had not been given to the registered proprietor, and, further that in any event the power to correct errors in a survey plan under s. 11 was a power only exercisable at the time of the first registration of the title.

Discussion

6. The critical sections in the Land Leases Act which fall for consideration are ss. 10 and 11, and ss. 99 and 100. It is to be noticed that the Director referred to in these sections is defined in s.1 to mean “*the Director of the department responsible for land*”. The Director and the Director of Land Surveys are different positions. Those sections provide:-

“10. Land survey plans

(1) The Director of Land Surveys upon application, and on payment of the prescribed fee, shall prepare or cause to be prepared in respect of each parcel, the subject of a lease required to be registered, a survey plan, the original copy of which shall be retained by him, and certified copies of which signed by the parties to the instruments shall be attached to the original instrument of lease to be presented for registration and to the copies of the instrument to be retained by the lessor and the lessee.

(2) The plan shall bear a distinguishing number and shall be referenced to the cadastral plan.

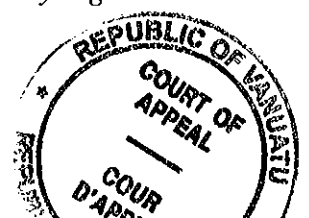
11. Correction of land survey plans

If it appears to the Director that there is any error in a survey plan he may, after taking such steps as he thinks fit to bring to the notice of any person shown by the register to be interested his intention so to do and giving every such person an opportunity to be heard, require the Director of Land Surveys to correct the error:

Provided that the Director may without such notice, require the Director of Land Surveys to correct the survey plan whenever such correction does not materially affect the interest of any person.

99. Rectification by the director

(1) Subject to section 100(2), if it appears to the Director that any register does not



truly declare the actual interest to which any person is entitled under this Act or is in some respect erroneous or imperfect, the Director after taking such steps as he thinks fit to bring to the notice of any person shown by the register to be interested his intention so to do, and giving every such person an opportunity to be heard, may as from such date as he thinks fit, rectify the register:

Provided that it shall not be necessary for the Director to take steps to bring the rectification to the notice of any person shown by the register to be interested nor to give any such person an opportunity to be heard in formal matters and in the case of errors and omissions not materially affecting the interests of any person.

(2) Upon the written application of any proprietor accompanied by such evidence as the Director may require, the change of name or address of that proprietor shall be recorded in the register.

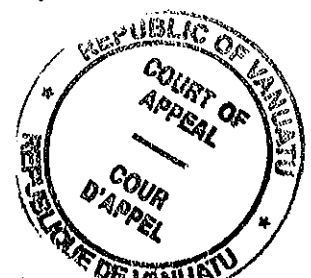
(3) The Director shall rectify the register to give effect to an order of rectification of the register made by the Court.

100. Rectification by the Court

(1) Subject to subsection (2) the Court may order rectification of the register by directing that any registration be cancelled or amended where it is so empowered by this Act or where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.

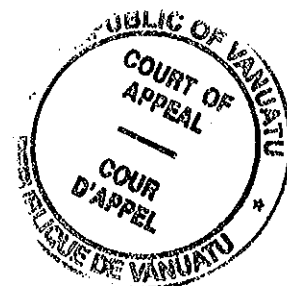
(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the interest for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

7. In the Interpretation provisions in s. 1 of the Act, “*Survey Plan*” means the plan prepared under s. 10, and this is the meaning of the expression in s. 11.
8. It will be noted that the powers of the Director under s. 11 are expressed in terms similar to the powers of the Director under s. 99. Nitchiku’s argument that the s. 11 powers only apply at the time of original registration gains some support from the fact that these separate powers are given in the Act. However the powers are not identical. Section 11 is concerned with error in a survey plan whereas s. 99 more broadly covers situations where the register does not truly declare the actual interest to which a person is entitled under the Act or is in some respect erroneous or imperfect. Whilst it is likely that an occasion for the

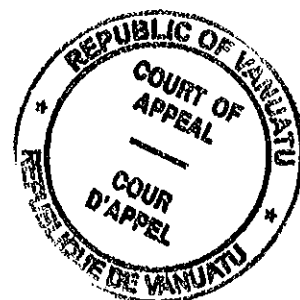


exercise of the power under s. 11 would usually arise at the time of application for first registration of the lease, we do not think that the power is so strictly confined.

9. However this conclusion does not answer the critical question in this case which is whether the power in s. 11 can be exercised so as to defeat the registered interest of a bona fide purchaser for value. Section 100 (2) protects the interest of such a proprietor unless the proprietor had notice of the defect sought to be cured by rectification or substantially contributed to it by his act, neglect or default.
10. If the power in s. 11 entitled the Director to alter a survey plan in the way that occurred in this case, the indefeasibility of title given to a registered proprietor by ss. 14, 15 and 100 (2) would be seriously diminished, and would be inconsistent with the object of s. 100 (2).
11. The scope of a provision similar to s. 11 was considered by the Privy Council in the landmark case of Frazer v. Walker [1967] 1 AC 569 at 585 – 586. That case concerned the New Zealand Land Transfer Act 1952. Section 81 empowered the Registrar to correct the title where it appeared to the satisfaction of the Registrar that a certificate of title had been issued in error, contained a mis-description of land or boundaries, or that any grant, certificate, instrument, entry or endorsement has been fraudulently or wrongfully obtained or is fraudulently or wrongly retained. That power was held to be an extensive one in Assets Co. Ltd v. Mere Roihi [1905] AC 176. The powers in s. 81 were more extensive than those in s. 11 of the Land Leases Act, but the powers in s. 11 are of a like kind.
12. The Privy Council held that the power in s. 81 had to be read with and subject to s. 183 of the Land Transfer Act. Section 183 was in terms with similar effect to s. 100 (2) of the Land Leases Act. Section 183 protected the registered title of a bona fide purchaser for value. The precise terms of s.183 are set out at page 582 of Frazer v Walker. The Privy council said, at 585 *“it is clear.... that s. 81 must be read with and subject to s.183 with the consequence that the exercise of the Registrar’s powers must be limited to the period before a bona fide purchaser, or mortgagee, acquires a title under the latter section”*



13. We consider the Opinion of the Privy Council applies equally in the case of the Land Leases Act. Whilst the powers of the Director under both s. 11 and s. 99 should be recognized as wide powers, they are powers subject to the protection given to the title of a proprietor who is in possession and has acquired the interest for valuable consideration without notice of the omission, fraud or mistake such a mistake could include an error in a survey plan.
14. As Nitchiku was a purchaser for value with no knowledge that the maritime zone may have been included in the survey plan in error, the powers of the Director, whether under s. 11 or s. 99 could not be used to rectify the registered title.
15. It follows that the correction of the survey plan made by the Director, now under challenge, was made by mistake; the mistake being the Director's belief that the power to do so existed under s. 11. Accordingly s. 100 (1) empowers this Court to order rectification of the register by reinstating the original survey plan.
16. Whilst this case has been argued on the assumption that the Zone Maritime Palekula IV land was included in the original survey plan in error, the evidence put before the Supreme Court does not satisfactorily establish that such an error in fact occurred. This judgment should not be taken as positively establishing the existence of such an error.
17. In light of the construction which we place on the relevant provisions of the Land Leases Act, it is unnecessary for us to discuss whether the Director correctly followed procedures laid down in s. 11 as to the giving of notice.
18. A question was raised before the Supreme Court whether the maritime zone included within the survey plan was being used for agricultural purposes as anticipated by the lease. This is not an issue which could affect the validity of the registration of Nitchiku's leasehold title. At most, it is a matter for consideration between the lessor and lessee under the terms of the lease.



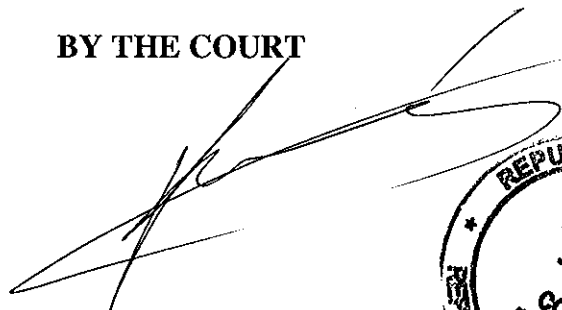
19. For these reasons, the appeal will be allowed and orders made to rectify the register so as to reinstate the original leasehold title of Nitchiku. The appellant is entitled to its costs of the appeal on a standard basis. These costs should be paid by the second respondent, Boetara Trustees Limited. There should be no order as to costs for or against the first respondent, the Republic of Vanuatu.

20. The formal orders of the Court are:-

- 1) Appeal allowed.
- 2) Order that the Land Leases Register be rectified by setting aside the purported correction made at the direction of the Director on or about 9th February 2009 and reinstating the original survey plan as part of leasehold title 04/2643/007.
- 3) The Second Respondent, Boetara Trustees Ltd to pay the costs of this appeal to the appellant to be agreed or fixed at the standard rate.
- 4) No order as to costs in relation to this appeal for or against the First Respondent, the Republic of Vanuatu.

Dated at Port Vila, this 4th May, 2012

BY THE COURT



Hon. Chief Justice V. LUNABEK

