IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appeal Jurisdiction)

Civil Appeal Case No.15 of 2013

BETWEEN: **AORE ISLAND LIMITED**
Appellant

AND: **RACHEL VATARUL**
First Respondent

AND: **WILLIE TAVUTI, PAUL SOPE, DALON SOPE and TOKO TAVUTI**
Second Respondents

AND: **THE GOVERNMENT OF THE REPUBLIC OF VANUATU**
Third Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Daniel Fatiaki
Hon. Justice Raynor Asher
Hon. Justice Dudley Aru
Hon. Justice Mary Sey

Counsel: *Mrs. MNF Patterson for the Appellants*
Mr. B. Yosef for the First & Second Respondents
Mr. F. Gilu for the Third Respondent

Date of Hearing: *19 July 2013*

Date of Decision: *26 July 2013*

JUDGMENT

1. This appeal concerns leasehold interests registered over custom land on part of Aore Island.

2. For the last 7 to 8 years there have been ongoing disputes within the custom owner family as to who is the rightful custom owner and the role of the person named as the lessor on the leasehold title. There have also been disputes between custom owner claimants and Aore Island Limited (Aore) which became the registered lessee on 20th of January 2006.

3. Aspects of these disputes have been before the Supreme Court on numerous occasions, and the dispute within the custom owner's family has been to the Court of Appeal on one occasion: ***Zakias Batu Livo v Rachel Vatarul*** [2011] VUCA 28.

4. Finally the real issues underlying these many contests are before the Court of Appeal in this appeal. Aore appeals against a decision of the Supreme Court that dismissed its claim for remedies for interference by the first and second respondents with Aore's quiet enjoyment of its registered leasehold interest, and upheld the counterclaim of the first respondent, the true custom owner, by ordering rectification of the leasehold title and giving her leave to renegotiate the terms of a strata title project registered over Aore's leasehold interest.

5. Since the notice of appeal has been filed a number of parties who were not before the Supreme Court have sought to intervene and be heard on the appeal on the ground that the orders made in the Supreme Court, potentially at least, could affect their rights. Their situation, and how their rights are to be protected in this appeal, are discussed after we have set out the background to the dispute and have summarised the pleadings and the orders of the trial judge.

Background

6. Aore was incorporated in Vanuatu on 24 of May 2005. It's shareholders and officers have at all times been members of the Woon family. Aore became the registered lessee of leasehold title 04/3033/005 (the 005 lease) on 20 January 2006 upon registration of the surrender by Alice Shirley Woon that day of lease 04/3033/002 (the 002 lease). The 005 lease covers approximately 327 hectares of coastal land on Aore Island which in pre-Independence days was known as Peyrolle Plantation, sometimes referred to as Lapita Plantation and by its custom name of Alau (the Alau land).

7. There is no dispute on the evidence that the first respondent, Rachel Vatarul (Rachel) is the true custom owner and has been so recognized by various tribunals since Independence, most recently by a Joint Area Land Tribunal in October 2010. The second respondents Willie Tavuti and Paul Sope are her sons, and Dalon Sope and Toko Tavuti are her grandsons. The contentious issues within the family stem from events in 1982. In that year Rachel was informally recognized as the custom owner but her eldest brother David Batu Livo (David) was asked by her to act as her representative in respect of her land until her sons reached maturity and could take over responsibility. This was agreed. David was recognized by the Minister of Lands on 2 June 1982 as representative of the custom owners of the Alau Land.

8. The Alau land was first brought under the Land Leases Act on 23 March 1987 when a lease signed by David as lessor and Plantations de Rouges as lessee was registered as the 002 lease.

9. From then until 1992 there were several transfers of the leasehold interest in the 002 lease to other parties, each transfer being signed by David (or in one instance by someone apparently on his behalf).

10. On 18 March 1992 the leasehold interest in the 002 lease was again transferred, this time to Brian William Woon and Michael Gregory Woon. David consented to the transfer on 12 February 2003. David thereafter consented to the leasehold interest being transferred within the Woon family to Alice Shirley Woon (who is the grandmother of Matthew Woon who is presently the sole shareholder of Aore). This transfer was registered on 17 May 2005. The lease 002 was always a lease for agricultural purposes.

11. These transactions concerning the 002 lease are but part of the history to the case and are not challenged by any party in the present proceedings. However Rachel in her evidence says that the agreement reached in 1982 with David was that he would discuss matters relating to her land with her and her family before making decisions about it. Initially he did so, but as time went on he began to treat the land as his own and to make decisions without reference to her or to her children. He started to make decisions which were in his own interest and against those of Rachel and her family. Complaints made by Rachel and her sons about David's conduct are central to the issues now before this Court.

12. On 20 January 2006 a surrender of the 002 lease by Alice Shirley Woon was registered. The surrender was to create a new title, the 005 lease, which was registered the same day with Aore as the lessee. The surrender was consented to by David, and he signed the new 005 lease and became the lessor named on the registered leasehold title. The 005 lease was headed "Class – Commercial Tourism", and an attached schedule set out the purpose and use for which the land was leased as "residential purposes, commercial tourism purposes and agricultural purposes at the election of the Lessee". The terms of the lease clearly anticipated a subdivision of the land by the registration of a strata plan, comprising at least 200 allotments over the 005 lease.

13. At the same time that the 005 lease was registered a plan of Strata Subdivision was also registered over the whole of the land in the 005 lease by Aore. The plan was registered as Strata Plan 0004. The plan subdivided the land into 207 allotments.

14. The 005 lease was executed by David on 20 May 2005 and by Aore on 9 June 2005, but the processes of registration were not completed until 20 January 2006.

15. Rachel and her sons say that they were not consulted by David about the surrender of the 002 lease or the grant or conditions of the 005 lease. They say that the 005 lease, in particular the provisions authorizing a subdivision, were against their interests, and the new lease was granted at an undervalue.

16. David died on 23 March 2008. Rachel obtained a grant of letters of administration of his real estate and pursuant to that grant became noted on the Land Leases Register as the lessor, but in the capacity as Administratrix. Her right to be granted letters of administration and to be registered as lessor was unsuccessfully challenged in the Supreme Court by David's son. An appeal against that decision was instituted, but withdrawn after discussion with the Court of Appeal. The Court of Appeal issued a memorandum setting out the situation for the assistance of the parties: ***Zakias Batu Livo v Rachel Vatarul*** [2011] VUCA 28. As between Rachel and members of David's family the decision of the Supreme Court settled the entitlement of Rachel as custom owner and the status of David as no more than her representative.

17. In the weeks following the registration of the Strata Plan Aore, under the direction of Matthew Woon, began clearing vegetation and earthworks to establish access roads to the proposed subdivision. This brought quick protest from Rachel's sons who demanded that the work stop.

18. It is clear that Rachel and her family considered that the subdivision had been registered through fraud and breach of duty by David who had acted without discussion with, or authority from, Rachel. They were particularly angry that the subdivision would have the consequence that they would be deprived of access to and use of the white beaches along the coastal boundary of the land. They considered that Matthew Woon shared in the improper conduct of David.

19. The respondent Willie Tavuti came onto the land. He threatened to burn down the equipment and kill the Aore staff if they continued working. Tensions within the two sides escalated over time and each side is accused of making threats against the other intended to protect the rights which they were asserting: on Aore's part to protect its rights as a lawful leaseholder, and on Rachel's part her family's belief that the subdivision should be stopped as it had been improperly registered through the misconduct and breach of duty of David.

20. The physical conflicts between the two sides came to a head on 2 and 3 November 2006. In its statement of claim Aore pleads that sons of Rachel and other members of their families entered onto the leased land and sought to take possession of it, terrorised Aore's staff and demanded all keys to the houses, workshop, generator shed and vehicles. It is alleged that Aore's truck was extensively damaged. It is alleged that threats of serious harm and injury were made, and that Aore's staff were unlawfully imprisoned for the night until the police arrived on 3 November 2006.

21. Both sides now make allegations against the other that in the months following, threats and interference with their rights continued.

22. Rachel and her sons also attempted by other means to assert their claimed rights. Rachel in a sworn statement says that she learned of the subdivision some time in May 2005 from a newspaper article. This is about the time that David and Aore agreed on the terms of the 005 a lease.

23. On 17 August 2005 lawyers on Rachel's behalf commenced proceedings in the Supreme Court against David to have her substituted on the 005 lease title as the lessor. For reasons that are not disclosed, her lawyers failed to attend scheduled conferences and failed to diligently prosecute the claim. It was for that reason the claim was struck out on 4 of May 2007. There is no evidence that these proceedings were brought to the notice of Aore and its officers.

24. There is in evidence a letter dated "14 June" written by the Superatavuitano Council of Chiefs in Sanma Province to Aore advising of its concern that Aore was paying land rentals to David which were in reality due to Rachel as the recognized custom owner, and asking specifically that the subdivision of the land stop. The trial judge held that it was written in 2005, and this has since been confirmed as the correct date. However, Aore did not stop the subdividing.

25. In a further effort to assert their position, one of Rachel's sons on her behalf on 23 March 2007 filed a Caution over the 005 lease. This sought to protect the interest of Rachel as custom owner. The Caution was removed from the Register as "withdrawn" on 23rd of August 2007 by the Director of Land Records.

26. On 12 August 2010 Rachel served a notice of forfeiture of the 005 lease on Aore based on an alleged non-payment of land rent and use of the land for an unauthorized purpose. That notice was held to be defective by the Valuer General on 9 March 2011.

27. In early 2011 John Tavuti, another of Rachel's sons, attended the office of the Vanuatu Investment Promotion Authority (VIPA) requesting that they put a hold on any foreign investor who intended to invest in land in the Aore subdivision, and that request was followed up with a letter from lawyers representing Rachel.

The proceedings in the Supreme Court

28. In 2012 the proceedings which have led to this appeal were commenced by Aore on its own behalf and on behalf of its staff members against Rachel as a first defendant, Willie Tavuti, Paul Sope, Dalon Sope and Toko Tavuti as second defendants and the Republic of Vanuatu representing the Director of Lands as third defendant.

29. Aore claimed

- damages for lost sales of subdivided lots due to the lodging of the caution;
- damages (not particularized) flowing from the forfeiture notice;
- damages for the interference with Aore's contractual arrangements with a purchaser of an allotment caused by the requests made to VIPA;
- damages for unlawful imprisonment and assault (claimed by Aore staff members specifically named as second claimants);
- injunctive relief to protect Aore and its staff from harassment, assault and trespass;
- damages for Aore's truck;
- damages for lost cattle sales caused by the invasion of the land on 2 November 2011;
- mesne profits, aggravated damages and exemplary damages.

30. Rachel and those of her family who were sued denied liability. Their defence pleaded that the 005 lease was created by the fraud of David, and that the lease did not have the consent of the true custom owner. The lease was therefore void ab initio. As the true custom owner never agreed to the subdivision, Aore's activities were illegal and the custom owner's family had every right to stop them. They were entitled to lodge the caution. They were entitled to give the notice of forfeiture, which the Valuer General removed without hearing the merits of the claim. The approach to the VIPA was because the subdivision was illegal.

31. As to the allegation of harassment and assault the defence pleaded that it was Matthew Woon who was making threats with a gun and otherwise, and that he provoked retaliation. The various claims for damages were also denied.

32. By way of counterclaim Rachel and her family sought orders rectifying the Register for the 005 lease, and stopping the Strata Title Project. The counterclaim alleged that David was not the declared custom owner of the land. Aore committed fraud and mistake when entering into the lease agreement to create the 005 lease because David made misrepresentations to Matthew Woon that he was the custom owner, and that Matthew Woon knew David was not the true custom owner and nevertheless went ahead to negotiate a new lease with him. It was also alleged in the counterclaim that the 005 lease contravened sections 36 and 38 of the Land Leases Act.

33. The trial judge found in favour of Rachel and her family, save for one injunctive remedy sought by Aore and its staff which did not depend on the contested issues concerning the validity of the 005 lease and its registration. With that one exception Aore's claim was dismissed. The judge held that the counterclaim on the balance of probabilities was established by admissible evidence. After saying (without reasons) that the Strata Title Project should not be stopped but should be renegotiated by Aore with Rachel. The Judge entered the following orders:

(a) The Second Defendants (members of Ratchel's family) by themselves their agents, servants, representatives or relatives be hereby restrained from intimidating, threatening, assaulting the First Claimants (Aore), it's Director, families, agents, workers and the Second Claimants, their agents, servants and relatives (including wives and children) either on Aore Island or elsewhere.

(b) The Third Defendant (i.e. the Director of Lands) by its servants, agents or representatives rectify the register forthwith by deleting "*David Batu Vito*" and substituting the name "Rachel Vatarul" as lessor of Lease Title 04/3033/005.

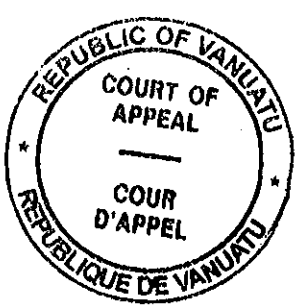
(c) The First Claimant be at liberty to renegotiate the Strata Title Project with Rachel Vatarul.

(d) All transfers of Lots within the Strata Title Project be rectified accordingly.

34. Order (a) reflected the general law duty of those restrained to keep the peace, and is not in issue between the parties. Order (b) was simply to bring the Land Leases Register into line with the established rights of Rachel as custom owner. Orders (a) and (b) are not under challenge.

35. Order (c) and (d) are under challenge in this appeal. It is not clear how the trial judge envisaged order (c) would operate, or how the Strata Title Project could remain in place yet be subject to renegotiation between the parties. Order (d) implies that the trial judge held that the registration of lease 005 and the strata plan was obtained by fraud or mistake within the meaning of s100 (1) of the Land Leases Act. Subject to the protection of a leaseholder who has acquired title as a bona fide purchaser for value, that finding justified removing the registration of the lease with the consequence that the leaseholder no longer had indefeasible title.

36. However, without more the lease agreement itself would remain extant and binding on the parties. A further order of the court would be necessary to declare void the lease agreement itself. Mistake alone would probably be an insufficient ground for doing so. Proof of fraud would be necessary. In the context of the case pleaded in the counterclaim there would have to be a finding of fraud by David and Aore to defeat the rights of Rachel as true custom owner. There is no express finding of such a fraud, but opening the Strata Title Project to renegotiation implies such a finding. Moreover, the order permitting renegotiation can only occur if the Strata Plan is also set aside as the terms of the 005 lease and the Strata Plan are interrelated and operate in conjunction.



37. The parties themselves have interpreted Order (c) in this way. The successful counter claimants have refused to negotiate and have demanded that Aore move off the land.

38. Order (d) is also not clear in meaning. If Order (c) effectively means that lease 005 is at an end, Order (d) would have the consequence that all entries for the titles to the individual allotments created on the registration of the Strata Plan will also be removed from the register.

The Interveners

39. Following the institution of this appeal Calypso Resort Vanuatu Limited, and PLN Advisory Pty Ltd as purchasers of allotments and ANZ Bank (Vanuatu) Limited, Bred (Vanuatu) Limited and Rob Berkeley as mortgagees of allotments within the Strata Plan have made either applications to be joined in the appeal or applications to be heard as interested parties. The Court has also been advised by Aore's counsel that there are other purchasers and mortgagees who have not yet approached the Court. Those that have sought to be heard say that they are bona fide purchasers for value who have acquired indefeasible title under the Strata Plan. They submit that whatever order is made by the Supreme Court, or by this Court on appeal, it should be framed so as to protect their titles. It is difficult to envisage how this could be achieved whilst the order for rectification of the 005 lease and the Strata Plan remains. If the present appeal is otherwise to be dismissed, the rights of bona fide purchasers for value might provide another ground which requires that the appeal succeed. We indicated to the interested parties that the Court would proceed with hearing the principal parties to the appeal first and would not make any order affecting their rights without hearing them further.

40. For reasons which follow we consider that the appeal must be allowed and the orders in the court below, in so far as they materially affect the interests of registered leaseholders, will be set aside. As the result is that the titles of leaseholders holding their interests in or through the 005 lease will not be affected by the outcome of the proceedings there is no need for the interested parties to be further concerned in this litigation.

The reasoning of the trial Judge

41. Each of the components of the claim was dismissed, essentially on the ground that the trial judge considered no damages were recoverable by Aore under any of the heads of loss pleaded, and because Aore had provoked the actions taken by Rachel and her sons.

42. On the counter claim the trial judge held that the "lease was obtained through fraud and mistake" because:

- the 005 lease was registered before the Minister of Lands gave consent to it;
- David had been guilty of blatant lies and fraud by representing himself as the custom owner;
- Matthew Woon by inference knew that David was not the custom owner and therefore substantially contributed to David's dishonesty on 20 January 2006 to obtain the 005 lease. Further, as Matthew Woon omitted to do anything to stop the strata title subdivision he was guilty of unconscionable conduct in dealing with David and not Rachel to create the lease.
- There were breaches of ss.36 and 38 of the Land Leases Act which rendered the 005 lease null and void *ab initio*.

Discussion

43. It is convenient to start first with the reasoning on the counterclaim as this concerns the validity and registration of the 005 lease and the strata plan.

44. The trial judge formulated the central question to be whether the 005 "*lease ... was obtained through fraud and mistake*". This formulation confuses two separate questions: first, whether the lease agreement itself was obtained by mistake or fraud so as to render it voidable or unenforceable, and secondly whether the registration of the lease was obtained by fraud or mistake so as to enliven the jurisdiction of the court to rectify the lease under s. 100 of the Land Leases Act.

45. The separate questions both require consideration, as the answer may be different in each case for the reasons discussed earlier when considering the orders now under appeal.

46. The conclusion that the 005 lease was registered, presumably by mistake, before the Minister of Lands gave consent is factually wrong. The trial judge had regard to a copy of the Minister's consent that was not clearly legible. Another copy elsewhere in the evidence clearly shows that the consent was given on 23 August 2005, not 23 August 2006.

47. The conclusion that David was guilty of misrepresenting himself as the custom owner was open on the evidence as were findings that David was in breach of the fiduciary duty he owed to Rachel and her family in his role as their representative. David and his successors were not represented in these proceedings and the evidence tended in Rachel's case against them is therefore not contested. The case has proceeded on the basis that David was guilty of not honouring the agreement he had made with Rachel, and that he was in breach of his fiduciary duty to her in entering into the 005 lease and consenting to the strata subdivision. On the evidence, the trial judge was correct in holding that David should have obtained Rachel's consent to the grant of the 005

lease, especially as to the extended area which the new lease would cover (so as to include the maritime zone previously not included in the 002 lease) and as to the formula for the rental payments under the strata plan. That David was guilty of fraud in his dealings with Rachel as the true custom owner was not challenged at trial by Aore. That was a position adopted by Aore in light of the evidence led in Rachel's case.

48. However, the central question in deciding the validity of the 005 lease agreement was not whether David was guilty of fraud on Rachel and her family, but whether Aore through Matthew Woon had knowledge of this fraud, or recklessly disregarded reason to suspect it, when Aore acquired its leasehold interest. If Aore had that knowledge, Rachel would be justified in law in repudiating the agreement for lease and the strata plan project which goes with it, as she has sought to do by her actions and these proceedings.

49. On the separate question whether the registration of the lease and the strata plan was obtained by fraud it does not necessarily follow that because the agreement for lease was obtained by fraud, that the subsequent registration of the lease was also obtained by fraud. The actual registration, which is the administrative act of the Director of Lands, may be obtained without fraud. However the fact of registration cannot then vest indefeasibility of title in the lessee as the lessee will not be a bone fide purchaser for value, and upon the lessor repudiating the lease, the Register can be rectified to remove the registration of the lease agreement that has ceased to exist.

50. In this case the evidence was directed to fraud invalidating the agreement for lease and the strata plan project. If the findings of the trial judge that these agreements are null and void is correct, a consequential order for rectification is required as there is no longer any lease or strata plan capable of supporting the entry on the Land Leases Register.

51. The finding that Michael Woon knew of the fraud by David is challenged by Aore. There is no direct evidence that he had this knowledge, and he denies it. The trial judge has found that "by inference" he had knowledge that David was only the spokesman for Rachel. The only evidence that could support that inference is the letter dated 14 June 2005 to Michael Woon from the Supenatavuitano Council of Chiefs.

52. This letter informed Michael Woon that the true custom owner was Rachel, not David. The letter said that land rental payments should go to Rachel and that she had not consented to the subdivision. It is open to argument whether that knowledge alone would be sufficient to alert Michael Woon to the possibility that David was acting fraudulently towards Rachel in his representative capacity, especially as the letter impliedly confirmed the lease by requesting a redirection of the rental payments. However, even if the letter did convey sufficient information to give Michael Woon knowledge of the fraudulent conduct of David, the letter was received after the 005 lease had been executed. Aore had

already become the bona fide purchaser for value of the leasehold interest under the 005 lease.

53. Until the receipt of the letter of 14 June 2005 Michael Woon on behalf of Aore was undoubtedly entitled to deal with the registered lessor and there is no evidence that he was doing so other than in good faith. Even if he had known at that stage that David was acting as representative for the custom owner there is no evidence that in the negotiations over the terms of the 005 lease and the strata plan he had any reason to believe that David was not acting in the best interests of those he represented. The evidence shows that the two men negotiated the formula for the new rental payments that would flow from the subdivision. There is nothing in the evidence to establish that David was not endeavoring to obtain the best outcome possible for the lessor. It is most unlikely that negotiations to that end would indicate any improper conduct on the part of the David that should have alerted Michael Woon to the fraud of David alleged in this case.

54. By the time the letter of 14 June 2005 was received David had committed the custom owner to the terms of the 005 lease and the strata plan which were final agreed when Aore signed the lease on 9 June 2005. That agreement was not affected by fraud on the part of Aore, and Aore was entitled to enforce the lease agreement including by proceeding with the process of registration which was completed on 20 January 2006.

55. The trial judge also made a finding that Aore and Michael Woon were guilty of unconscionable conduct because Michael Woon dealt with David to create the 005 lease instead of dealing with Rachel. That finding cannot stand as it assumes that at relevant times Michael Woon was aware that David was acting only as a representative for Rachel. Moreover, even if he was aware of that fact when he was negotiating the 005 lease with David it was not unconscionable to do so as David was the lessor under the 002 lease, and under s.36 of the Land Leases Act David was the correct person to be giving consent to the surrender of that lease and the creation of a new one (see below). A finding of unconscionable conduct on the part of Aore and Michael Woon would require a finding that Michael Woon had knowledge at the time that David was acting in fraud of the true custom owner.

56. Aore argued before the trial judge and in this court that Rachel, and through her, her family are bound by the acts of David and estopped from repudiating them as they allowed him to become and remain registered as lessor. Moreover, as lessor named in the 002 lease he had since 1987 been the person whose consent to the 005 lease had to be obtained under s.36 of the Land Leases Act.

57. Section 36 provides:

36 . The lessor's consent to disposition of leased land

Notwithstanding any provision to the contrary that may be contained in this Act or in any other law, any disposition of any land leased under a registered lease or any disposition of any part of such land or interest comprised therein shall not be registered until the written consent of the lessor for such disposition verified in accordance with section 78 has been produced to the Director.

58. "*Lessor*" is defined in s.1 to mean the person who has granted a lease or his successors in title.

59. David was the lessor whose consent was required under s.36. We consider that the submission of Aore is correct. As David was registered as lessor with the consent of Rachel, she and her family are bound by his actions, in the absence of knowledge by Aore that David was only her representative and that he was acting outside his authority.

60. Apart from the letter of 14 June 2005 there is no evidence that Aore received any communication or knowledge that the true custom owner was disputing the role of David, or alleging that David was acting fraudulently in disregard of the interests of the custom owner.

61. The Supreme Court proceedings commenced by Rachel on 17 August 2005 were not brought to the attention of Aore.

62. The many events from April 2006 onwards between the parties could leave no doubt that Rachel and her family were repudiating the actions of David, but by then they were bound by the 005 lease and the Strata plan which Aore had entered into without knowing anything improper had been done by David.

63. We conclude that there was no basis in the evidence to find that by implication Aore through Michael Woon was aware that David was acting dishonestly in his role as representative for the custom owner.

64. We have already referred to S 36 of the Land Leases Act. We consider there was no breach of that section as David was the lessor from whom consent was required for the purposes of the Land Leases Act.

65. Aore also challenges the finding that the 005 lease did not comply with s.38. Section 38 provides:

38. Purpose and development conditions to be specified
Every lease shall specify –

(a) the purpose and use for which the land is leased; and

(b) the development conditions, if any.

66. The 005 lease clearly specifies the purpose and use for which the land was leased and sets out at length development conditions. As we understand the finding that the 005 lease was in breach of s.38, the finding was based on the definition of "*Custom Owners*" in the lease, namely that "*Custom Owners means the recognized legal custom owners of the Leased Land according to all the laws, including without limitation, the Constitution of the Republic of Vanuatu*". The trial judge said that as David held himself out as custom owner when he was not so recognized by a competent land tribunal, he had acted dishonestly which had "an adverse affect on the validity of the lease agreement". As we have already discussed, the role adopted by David as custom owner under the lease did not affect the validity of the 005 lease as it had been entered into before Aore received any notice that David's role was not as he represented it to be. Even if the reasoning of the trial judge was correct we do not think it supports a finding that there was a breach of s.38. In our opinion no breach of s.38 is made out on the evidence.

67. In the course of his discussion about s.38 the trial judge referred to a statement of Sakius Batu Livo, a son of David, which was attached to a sworn statement of Rachel. The origin of the statement of Sakius Batu Livo was not explained. It is in the form of a statement prepared for use in a court but it is undated and unsworn. It commences by asserting that he is a claimant in the case. It therefore appears that the statement was prepared for proceedings brought by him. The content of the statement suggests that it was made at a time when he was claiming to be the true custom owner through his late father David and when he was himself challenging the validity of the 005 lease. He says that his father told him he entered the 005 lease through misrepresentation and force from Michael Woon. This assertion is hearsay information related very much to the self-interest of Sakius Batu Livo. The trial judge said: "Matthew Woon did not challenge the inadmissibility (sic) of those evidence or rebut them. As such they are admissible to question the validity of the new lease 04/3033/005."

68. The judge's notes however show that the admissibility of the statement of Sakius Batu Livo was challenged. It was plainly an inadmissible statement. In so far as this statement may have been taken into account on the validity of the 005 lease, it should not have been.

69. For these reasons we conclude that the evidence failed to establish that the 005 lease and the strata plan which the 005 lease authorized was entered into through fraud on the part of Aore and Michael Woon. We consider there is no basis for the order for rectification of the leasehold title, save in respect of the unchallenged order that the Register should be amended to show Rachel as the lessor.

70. The order which purported to give liberty to renegotiate the Strata Title Project must be set aside.

71. We turn now to the trial judge's reasons for dismissing Aore's claim, and the appeal against them. We do so in the order in which the trial judge dealt with the heads of claim.

72. **The caution.** The evidence suggests two cautions were lodged, one by Willie Tavuti in March 2006, and another by John Tavuti in March 2007. The claimant seeks damages for sales allegedly lost by reason only of the caution lodged on or about 23 March 2007 and withdrawn by the Director of Lands on 23 August 2007. It seems probable that the other caution was not actually registered.

73. Both cautions were lodged to protect the interest of a custom owner against the registered lessor. The cautions were not lodged to protect registrable leasehold interests. In ***Ratu Development Ltd v Ndai*** [2007] VUCA 28 at [25] this Court held that the Land Leases Act does not provide for registration of interests of custom owners, nor does it seek to regulate the custom ownership of land. The Act permits cautions for the protection of interests that are capable of being registered under the Land Leases Act, namely leasehold interests, and that it would be inconsistent with the purpose and the scheme of the Act to allow cautions to be used to protect the interests of custom owners: see at[27]. There was no lawful basis for the cautions to be lodged in this case. Aore's claim for damages for sales lost by reason of the caution depended on the provisions of s. 97 (5). That subsection provides:

> *(5) Any person lodging any caution with the Director or allowing any caution to remain without reasonable cause shall be liable to pay such compensation as the Court thinks just to any person who sustains damage or who has incurred costs or expenses thereby.*

74. There was no consideration by the trial judge as to whether the caution was lodged or not removed "without reasonable cause". There was no discussion of the matters considered relevant to such a claim in ***Inter-Pacific Investments Ltd v Sulis*** [2007] VUSC 6. The trial judge did not consider whether there was any causative connection between the caution and the sales allegedly lost, nor did he discuss the quantum of the damages claimed. The claim for compensation was dismissed on the ground that the Director of Lands had followed the wrong procedure to remove the caution and that Matthew Woon, by pressing the Director to remove the caution, had "urged the Director to take... unlawfully action". For that reason it was held that Aore could not benefit by claiming compensation.

75. We cannot agree with the reasoning of the trial judge. The caution should not have been lodged. Aore was within its rights to urge the Director to remove it from the Register. There is no basis for finding that Matthew Woon had any responsibility for the Director not following the correct procedure that required notice to the cautioner. Moreover, the

action of the Director caused the caution to be removed sooner than would otherwise have been the case, which is to the advantage of the cautioner as it lessened the time over which compensation potentially could be assessed.

76. **The forfeiture notice.** The trial judge held that it was irregular and should not be enforced for four reasons, two of which he said were conclusive. They were that the notice was defective in law and fact and that other parties having interests in the lease were not served. Yet the claim for damages was dismissed without further reason. It is not clear from the pleadings what loss if any is alleged to have flowed from the lodging of the forfeiture notice. None is specifically pleaded. As the forfeiture notice was something between Aore and Rachel and was not acted on it is difficult to understand how it could have affected sales. Perhaps the claim based on the forfeiture notice was dismissed because there appeared to be no evidence that any recoverable loss could have flowed from it. If that were the reason, it would have been open to the trial judge to so find. We do not think that this Court should now interfere with the dismissal of the claim for damages based on the forfeiture notice.

77. **The threats of violence and assault alleged between 2006 and 2011.** The evidence about threats, harassment, assault, trespass, false imprisonment and property damage were contested and the evidence was not subject to close analysis or findings. It was accepted that there was some substance to the claims by Aore. Dealing with the claim for injunctive relief to restrain Rachel's sons with their agents and servants from entering the 005 lease and the strata plan allotments, and to use only the public road away from the allotments, the trial judge said:

> *"I hesitate to accept the evidence of Mr and Mrs Woon without any confirmation by the Second Claimants (Aore's staff). I however accept the evidence of the defendants showing some degree of provocation, threats, abuses, aggressiveness and/or arrogance by the agents of the First and Second Claimants which indicate that the Claimants have come to Court with dirty hands, seeking restraining orders which are equitable reliefs. For that reason the reliefs for restraining orders sought by the Claimants.... is denied and is accordingly dismissed".*

78. It seems clear that both sides to this litigation acted aggressively at times to assert the position they claimed. On the basis that the 005 lease was set aside, as was the effect of the final orders in the Supreme Court, it is understandable that the injunction sought by Aore would be refused. However as the right to occupation and possession of the 005 lease by Aore is now to be finally established by the order of this Court, we consider Aore is entitled to the injunctive relief it claimed. The fact that Aore and its staff in times past have matched the misconduct of the

other side is not a basis for refusing an injunction which is to operate henceforth.

79. **The damages**. On the question of the damages claimed by Aore the trial judge identified the evidence that had been adduced by both sides but again did not analyse it or make findings on points of contention, save in respect of the claim for Vt 77,922 for the lost sale of cattle.

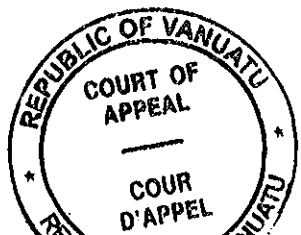
80. The trial judge said that Aore was responsible for its own losses as it pressed on with the subdivision after being asked to stop. On the basis that the 005 lease was null and void as the judge held, there would be force in this conclusion. However, this Court holds otherwise, and as Aore was exercising its lawful rights in pressing on with the subdivision the fact that it did so does not disentitle it to damages.

81. On the claim for damage to the truck arising at the time of the incident on 2– 3 November 2006 the trial judge said that whilst Rachel's sons had brought a team of people onto the land and were directing them, those in the group who were named in the evidence as causing damage were not specifically named as defendants. On this basis, it seems, the loss claimed for damage to the truck was dismissed. The case of Aore was that the damage was caused as part of a joint tortious exercise carried out under the direction of the sons, and as such those who were named as parties in the proceedings were jointly and severally liable with those who actually carried out the damage. The trial judge did not discuss that contention.

82. We are not persuaded that the pleadings and evidence provided a basis which justified the claim for lost sales of cattle. In other respects however, we consider there was a basis for the claims for damages arising from events between 2006 and 2011 pleaded and advanced in evidence, and those claims have not been tried. Further, the claim for interference with contractual rights arising from the approach made to VIPA to "hold" further transactions was not considered.

83. We consider the appeal against the dismissal of the claim for an injunction against entry onto the leasehold land and strata title allotment should now be made and an injunction granted in the terms sought.

84. The appeal against the dismissal of claims for compensation for the caution filed on or about 23 March 2007, and for damages for events between 2006 and 2011 should be allowed, save for the claim for lost cattle sales. The matter should be returned to the Supreme Court to try the unresolved damages claims. We note that whether any compensation for the caution should be allowed, and if so the quantum, will be matters for the trial judge. We note however that those staff members of Aore who were the Second Claimants in the court below have not appealed and their claims for damages will remain dismissed. The outstanding matters to be determined are the unresolved claims by Aore.



85. As the trial judge has been closely involved in numerous aspects of the conduct of the parties over recent years we consider another judge in the Supreme Court should undertake the trial of these issues if the parties are now unable to reach a sensible compromise to avoid yet more expense.

86. For these reasons the formal orders of this Court are:

1. The appeal against the dismissal of the claims by Aore Island Limited is allowed.

2. The following injunction made in the Supreme Court remains in full force namely that:

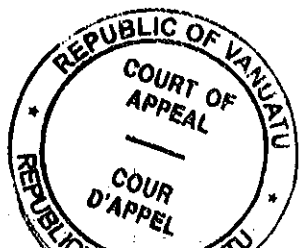
> The second defendants (Willie Tavuti, Paul Sope, Dalon Sope and Toko Tavuti), by themselves their agents, servants, representatives or relatives are hereby restrained from intimidating, threatening, or assaulting the First Claimants (Aore Island Limited), it's Director, families, agents, workers and the Second Claimants(Mr and Mrs Winkol, Mr and Mrs Moli Brian Bakeo, Mr and Mrs Brechtefeld, Charlie, John Robert, John Freza, Humai, Joe Mahuri, Lesly Haila, Bong Taki, Tari Huri Wala, Boe Wala, Moli Wala and Wala Wala), their agents, servants and relatives (including wives and children) either on Aore Island or elsewhere.

3. The following additional injunction is ordered:

> That the second defendants (Willie Tavuti, Paul Sope, Dalon Sope and Toko Tavuti), their agents and servants be restrained from entering onto the lease and the Lots of the Strata Plan within the registered leasehold title 04/3033/005 except with the prior written consent of Aore Island Limited, and only use the Public Road away from the Strata Plan allotments.

4. The claims of Aore Island Limited for compensation for the lodgment of the caution on or about 23 March 2007 and the outstanding claims for damages for events occurring between 2006 and 2011 be returned to the Supreme Court to be tried before a judge other than the trial judge. For the removal of doubt, the claims by Aore Island Limited for damages alleged to arise from the forfeiture notice and for lost cattle sales remain dismissed and are not outstanding claims.

5. The orders of the Supreme Court directing the third respondent by its servants, agents or representatives to rectify the leasehold title 04/3033/005 by substituting the name "*Rachel Vatarul*" for the name "*David Batu Livo*" is upheld and it should be implemented forthwith.



6. The counterclaim is otherwise dismissed.

7. The order made in the Supreme Court granting liberty to renegotiate the Strata Title Project is set aside.

8. The order for rectification of transfers of Lots within the Strata Title Project is set aside.

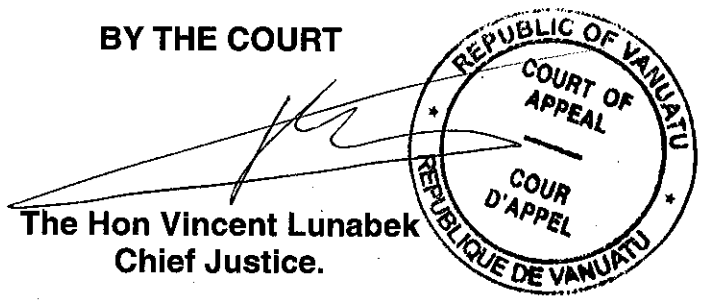
9. The order for costs made in the Supreme Court in favour of the first and second respondents is set aside.

10. The first and second respondents must pay the costs of the appellant in the Supreme Court and in this Court on the standard basis as agreed or taxed.

11. All parties have liberty to apply to a single judge of the Supreme Court to lift or vary the injunctions.

Dated at Port Vila, the 26th day of July 2013.

BY THE COURT



The Hon Vincent Lunabek
Chief Justice.