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

Civil Appeal
Case No. 16/1199 CoA/CIVA

Consolidated with

Civil Appeal
Case No.16/2181 CoA/CIVA

BETWEEN: The Republic of Vanuatu
Appellant

AND: Ricky Toro & Tony Toro
(Representing Family Toro)
Respondents

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice Bruce Robertson*** ***Hon. Justice Oliver Saksak*** ***Hon. Justice Daniel Fatiaki*** ***Hon. Justice John Mansfield*** ***Hon. Justice David Chetwynd*** ***Hon. Justice Paul Geoghegan***
Counsel:	*Mr. Lennon Huri for the Appellant* *Mrs. Mary Grace Nari for the Respondents*
Date of Hearing:	*12th day of July, 2016*
Date of Judgment:	*22nd day of July, 2016*

JUDGMENT

INTRODUCTION

1. This appeal is from two Judgments of the Supreme Court given in the same Supreme Court action. Each judgment concerns leasehold title 12/0633/059 (Lease 059) in the Land Leases Register under the Land Leases Act [Cap 163] (the Act).

2. The Register is maintained by the Director of the Department of Lands (the Director) under the Act.

3. Between 14 March 2000 and 4 December 2006, the Minister of Lands was the registered lessor of Lease 059. The lessee for a term of 50

years at an apparently very low rental was Kalchili Kiri (the Kiri lease). From 4 December 2006, the Lessor of Lease 059 became Ricky Toro and Tony Toro representing "*Family Toro*" with the Lessee still Kalchili Kiri (the Kiri lease). It is appropriate to refer to Ricky Toro and Tony Toro representing Family Toro together as Family Toro unless it is necessary to distinguish between them. Family Toro took Lease 059 subject to the Kiri lease.

4. The registration of Family Toro was made by the Director following a decision of the Ifira Village Land Tribunal on 13 November 2005 that Family Toro is the custom owner of part of Laviskoni Land. The Secretary of the Ifira Village Land Tribunal on 24 January 2006 had written to the Director that the area of Lease 059 was not within the Laviskoni Land of which Family Toro were the custom owners, but the Director nevertheless made that registration on the available maps and information.

5. The Supreme Court action and now this appeal arise because of registered dealings concerning Lease 059 after 4 December 2006, which did not take place with the knowledge or approval of Family Toro as registered lessor of Lease 059.

THE LEASE TRANSACTIONS

6. On 10 February 2009, the Director registered a transfer dated 30 December 2008 of the Kiri lease over Lease 059 from Mr Kiri as lessee to Medici Investment Ltd. (Medici). Mr Kiri became a 50% shareholder in Medici as part of the consideration.

7. Section 36 of the Act relevantly provides:

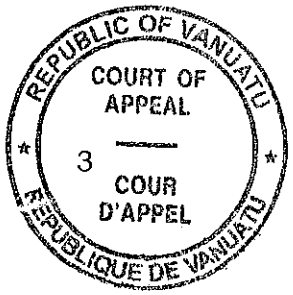
> *"...any disposition of any land lease under a registered lease or any disposition of any part of such land or interest comprised therein shall not be registered until the written consent of the lessor for such disposition verified in accordance with section 78 has been produced to Director".*

8. That registration of the transfer should not have been made because there was no written consent on behalf of Family Toro as lessor as required by section 36. The Director relied on a consent produced to the Director by the Minister of Lands at the date of that consent, Raphael Worwor, but the Minister was not the registered lessor. The Minister wrongly stated in that consent that he was the registered lessor.

9. As about the same time as the registered transfer of the Kiri lease to Medici, Medici consented in writing to the surrender of the Kiri lease by instrument dated 21 November 2008. Two different Ministers of Lands Mr. Worwor and John Morrison Willie consented to that surrender and subsequent dealings. Mr. Worwor wrongly signed the surrender as lessor of the lease when he was not, contrary to section 49 (1) (b) of the Act. Mr Willie then wrongly consented to the sub-division which followed as registered lessor, when he was not the registered lessor of Lease 059 (the precise date of his consent is unclear). In each instance the consent should have been given by Family Toro as the registered lessor.

10. Despite those breaches, the Director again in breach of s.36 of the Act, registered the surrender of the Kiri lease, because the lessor (Family Toro) had not consented in writing to it.

11. As noted, after the surrender of the Kiri lease, the Lease 059 land was subdivided into 28 new leasehold titles number 12/0633/863 to 890 as subdivided allotments. Eight of the new leases were signed by the Minister as lessor (when he was not) and 20 were signed by Mr Kiri as lessor (when he was not). Mr Kiri had by then transferred the lease to Medici, so he was neither the registered lessor nor the registered lessee of Lease 059. The proper person to have given those consents was Family Toro as the registered lessor.



12. It is convenient to call these registered dealings with Lease 059 or the area of Lease 059 without the consent of Family Toro collectively the "*Lease Transactions*".

13. That is not the end of the story.

14. Family Toro, when they learned of what had happened, brought proceedings in the Supreme Court to restore its position.

15. On 18 November 2013, the Supreme Court (Spear J) made orders that the 28 leasehold titles be registered to the Family Toro and to prevent any further dealings with the Lease 059 land (as subdivided) except under Court Order or by written consent of Family Toro. That is the first judgment which is the subject of this appeal (the 2013 Judgment)

16. By that date, 14 of the 28 leasehold titles remained registered in the name of Medici as lessee. A further 13 of them had been transferred to Zheng Yu Beng (Zheng), and one had been transferred to The Operation Education Vanuatu Committee Inc. (OEVC). Family Toro accept that Zheng acquired the 13 leases for valuable consideration and in good faith, so s100 (2) of the Act protected him from any liability for the registration of those 13 leases and protected his registered interest.

17. Family Toro, in the Supreme Court Claim, then sought an order for cancellation of the remaining 15 leases held by Medici and by OEVC. Those orders were not resisted. In the case of Medici, it was accepted that the transfer of the Kiri lease to Medici was the result of mistake or fraud within s100 (1) of the Act. In the case of OEVC, it had not paid for the transfer of the lease of its allotment so it could not use the shield of s100 (2) of the Act, although it had operated its charitable business from that subdivided allotment since 2009.

18. As noted, those orders were not resisted. So Family Toro ultimately was restored as lessor of 15 of 28 of the subdivided leases over the area Lease 059. Each of Medici and OEVC reserved any rights they

had to claim damages for the losses they had suffered. That is not relevant for present purposes.

THE DAMAGES CLAIM

19. The judge with the conduct of the Supreme Court action (Harrop J) observed in the second Judgment (referred to below) that the consequence of the Republic acquiescing in those orders meant that it is also accepted that Family Toro was from 4 December 2006 properly registered as the lessor of Lease 059 (despite the letter of 24 January 2006 to the Director from the Secretary of the Ifira Village Land Tribunal referred to above) and that the Republic also accepted that Family Toro were the custom owners of the Lease 059 land.

20. The matter then proceeded as a claim for damages against the Republic of Vanuatu for any losses the Toro Family had suffered by reason of the registration of the 13 subdivided leases to Zheng. Each of Medici and OEVC were excused from participating further in the proceedings.

21. The Republic denied liability for any damages. It said that, despite whatever errors had occurred by staff of the Director, the errors were based on information provided and relied on in good faith, so sections 9 and 24 of the Act protected the Director from liability in respect of that conduct. It also said that the registration of Family Toro as lessor of Lease 059 on 4 December 2006 was a mistake, having regard to the letter of 24 January 2006 from the Secretary of Ifira Village Land Tribunal.

22. In short, as the judge pointed out, despite the wrongful conduct of the Ministers and the Director referred to, the Republic said that it is not liable for those mistakes because, earlier, the Director was also mistaken by registering Family Toro as the registered lessor of Lease 059. Harrop J pointed out that the Director under s99 of the Act could

have taken steps to rectify that asserted mistake at any time after 4 December 2006, but had not done so.

23. Judgment on the damages claim was given on 15 March 2016. That is the second judgment under appeal (the 2016 Judgment).

24. The trial judge approached the claim for damages on the basis that the Director was obliged to, and all members of the public were entitled to do, and could, act on the basis of the correctness of the Register, unless and until it was altered lawfully. He remarked at [29] of his reasons that the Court of Appeal has said on a number of occasions, albeit in the context of concerns about the protection of a lessee-registered interest, that "***the Register is everything***". Reference was made to *Ratua Development Ltd Ndai* [2007] VUCA 23; *Huang Xiao Ling Leong* [2013] VUCA 15.

Consequently, Harrop J said at [32] of the 2016 Judgment:

> *"That registration [of Lease 059 to Family Toro] was in effect a declaration to the world at large, and certainly to all staff of the Director of Lands and any Minister of Lands, that any dealings with leasehold title 059 had to be done with the consent of [Family Toro]. It was also a form of comfort to them that there could be no dealings on their title without reference to them, as assured by section 36."*

25. Harrop J also pointed out, as is the fact, that the Director had had the opportunity under s99, if it was appropriate, to consider changing the Register by removing Family Toro as the lessor of Lease 059 but had not done so. The procedure available to the Director under s99 had simply not been used. It is worth recording the relevant terms of s99:

> *"Subject to s100 (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 to 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".*

26. Hence, as Harrop J. said, it was plainly wrong for the Director (presumably through his staff) simply to treat the Register as if it were wrong and to ignore it without correcting it. The acts of the Director and of the Ministers, ignoring the status of the Family Toro as the registered lessor of the Lease 059 land, were wrong. Simply to treat the Register as if it were wrong was not authorised by the Act. The failure to respect the Register would bring "*the entire land registration system into disrepute*": [at 38].

27. Harrop J. also noted that there was no evidence from the Director, or from or on behalf of the Ministers, explaining why they had acted in the way that they had. There was no evidence to prove that they acted in good faith in their respective actions which were not consistent with the terms of the Register. There was no evidence from the officers of the Director directly involved in the transactions to justify what had been done on behalf of the Director. The Ministers concerned had not sought to justify what they had done, either directly or through evidence from their officers if they were involved in the transactions on their behalf. There is still no process taken under s 99 of the Act to attempt to correct the registration of Toro Family as the registered lessor of Lease 059 (as now subdivided).

28. The Republic first relied upon s9 of the Act to seek protection from any liability for damages. It provides:

> *"The Director shall not, nor shall any other officer of the lands record office, be liable to any action of proceedings for or in respect of any act or matter done or omitted to be done in good faith in the exercise or intended exercise of his powers under this act or any order made there under".*

29. Harrop J noted that it has been decided in *Inter-Pacific Investments Ltd Sulis* [2007] VUSC 6 at [35] that there is no reason why the Director should be liable, and his employer the Republic vicariously liable, for negligence in the exercise of statutory duties under the Act. Indeed, section 9 anticipates that possibility. He also said that there was no serious suggestion that both the Director and the Ministers did not each

owe a "duty of care" to Family Toro, as the registered lessor, in respect of the Lease Transactions referred to.

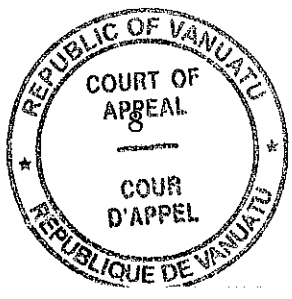
30. He then noted that the protection of s9 is available if the Director establishes good faith in the exercise of statutory functions and duties. It is an affirmative defence which needs to be asserted and proved. As there was no evidence upon which good faith in respect of any, or all, of the dealings referred to was presented, and no evidence at all as to what motivated the relevant staff and Ministers at the time of each of those transactions, and the Director himself (who gave evidence) said that he was not in a position to speak on behalf of the staff involved, there was no evidentiary basis to be satisfied that s9 applied in the particular circumstances. That was said, whatever the precise content of the concept of "*good faith*" in s9 of the Act may be.

31. Harrop J also disposed of the defence under s24 of the Act in short term. It provides:

> *"Where by this Act any person is exonerated from enquiring as to any matter of fact relating to a registered interest, or to a power of dealing therewith, or is protected from the effect of notice of any such matter or fact, then, in registering any instrument relating to that interest, the Director shall not be concerned to make any enquiry or search in relation to that interest which such person need not have made nor shall the Director be affected by any notice with which such person need not have been affected".*

32. Harrop J said that it was self-evident that that provision had no application to the present circumstances. The Republic made no submission to explain how it might have applied. The document to which the Director and his staff had failed to have regard was the Register, with the Family Toro interest registered by the Director on 4 December 2006. The conduct of the Director and the Ministers did not relate to any background enquiries.

33. Consequently, that ground of defence also was not made out.



34. On the approach to the actual assessment of damages, it is not necessary to refer to the reasons in detail. That is for the reasons set out below. Harrop J said there had been only a relatively brief focus on the evidence and submissions on the proper amount of damages.

35. Having identified the cause of action as a "simple claim in negligence, albeit with aspects of breach of statutory duty", it became necessary to identify the loss suffered by Family Toro.

36. Harrop J identified first loss from being deprived of the right to consent (if their consent was given) to the transfer of the Kiri lease to Medici, and then from the Medici surrender of that lease. The primary judge found no loss was established in relation to those steps.

37. Secondly, there was loss following from the transfer of the 13 leases to Zheng from Medici. Zheng had paid VT45 million to Medici for those leases. There was evidence that that sum was within a range of reasonable market prices at the time in August 2011. Harrop J considered, on that basis, that VT45 million is a fair and reasonable measure of compensatory damage.

38. Judgment was entered accordingly in the 2016 Judgment. The overall outcome was

    (1) Family Toro was at all times, and remains from 4 December 2006, the registered lessor of Lease 059 (or as now subdivided);

    (2) the 15 leases held by Medici and OEVC were (or are to be) cancelled, and the Register is to be rectified accordingly under s100 (1) of the Act; Family Toro becomes the lessor of those allotments; and

    (3) the Republic is to pay Family Toro VT45 million damages in respect of the 13 other leases now held by Zheng, as those leases continue to be registered and to have effect.

    (4) the Republic was ordered to pay the costs of Family Toro.

THE APPEALS

39. The appeal from the 2016 Judgment was instituted on 14 April 2016. It seeks to set aside the whole of that judgment.

    The grounds are:

    1. There is a serious question which needed to be addressed by the Court which is "whether or not Respondents (Family Toro) were declared custom owner of the land subject to the lease 059 by the Ifira Village Land Tribunal dated 30 November 2005".

    2. The Judge at first instance erred in fact and law in holding that the Respondents are the custom owners of the land subject to lease title 12/0633/059 ("lease 059") when the records of the Department of Lands shows otherwise.

    3. The Judge at first instance erred in fact and law in holding that the Republic of Vanuatu accepted that the Respondents were from 4 December 2006 properly registered as lessor of lease 059.

    4. The Judge at first instance erred in fact and law in holding that the Republic of Vanuatu is liable to pay damages in the sum of VT45,000,000 on that basis that:

        (i) The Respondents' claim was for rectification under section 100 of the Land Lease Act [Cap 163] (the "Act") and the Respondents failed to satisfy the Court with the requirements of section 101 of the Act in order to be granted compensation against the Government.

        (ii) The claim was for rectification under section 100 of the Act on the basis of mistake and/or fraud and not negligence on the part of the Department of Lands.

40. The appeal from the 2013 Judgment was instituted well out of time, on 4 July 2016, after leave to appeal out of time was given on 1 July 2016.

41. Grounds 1 and 3 are the same as Grounds 1 and 2 set out above, save that Ground 3 is expressed a little more circumspectly: rather than simply referring to "records", it refers to "records or information" and it

adds at the end: "although by mistake Family Toro's name appear (sic) in the lease document."

Ground 2 asserts (wrongly) that Spear J:

> *"erred in law and in fact in establishing the rightful custom owner of the land subject to lease 059 before making orders for rectification."*

42. That ground can be addressed immediately. Spear J did not decide that. He decided that the Register had to be recognised and the Act had to be complied with.

CONSIDERATION

43. This appeal can now be addressed quite briefly.

44. The pleadings show the principal position of the Republic. Following the Second Amended Claim on 1 October 2014, the Republic changed its Defence, to some degree, to say that when the Lease Transactions took place, the Director had received information from the Secretary of the Ifira Lands Tribunal that the land subject to Lease 059 is not within the portion of land declared to family Toro, so its consent was not required for the transfer. That Defence added translated references to the terms of the declaration made by the Ifira Village Land Tribunal.

45. Hence, the Republic's primary position is that the Director and the Ministers can ignore the Register. They cannot. They must comply with the Act, including doing what it requires in relation to a registered lessor.

46. It is no justification for ignoring the Register that, at the time of the Lease Transactions, the Republic had information that the Land within Lease 059 may not be part of Laviskoni land that the Ifira Village Land Tribunal had said was in the custom ownership of Family Toro.

47. The Republic in its initial Defence to the Supreme Court claim said it registered Family Toro as Lessor of Lease 059 pursuant to the declaration of that Tribunal. It had that declaration at that time. It did so after the Director had received the letter from the Secretary of the Tribunal of 24 January 2006. So it appears that the Secretary's letter, and the Secretary's declaration of the Tribunal, had already been considered by the Director when the transfer of Lease 059 was made to Family Toro.

48. In our view, both Spear J and Harrop J correctly recognised that the Register must be given effect to. That has been repeatedly said by the Court of Appeal: Ratua Development Ltd –v- Ndai [2007] VUCA 23; Huang Xiao Ling –v- Leong [2013] VUCA 15.

49. In any event, despite the Defence about a state of belief on the part of the Director (and possibly the Ministers) counsel for the Republic acknowledged that there is no evidence to support the claim that the Director and the Ministers had that belief at the time of the Lease Transactions. There is no evidence at all that, at that time, they believed that Family Toro should not be the Lessor of Lease 059. Not one of the Ministers or their officers gave evidence about such a state of mind. No officer of the Director gave evidence about such a state of mind. The Director himself gave evidence, but did not know why his officers had chosen to ignore the Register.

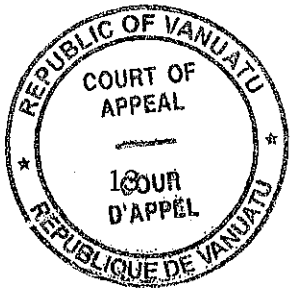
50. The declaration of the Tribunal and the letter from the Secretary of the Tribunal, the content of which are more fully set out in the Amended Defence to the Second Amended Claim, were available to the Director at 4 December 2006. In short, there is no evidence that those documents were looked at in the period of the Lease Transactions. They appear to have recently been reviewed, as a source of information, sometime in 2015. That cannot inform the state of mind of the Director or the Ministers at the time of the Lease Transactions.

51. As Harrop J concluded, those matters also mean that the "*good faith*" defence in section 9 of the Act is not available to the Director in respect of this claim. The reasons of Harrop J for rejecting it are, with respect, correct.

52. The end result is that the Appeal on liability must be dismissed. The 2013 Judgment, and the 2016 Judgment on the liability issue, and the orders made pursuant to the 2013 Judgment are correct.

53. The issue of damages is a complex matter. Harrop J referred to the lack of focus on the issue in the course of the hearing, understandably as the main issue was whether the Republic was liable to Family Toro at all.

54. One subsidiary pleading issue can readily be addressed. The Second Amended Claim seeks damages from the Republic "for rectification of lease on the basis of fraud or mistake". In its context, that is a claim for damages, for the wrongful conduct of the Director and of the Ministers in, and in relation to, the registration of the Lease Transactions, ignoring Family Toro. The Republic said that Harrop J, in the circumstance was wrong to award damages against the Republic because the claim as expressed did not permit such damages. The Court does not consider that the use by Harrop J of the analogy to an assessment of damages for breach of a common law duty of care is necessarily erroneous. The comments using the phrase "duty of care" in the 2016 Judgment were clearly used in that context, in an endeavour to identify the proper way to assess the damages payable by the Republic for breach by the Director of his statutory duties, and for the wrongful conduct of the Ministers in representing that they were the lessor of the Lease 059 when they were not. There is no basis at all for the Republic to claim to have been taken by surprise, or to suggest that Family Toro was moving outside its pleaded claim for damages for that conduct.



55. The parties were agreed that, if the Appeal on liability is unsuccessful, appeal against the 2016 Judgment should nevertheless be allowed for the purpose of setting aside the 2016 Judgment on the quantum of damages only, and remitting that issue to the Supreme Court for reconsideration. They each contemplated that they should have the opportunity to adduce further evidence on the issue, and perhaps to take further procedural steps.

56. The Court accepts that is an appropriate course. The amount of the damages, as appears from the brief submissions on this Appeal, may be a complex one, not fully addressed by the parties before Harrop J.

57. The apparent starting proposition may be that Medici holds the net benefit of the wrongful registration of the 13 allotments now (it is accepted) held indefeasibly by Zheng. That benefit (albeit a gross benefit, without allowing for expenses and without allowing for fees paid to the Republic) was the basis of the assessment of damages by Harrop J. It may be that Family Toro, to mitigate its loss, should first seek recovery of that amount from Medici. It may be that the Republic is entitled separately to seek contribution or indemnity from Medici in respect of that amount. It may be that the loss of Family Toro in respect of those allotments recoverable from the Republic is the value of its loss of opportunity to sub divide the land itself. Those matters really require further evidence properly to assess any damages. There may be other relevant considerations or contentions to be taken into account. Those views are provisional only, necessarily so, because neither Mr Kiri (through his estate) nor Medici were represented on the Appeal, or when the issue of damages was addressed, and because the question was not fully argued on the Appeal.

58. The formal orders of the Court, despite the main issue on the appeal being unsuccessful, are that:

    (1) the Appeal against the 2016 Judgment is allowed only for the limited purpose of setting aside the order fixing the damages payable by the Republic;

(2) the issue of the proper assessment of damages payable by the Republic to Family Toro is remitted to the Supreme Court for further hearing and consideration;

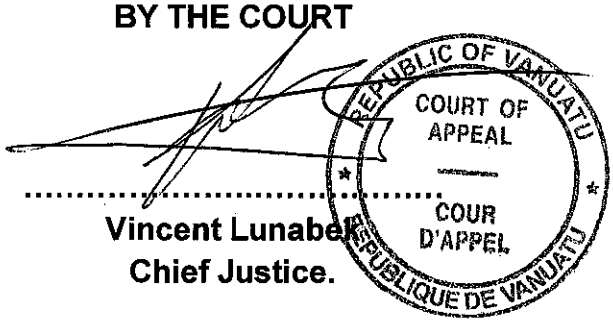
(3) the Appeal is otherwise dismissed; and

(4) the Republic pay Family Toro its cost of the Appeal.

59. The costs order is made because, on the principal issues argued on the Appeal, the Republic was not successful.

DATED at Port Vila this 22nd day of July, 2016.

BY THE COURT



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Vincent Lunabek
Chief Justice.