

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

**Civil Appeal
Case No.17/167 CoA/CIVA**

**BETWEEN: DEPARTMENT OF LANDS STAFF
Representing 55 Appellants
Appellants**

**AND: TRANSPARENCY VANUATU COMMITTEE
First Respondent**

**AND: MINISTER OF LANDS
Second Respondent**

**AND: DIRECTOR OF LANDS
Third Respondent**

Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice Ronald Young
Hon. Justice John Mansfield
Hon. Justice Dudley Aru
Hon. Justice Paul Geoghegan
Hon. Justice David Chetwynd
Hon. Justice Mary Sey*

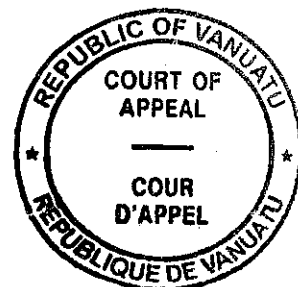
Counsel: *Mr Daniel Yawah for Appellant
Mr Hardison Tabi for Respondents*

Date of Hearing: *29th March 2017 at 9 am o'clock*

Date of Judgment: *07th April 2017 at 4 pm o'clock*

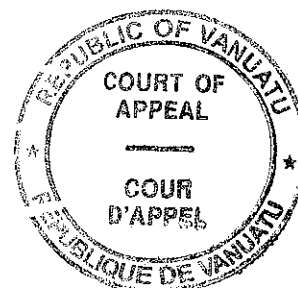
JUDGMENT

1. On 3 August 2012 the Minister of Lands (the Minister) decided under the Land Reform Act [CAP 123] to facilitate the grant of certain leases to staff of the Department of Lands and to others at premiums of 50% of the proper premium (the Decision). He requested the Director of Lands to find suitable plots and to allocate them to eligible staff.



2. The Minister has the power to give leases capable of being registered under the Land Leases Act [CAP 163] over certain land including land acquired by the Government in the public interest or for the purposes of Article 81 of the Constitution.
3. On 26 October 2012, apparently at sometime during the process of implementing the Decision, the Transparency International Vanuatu Committee Inc (Transparency) by a Judicial Review application challenged the validity of the Decision, and sought an order prohibiting the Minister from implementing the Decision, including by taking any steps to procure the registration of any leases granted under the Decision, and further prohibiting the Director of Lands (the Director) from registering any such leases.
4. The Minister acknowledged that the decision was unlawful. It appears that was because the premium payable for the leases was fixed at 50% of value, rather than the full premium value.
5. By consent, in the Judicial Review Case, it was ordered on 16 December 2013, that the Decision was unlawful and it was quashed. No other orders were then made.
6. That Order was made without attention to the fact that a number of employees of the Department of Lands (of whom 55 are the present Appellants and are called the Department of Lands Staff), and others, had already been granted leases under the Decision, and in some cases those leases had already been registered. Those persons had not been party to the Judicial Review proceeding. The Department of Lands Staff successfully applied to be joined as defendants to that proceeding, and then successfully appealed from the consent order to the Court of Appeal: The consent judgment was set aside: Department of Lands Staff v- Vanuatu Transparency Committee Inc [2014] VUCA 9. The matter was remitted to the Supreme Court for further hearing.

7. The Judicial Review claim was duly amended to add the Department of Lands Staff as one additional set of defendants, and a further 19 persons (not apparently employed in the Department) also as an additional and separate set of defendants. The amended claim also expressly raised that some of the granted lease land was "public land areas", which in any event should not be sold but should be used for public purposes only.
8. The amended defence of the Minister to the amended claim continued to acknowledge that the decision was unlawful because it appears,
 - (1) the power to lease land under section 31 of the Land Leases Act should only be exercised if a premium based upon the full rental value of the unimproved land is charged, as required by section 32 of the Land Leases Act, rather than the 50% premium which the Minister had prescribed in the decision;
 - (2) the Minister also accepted that, as much if not all of the land granted was public land, and its use was for public purposes, section 9 of the Land Reform Act only permits the Minister to vest public land in indigenous citizens or communities on the advice of the Council of Ministers. Such advice had not been obtained.
9. The Minister further indicated that he would submit to any order of the Court.
10. It appears that Transparency, having had the Minister accept its concerns about the validity of the Decision, ceased actively to prosecute the claim.
11. After sometime, the Minister then applied to become the claimant in the proceeding, together with the Republic of Vanuatu itself. That application did not seek the dismissal of the proceeding, or any other determinative orders.



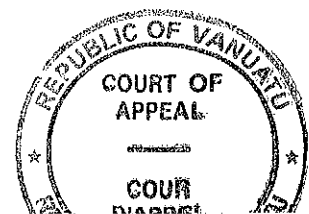
12. In addition, the Department of Lands Staff applied to have the Transparency claim dismissed for want of prosecution. There had been a series of procedural orders that Transparency had not complied with.
13. Those two interlocutory applications were heard together.
14. Judgment was given on 21 December 2016. The Minister's application to become the claimants including the joinder of the State, was refused. That is understandable. It does not sit well for the Minister to be claimant for Judicial Review to challenge the legality of the Minister's own decision. There is no separate decision of the Minister formally revoking, or purporting to revoke, the Decision.
15. The claims of Transparency against the Department of Lands Staff, and against the other 19 persons, were dismissed for want of prosecution. The Department of Lands Staff were given costs of the proceeding.
16. However, that proceeding was not fully dismissed. The primary judge said at [10] and [11] of the reasons for judgment then published:

“As regards the First Defendant [the Minister of Lands] having made a clear admission on 6th June 2016 that the decision made on 3 August 2014 was unlawful, [the Minister] has no defence and no prospect of successfully defending the claim in respect of first relief sought, which is that the said decision should be quashed. Accordingly the decision made by the former Minister dated 3 August 2014 is here quashed on ground of illegality.

“The remaining two reliefs sought in the amended claims of the claimant filed on 18 March 2016 cannot now be determined in light of the defences of the remaining defendants. These may be live issues which would have to be heard and determined in another proceeding which may be instituted by the Republic at some stage. But that is for another time”.

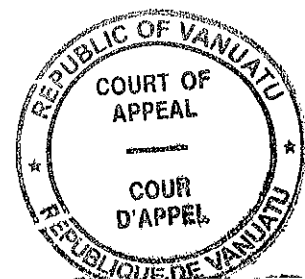


17. The reference to the defences, and to the remaining two claims for relief, are to the claims of Transparency for orders prohibiting the Department of Lands Staff (and the other 19 person) from occupying the leases, and secondly for an order declaring the leases issued to them were unlawful and must be cancelled.
18. In short, as is common ground, the Minister's position is that the Decision was unlawful, and that any leases issued based on the Decision should be cancelled, and if they have been registered, then the registration itself should be cancelled. The Department of Land Staff dispute that the Decision was unlawful, and say in any event leases granted under the Decision should stand, and should be registered, and if they have already been registered then the registration should not be cancelled.
19. The recital of that somewhat complicated background is almost enough to resolve the appeal.
20. The Court of Appeal, as noted above, previously set aside the consent order because the Department of Lands Staff (and the other 19 persons) were entitled to be heard before the order was made declaring the Decision unlawful, and the consent order quashing the Decision was set aside. Transparency was seeking orders then refusing any implementation of the Decision. The interests of the Department of Lands Staff were clearly potentially affected if the Decision was quashed.
21. That is the effect of the judgment now appealed from. The Decision is quashed on the ground of illegality, but the Department of Lands Staff have not had a chance to argue their position. As noted, the Transparency claim involved cancelling any leases or registration of leases.
22. The same order should be made again on the appeal in respect of the order made by [10] of the Decision published on 21 December 2016 that the

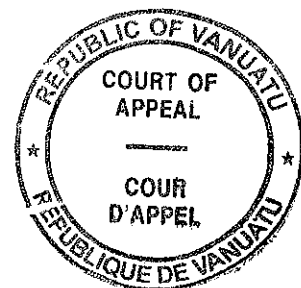


Decision is unlawful and should be quashed. That is a matter that the Department of Lands Staff were entitled to argue, but were not given an opportunity to do so.

23. There is a further reason why that order should be set aside. The Minister's interlocutory application to the Supreme Court to be made the claimant in the proceeding (and the Republic of Vanuatu becoming the named claimant) did not include any application for a final order declaring the Decision to be quashed on the ground of illegality. Consequently, the Department of Lands Staff were not given proper notice that such an order might be made, or an opportunity to address that question.
24. In the circumstances, counsel for the parties (other than Transparency, which did not appear on the Appeal, and the other groups of 19 defendants who appear to be riding passively on the coat tails of the Department of Lands Staff) submitted a proposed form of order to ensure the proper and speedy resolution of the issues, in the event that the Court of Appeal did decide to set aside the Order appealed from. As we have indicated, we do propose to set aside that Order.
25. The Court is grateful to the Republic (and the Minister) and to the Department of Lands Staff and their respective counsel for their assistance in that regard.
26. Slightly refined from their joint formulation, we note the issues are :
 - (1) Whether or not the Decision is unlawful;
 - (2) If the Decision is unlawful, should the leases granted under the Decision be cancelled, and if they are not cancelled but have not been registered, are the holders entitled to have the leases registered;



- (3) If the Decision is unlawful, should the leases granted under the Decision which have been registered be cancelled and the registration cancelled.
- (4) Depending upon the answers to those questions, if the interests of the holders of leases granted under the Decision are adversely affected, are the holders of those leases entitled to compensation.
27. Those issues may require to be addressed separately in relation to individual grants of leases, depending on the individual premium paid (as the submissions suggested that in some instances the premium paid was close to the full premium), depending on whether each lease was over public land and depending on the circumstances relied upon to invoke the protection of a 100 of the Land Leases Act.
28. Those are matters for the Supreme Court.
29. The active parties are agreed that, if the matter is referred back to the Supreme Court, the practical procedural order is that the Attorney-General for the Republic should become the claimant instead of Transparency. There will be no need to alter the existing defendants. It is likely that, apart from ensuring the relevant material is provided to the Supreme Court, the Minister and the Director will not take an active part in any hearing. The Supreme Court may need to give further directions to more clearly define and refine the issues.
30. As the Department of Lands Staff have been successful on the appeal, the joint memorandum of counsel accepts that the Minister and the Director should pay to them costs of the appeal of VT50,000. The Cross-Appeal of the Minister and the Director seeking to uphold the order of the primary judge will also be dismissed, but with no separate order for costs.




31. The Court orders that:

- (1) The appeal is allowed
- (2) The order made by the Supreme Court on 21 December 2014 quashing the Decision of the Minister made on 3 August 2014 on the ground of illegality is set aside.
- (3) The cross-appeal is dismissed.
- (4) The Minister of Lands and the Director of Lands pay to the Department of Lands Staff costs of the appeal fixed at VT50,000

DATED at Port-Vila this 7th day of April, 2017

BY THE COURT



**Hon. Vincent Lunabek
Chief Justice**

