

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

**Civil Appeal
Case No. 20/206 CoA/CIVA**

BETWEEN: Rolland Orah
Appellant

AND: Andrew Thomas Butlin and Robyn Wendy Lloyd
First Respondents

AND: Republic of Vanuatu
Second Respondent

Coram: *Hon. Chief Justice V. Lunabek
Hon. Justice B. Robertson
Hon. Justice J. Mansfield
Hon. Justice D. Aru
Hon. Justice V.M. Trief*

Counsel: *Mr R. Sugden for the Appellant
Mr G. Blake and Mr N. Morrison for the First Respondent
Mr L. Huri for the Second Respondent*

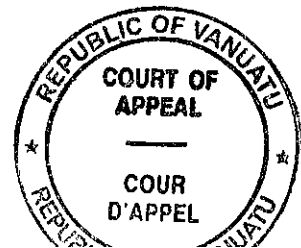
Dates of Hearing: *8 and 15 July 2020*

Date of Judgment: *17 July 2020*

JUDGMENT

A. Introduction

1. The Appellant Mr Orah is a custom ownership claimant for Lenur Island, which is located off the south-west coast of Malekula. The Supreme Court ruled in his favour that the registration of lease title no. 04/1712/001 over Lenur Island was obtained by fraud or mistake. However, it also held that the registration of the transfer of the lease could not be rectified as the First Respondents Andrew Thomas Butlin and Robyn Wendy Lloyd were *bona fide* purchasers for value.
2. Mr Orah appeals on a number of grounds including that Mr Butlin and Ms Lloyd caused or substantially contributed to the fraud and/or mistake such that they do not have the protection of subs. 100(2) of the *Land Leases Act* [CAP. 163] (the 'Act').

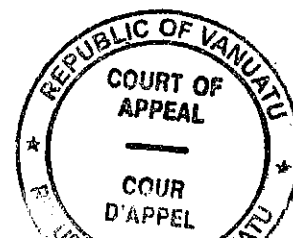


B. Leave to appeal out of time

3. The First Respondent does not oppose leave to appeal out of time being granted. Accordingly, the Appellant is granted leave to appeal out of time.

C. Background

4. On 8 November 2007, Mr Butlin and Ms Lloyd (purchasers) entered into a Sale and Purchase Agreement with Stuart Titek (vendor) for the purchase of a lease over Lenur Island for VT21,000,000 (the 'Contract'). That lease was not yet in existence.
5. On 12 November 2007, Mr Butlin sought to instruct Mr Morrison as his solicitor to handle the transaction. He emailed and attached a copy of the Contract and advised that the required deposit of AUD\$23,900.54 (the 'Deposit') had already been paid to the Real Estate Agent. Further, that settlement was due on 20 December 2007.
6. On 12 November 2007, Mr Titek signed a 75-year lease over Lenur Island.
7. On 13 November 2007, Mr Morrison emailed Mr Butlin accepting his instructions and indicating that settlement was possible by 20 December 2007.
8. On 15 November 2007, Peter Titek emailed Glen Craig of the Real Estate Agent for assistance as he did not have sufficient funds to obtain registration of the lease.
9. On 20 November 2007, Mr Craig wrote to Mr Morrison requesting permission to use the Deposit funds to register the lease and pay incidental costs including the initial VT1,500,000 premium for the lease on behalf of Stuart Titek.
10. On 20 and 21 November 2008, Mr Morrison sought instructions from Mr Butlin, and it was agreed that the Deposit funds could be so used.
11. On 22 November 2007, the Deposit was transferred to Ridgway Blake Lawyers' trust account.
12. On 22 November 2007, the Minister of Lands signed the lease on behalf of the disputing custom owners, with a premium of VT1,500,000 attached. At the same time, the Minister also signed a Consent to Transfer the lease from Mr Titek to Mr Butlin and Ms Lloyd, with a premium of VT21,000,000 attached.

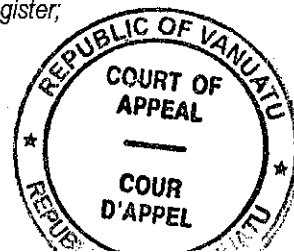


13. On 26 November 2007, the VT1,500,000 premium for the lease, stamp duty, first year's land rent and registration fees were paid from the Deposit.
14. On 3 December 2007, the lease of Lenur Island, lease title no. 04/1712/001 between the Minister of Lands on behalf of the disputing custom owners (lessor) and Stuart Titek (lessee) was registered.
15. On 19 December 2007, the transaction was settled and as a result Mr Titek received the final instalment of the VT21,000,000 price pursuant to the Contract, less some costs including a VT4,000,000 commission for the Real Estate Agent.
16. On 10 June 2009, the transfer of the lease from Stuart Titek (transferor) to Mr Butlin and Ms Lloyd (transferees) was registered.
17. The custom ownership of Lenur Island has not yet been determined.
18. Mr Orah, a disputing custom owner of Lenur Island, brought an action seeking cancellation of the registrations of the lease and its transfer.
19. The Supreme Court held that the registration of the lease was obtained by fraud or mistake. However, the registration of the transfer of the lease could not be rectified as Mr Butlin and Ms Lloyd were *bona fide* purchasers for value. Mr Orah appeals the Supreme Court judgment on a number of grounds.
20. The Second Respondent the State abides the decision of this Court.

D. The Law

21. Sections 14 and 15 of the *Land Leases Act* provide:

14. *Subject to the provisions of this Act, the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease together with all implied and expressed rights belonging thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.*
15. *The rights of a proprietor of a registered interest, whether acquired on first registration or subsequently for valuable consideration or by an order of the Court shall be rights not liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all rights, privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –*
 - (a) *to the encumbrances and to the conditions and restrictions shown in the register;*



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

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

22. Section 23 of the Act provides:

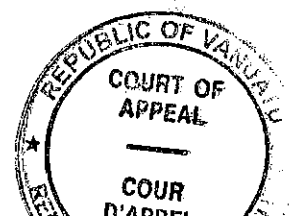
23. (1) *No person dealing or proposing to deal for valuable consideration with a proprietor of a registered interest shall be required or in any way concerned –*
- (a) *to inquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor was registered; or*
 - (b) *to see to the application of any consideration or any part thereof; or*
 - (c) *to search any register kept under any previous law.*
- (2) *Where the proprietor of such an interest is a trustee, he shall in dealing therewith, be deemed to be the absolute proprietor thereof and no disposition by such trustee to a bona fide purchaser for valuable consideration shall be defeasible by reason of the fact that such disposition amounted to a breach of trust.*

23. Section 100 of the Act provides:

100. (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.*

E. Grounds of the Appeal

24. The appeal is advanced on three main grounds. First, that the primary Judge erred in failing to find on the basis of the evidence before him that the registration of the lease was obtained by mistake and/or fraud including fraud upon the disputing custom owners by virtue of the payment of a lease premium of only VT1,500,000 and immediate on-sale of the lease for VT21,000,000 netting a profit for the First Defendant at the expense of the custom owners.



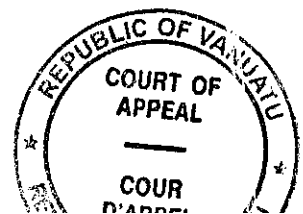
25. Secondly, that the primary Judge erred by failing to hold that by paying for the lease premium from the Deposit, Mr Butlin and Ms Lloyd "caused or substantially contributed to" the mistake and/or fraud such that they do not have the *bona fide* purchaser for value protection accorded by subs. 100(2) of the Act.
26. Thirdly, that the primary Judge erred in not finding that Mr Morrison had, at the relevant time, knowledge that registration of the lease would be a fraud upon the custom owners and would be obtained without proper inquiries having been made of the disputing custom owners, and in failing to hold that Mr Morrison's knowledge of facts that clearly showed the registration of the lease would be obtained by fraud and/or mistake was not attributable to Mr Butlin. Mr Sugden submitted that given the evidence that emerged at trial, his client had a basis upon which to apply to amend the Claim to put into issue Mr Morrison's knowledge of the fraud and/or mistake, and that this was attributable to Mr Butlin.

F. Discussion

27. Leasehold interests are conferred by registration of a person as the proprietor of a lease – s. 14 of the Act. The rights of a proprietor of a registered interest shall be rights not liable to be defeated "except as provided for in this Act" – s. 15 of the Act. The only way for the rights of a registered proprietor to be defeated is pursuant to s. 100 of the Act where the Court is satisfied that a registration has been obtained, made or omitted by fraud or mistake. The subject of rectification in s. 100 of the Act is "rectification of the register".
28. Mr Orah claimed that the registration of the lease and of the transfer of lease were obtained by fraud and sought rectification of the register pursuant to s. 100.
29. Were the registrations of the lease and of the transfer of lease obtained by fraud?
30. Mr Sugden submitted that the first ground of the appeal was put in case this Court did not agree that the primary Judge had already made findings as to fraud. In his submission, however, the primary Judge did find at paras 97-99 of the judgment that the registrations of the lease and of the transfer of lease were obtained by fraud (para. 95 is also set out):

(i) Issuance of the lease

- 95 *If the Lands Offices processes have not been strictly complied with, the obligation of the Minister was to decline to sign the lease. Only where applications for a lease have followed the correct procedures should a lease be brought into existence. Mr Korman's conduct is accordingly incomprehensible.*



97. *The initial issuance of the lease by Minister Korman was clearly done by mistake or fraud.*

(ii) **Consent to Transfer of lease**

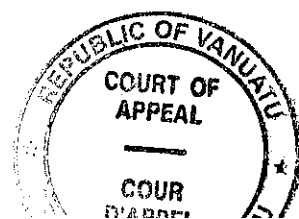
98. *In signing the Consent to Transfer the lease on the very same day as the new lease itself, the Minister has clearly erred in his duty towards the custom owners – a group whose interests he was statutorily compelled to protect. Instead, Mr Korman allowed Mr Stuart Titek to enjoy a VT19.5 million profit from the transaction which was at the cost of the custom owners. Mr Korman dealt with only a hundred leases per year, so the possibility of his being so busy or distracted by other matters can be safely put to one side. I believe that Mr Korman was aware of what he was undertaking when he executed the Consent to Transfer.*

99. *The Court cannot be seen to support such cavalier actions. Mr Korman's were unlawful and seem to show a lack of proper concern – they are therefore liable to rectification.*

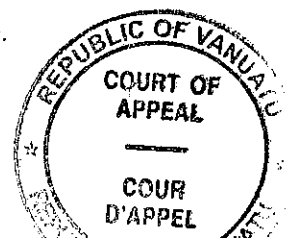
31. None of the primary Judge's factual findings have been challenged.

32. We agree with Mr Sugden that the primary Judge has made findings of fraud at paras 97-99 of the judgment, and also at para. 95. We would add that the registrations of the lease and of the transfer of lease were obtained by fraud in the particular circumstances of this case as follows:

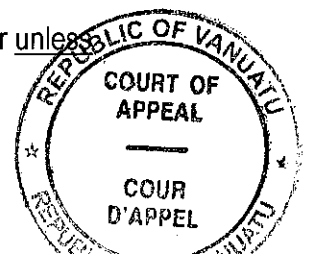
- The custom ownership of Lenur Island has not yet been determined.
- Mr Butlin and Ms Lloyd (purchasers) and Stuart Titek (vendor) entered into the Contract for the purchase of a lease over Lenur Island before any lease was in existence.
- Mr Butlin and Peter Titek on behalf of Stuart Titek agreed that the Deposit be transferred to Mr Morrison for the purpose of paying the VT1,500,000 lease premium, first year's land rent, stamp duty and registration fees to the Government to enable the lease to be registered. On 26 November 2007, Mr Morrison did so.
- The premium for the lease was paid to the Minister for and on behalf of the disputing custom owners. This would ordinarily be held in the Custom Owner Trust Account until such time as custom ownership is determined and the monies are disbursed to the declared custom owners.
- The Minister of Lands signed both the lease **and** the Consent to the transfer of the lease on the same day. The lease premium of VT1,500,000 and the consideration for the transfer of the lease of VT21,000,000 were apparent on the face of both documents.



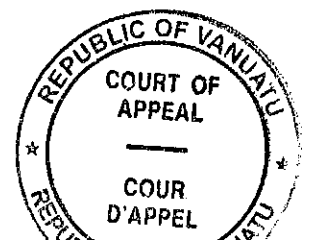
- By virtue of the payment of a lease premium of only VT1,500,000 and immediate on-sale of the lease for VT21,000,000, not only did Stuart Titek net a VT19,500,000 profit but this also amounted to a fraud on the custom owners and on the Government (which receives a percentage of the premium by way of stamp duty and registration fees).
33. We note also that this case concerns land in respect of which the Minister of Lands had a duty to act for and on behalf of the disputing custom owners for that land. The Court is mindful that the matters raised in this appeal go to the question of the rights and interests of the disputing custom owners.
34. That disposes of the first ground of appeal.
35. The second ground of appeal is that the primary Judge erred by failing to hold that by paying for the lease premium from the Deposit, Mr Butlin and Ms Lloyd "caused or substantially contributed to" the mistake and/or fraud such that they do not have the *bona fide* purchaser for value protection accorded by subs. 100(2) of the Act.
36. The primary judge rejected the claim that Mr Butlin and Ms Lloyd did in fact know about the fraud which he found to exist, so the "knowledge of the fraud" option to bring their conduct within the exception under subs.100(2) of the Act was rejected. That was not challenged on the appeal. The alternative basis of pursuing that option was through the asserted knowledge of their lawyer Mr Morrison. That had been raised in closing submissions, but had not been pleaded.
37. Mr Sugden applied orally to amend the Claim to include matters that he said were contested at trial and raised by the evidence including that Mr Morrison had knowledge of the fraud on the custom owners, that this should be attributed to Mr Butlin and Ms Lloyd, and that the latter substantially contributed to the fraud resulting in the registration of the lease.
38. This Court put to Mr Sugden that Mr Morrison was at no time put on notice of nor given an opportunity to give evidence as to what he knew or did not know of the fraud leading to the registrations, and whether his knowledge can be imputed to Mr Butlin.
39. Mr Sugden accepted this but maintained his application to amend the Claim to include that by paying for the lease to be registered in the circumstances disclosed by the evidence Mr Butlin and Ms Lloyd "caused or substantially contributed to" the mistake and or fraud (within the words of subs. 100(2) of the Act) resulting in the registration of the lease.



40. Given Mr Sugden's submissions, Mr Morrison understandably considered that his client's interest was now compromised and he could not even make submissions in response to Mr Sugden's application to amend the Claim. Mr Morrison immediately sought an adjournment to brief new counsel. The Court is grateful to Mr Blake for his assistance given he had only one week notice.
41. Mr Blake opposed the application by Mr Sugden and submitted that the application should be refused. His submissions focused on the proposed amendments in relation to Mr Morrison's knowledge and imputation of his knowledge to Mr Butlin.
42. It is not necessary to rule on that application, as the appeal can be resolved on consideration of the alternative proved under subs. 100(2). However, it is apparent that the trial would have been conducted differently if the allegation about Mr Morrison's knowledge, and it being attributed to Mr Butlin and Ms Lloyd had been properly put and Mr Morrison given the opportunity to consider whether or not to give evidence. In those circumstances, it is most unlikely that such an amendment would have been allowed.
43. We note that it is pleaded in paras 17 and 19 of Mr Orah's Amended Claim that by their act of paying for the VT1,500,000 lease premium out of the purchase money, this enabled Mr Titek to obtain VT19,500,000 at the expense of the disputing custom owners and the Republic in relation to stamp duty and registration fees. This was proved at trial and the primary Judge made his findings of fraud set out above.
44. Now on appeal Mr Sugden submits that Mr Butlin and Ms Lloyd substantially contributed to the fraud in consequence of which rectification is sought. This question of law arises from the pleadings therefore we consider that amendment of the Claim is not required.
45. Did Mr Butlin and Ms Lloyd by their act substantially contribute to the fraud in consequence of which rectification is now sought?
46. Subsection 100(2) provides:
100. ...
- (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.*
47. Accordingly, the register shall not be rectified so as to affect the title of a proprietor unless such proprietor alternatively:

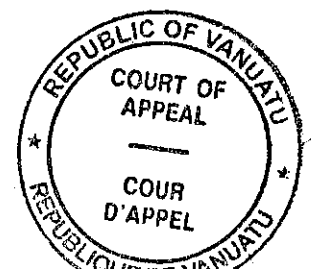


- (i) Had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought; or
 - (ii) Caused such omission, fraud or mistake; or
 - (iii) Substantially contributed to it by his act, neglect or default.
48. Mr Sugden submitted that knowledge of the fraud and/or mistake was not required – as long as Mr Butlin and Ms Lloyd had by their acts substantially contributed to the fraud resulting in the registrations of the lease and transfer of the lease, their title could be affected by rectification pursuant to subs. 100(2) of the Act. Mr Sugden relied on the express wording of subs. 100(2), pointing out that knowledge was required in the first of the three alternatives set out in that section, but as it had not been included in the other two alternatives, Parliament provided that knowledge was not required for a Court to find that a registered proprietor had caused or substantially contributed to the fraud in consequence of which rectification is sought.
49. Mr Blake opposed Mr Sugden's submission that Mr Butlin and Ms Lloyd substantially contributed to the registration of the lease by their act of releasing the Deposit monies for the vendor Mr Titek's benefit. Mr Blake submitted that knowledge of the fraud is required on the part of the registered proprietor. He submitted that to allow a registered proprietor's title to be defeated where he has unwittingly and in circumstances where he is totally unaware of the consequences/ramifications of his acts and any underlying fraudulent conduct waters down in a very substantial way the indefeasibility of proprietorship established by the Act. Further, to do so would undermine the Act to a point where title could no longer be regarded as indefeasible, thereby removing confidence in the system of land tenure under the Act.
50. Mr Blake also submitted that if unwitting assistance was actionable, it would also undermine the protection of s. 23 of the Act which removes the need to "inquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor was registered". We can deal with this submission shortly – s. 23 provides protection to persons dealing "with a proprietor of a registered interest". When Mr Butlin and Ms Lloyd contracted with Mr Titek, there was no lease yet in existence. They were not dealing with a proprietor of a registered interest. Section 23 does not assist them.
51. The Courts are bound to give meaning to the words used by Parliament. Knowledge is required in the first alternative but not expressly referred to in the second or third alternative



elements of subs. 100(2). Whether or not a registered proprietor substantially contributed to the fraud is a question of fact.

52. It is accepted that the VT1,500,000 premium for the lease, stamp duty, first year's land rent and registration fees were paid from the Deposit.
53. The registration of the lease on 3 December 2007 was enabled by the payment of the VT1,500,000 lease premium and associated fees from the Deposit funds. But for the use of the Deposit funds in that way, the registration of the lease would not have occurred as and when it did.
54. Without the registration of the lease, there could not have been any transfer of the lease to Mr Butlin and Ms Lloyd. The use of the Deposit funds to enable the registration of the lease also enabled the registration of the transfer of the lease from Mr Titek to Mr Butlin and Ms Lloyd therefore did contribute to the fulfilment of the fraud as and when it occurred. Without the use of those funds, the fraud would not have happened at the time and in the manner that it did.
55. Mr Blake submitted that the act of releasing Deposit monies to pay for the lease premium and fees was not a "substantial" contribution to the fraud. We disagree. In the very unusual circumstances of this case and on its particular facts, the registration of the lease was enabled by the payment from the Deposit monies of the VT1,500,000 lease premium, first year's annual land rent, stamp duty and registration fees. But for that, registration of the lease could not occur as and when it did. That registration is what rectification is now sought in respect of.
56. Accordingly, given the wording of subs. 100(2) and in the very unusual circumstances of this case, we are satisfied that Mr Butlin's authorisation for the Deposit monies to be used for these payments constituted a "substantial" contribution on his part to the fraud in consequence of which rectification is now sought. He did not know that by his act, he was substantially contributing to the fraud that occurred however that is what occurred on the particular facts of this case.
57. This Court is driven to this conclusion by the wording of subs. 100(2) and in the very unusual circumstances of this case. Importing a requirement of knowledge into the third alternative in subs. 100(2) involves re-writing the words of Parliament. All the words must be recognised and applied. We reject the submission that to do so would dilute the doctrine of indefeasibility. The outcome in this case is a necessary consequence of the particular circumstances of this case.



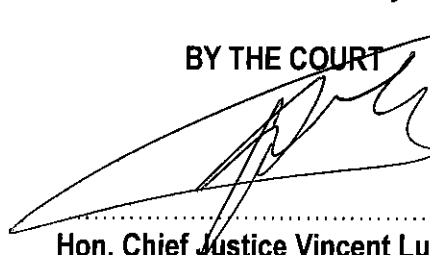
58. Accordingly, an order will issue for the cancellation of the registrations of lease title no. 04/1712/001 and its transfer to Mr Butlin and Ms Lloyd. The subject land will revert then to the disputing custom owners.
59. In the circumstances, the VT1,500,000 lease premium paid to the Government needs to be returned to Mr Butlin and Ms Lloyd, with interest. An order will issue to that effect.
60. Given the appeal succeeds on the second ground of appeal, we need not consider the remaining grounds of appeal.

G. Result

61. The Appellant is granted leave to appeal out of time.
62. The appeal is allowed.
63. It is ordered that the registrations of lease title no. 04/1712/001 and of the transfer of the lease to the First Respondents be cancelled forthwith by the Director of Lands.
64. The Second Respondent is to pay to the First Respondents VT1,500,000 being the sum of the lease premium that has been held in trust for the disputing custom owners, and any interest earned on that sum from 26 November 2007 until date of payment to the First Respondents.
65. The First Respondents are to pay the Appellant's costs of the appeal which we set at VT75,000, to be paid within 21 days.
66. There is no order as to the costs of the appeal for the Second Respondent.

DATED at Port Vila this 17th day of July 2020

BY THE COURT


.....
Hon. Chief Justice Vincent Lunabe

