

(Civil Jurisdiction)

BETWEEN: GLADYS WILLIAM

First Claimant

AND: DON, KENWAY, WILLIAM,
KELSIN and TONY WILLIAM

Second Claimants

AND: EZRA WILLIAM

First Defendant

AND: AHC (Vanuatu) LTD

Second Defendants

AND: MINISTER OF LANDS

Third Defendant

AND: DIRECTOR OF LANDS

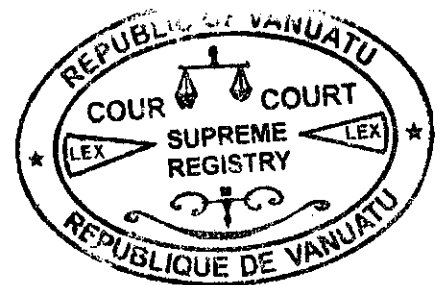
Fourth Defendant

Coram: Mr Justice Oliver A. Saksak
Ms Mandeng John – Clerk

Counsels: Mr Saling Stephens for the First and Second Claimants
Mr John Malcolm for the First and Second Defendants
Mr James Tari for Third and Fourth Defendants

Date of Hearing: 8th December, 2003.

Date of Judgment: 26th February, 2004.



JUDGMENT

Introduction

This is a reserved judgment.

The Third and Fourth Defendants were dismissed as Parties to this Action on 8th December, 2003 following an application made by Mr Tari. An Order to that effect was issued on 11th December, 2003. There are now only two remaining Defendants, Ezra William and AHC (Vanuatu) Ltd.

Claims

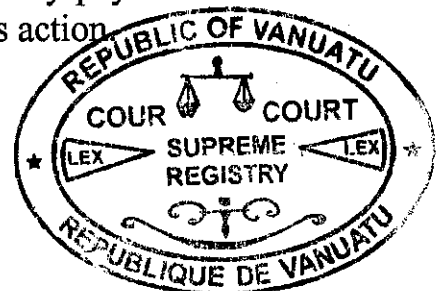
The First Claimant is claiming as the lawful wife and the Second Claimants are claiming as the sons of the First Defendant.

They seek –

- (1) Declarations that:
 - (a) the subdivision of Title No.04/2621 to 04/2621/008 and 04/2621/009 was done through fraud or omission and/or mistake and should be declared null and void and of no legal effect; and
 - (b) the registration of Title No.04/2621/008 and 04/2621/009 were done through fraud, omission and/or mistake and should be declared null and void and of no legal effect.
- (2) An Order requiring the Fourth Defendant to rectify the Register by canceling the registration of the Second Defendant's leases and restoring same to previous Title No.04/2621/001 in the joint names of the Claimants.

In the alternative, the Claimants seek Orders –

- (a) requiring all the Defendants jointly and severally to compensate the First and Second Claimants for the sum of VT110.000.000 for improvements had on the said titles; and
- (b) requiring all the Defendants to jointly and severally pay the First and Second Claimant's costs of and incidental to this action.



Cross-Claim

By way of a cross-claim the Second Defendant as bone fide purchaser for valuable consideration invoking the provisions of section 100(2) of the Land Leases Act Claims:-

- (a) a declaration that it is the lawful leasee;
- (b) an order removing the Claimants from their property;
- (c) an order for general damages for trespass and pursuant to the Magistrate's Court claims;
- (d) costs; and
- (e) such further or other order as deems fit.

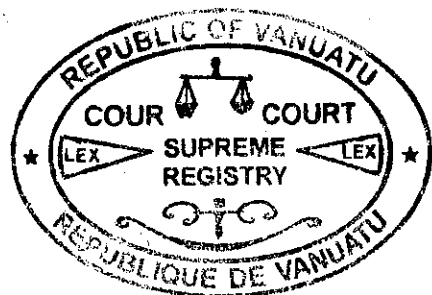
In the alternative, the Second Defendant invoking sections 101-103 of the Land Leases Act [CAP.163], seeks indemnity against the Third and Fourth Defendants.

The Facts

The First Defendant was the original proprietor of Leasehold Titles No.04/2621/001 and 04/2621/002. The title was transferred into the First Defendant's sole name in 1968 by Mr Edward Allegre. The First Defendant paid valuable consideration in the sum of VT150,000 French Francs. In or about July 2001 the First Defendant created subdivisions as titles No.04/2621/008 and 04/2621/009. On 9th September 2002 Leasehold Title No.04/2621/008 was transferred by the First Defendant to the Second Defendants for the sum of VT7,200,000 as consideration, and Leasehold Title No.04/2621/009 was transferred for the sum of VT8,300,000. The total amount paid by the Second Defendant to the First Defendant was VT15,500,000.

Burden and Standard of Proof

The burden of proof rests on the party who alleges a particular fact and the standard of proof required is on the balance of probabilities.



The Evidence

A. The Claimants

The Claimants produced evidence by affidavit and orally from Gladys William, Don William and John Bison, an Agriculture Field Officer. Kenway, William, Kelsin and Tony William did not give evidence either by affidavits or orally in relation to their respective claims.

B. The Defence

The Defendants produced evidence by affidavits and orally from Allan Cort in support of the Second Defendant and Ezra William the First Defendant. References to relevant evidence will be made when determining the issues raised by Counsels.

The Issues –

1. Whether or not AHC (Vanuatu) Ltd committed a fraud and/or mistake on the claimants?

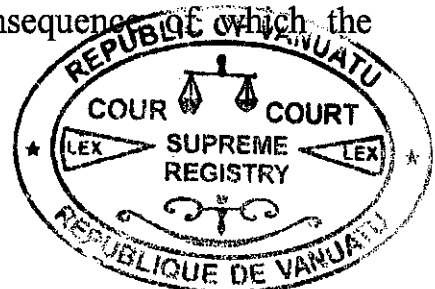
In her oral evidence and in cross-examination Gladys William admitted that the Second Defendant committed no fraud and/or mistake against her and the Second Claimants. Don William also admitted in cross-examination that there was no fraud and/or mistake by AHC Ltd. John Bisson's evidence was irrelevant to this issue.

The Law

Section 100 of the Land Leases Act [CAP.163] provides –

“(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 that title of a proprietor who is in possession and acquired the interests 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.”

Applying the law to the facts as supported by evidence, I answer this issue in the negative. Where there is no fraud or mistake it follows that the Court has no jurisdiction to Order the rectification of the register. The effect of this finding is therefore that the reliefs sought by the Claimants at paragraphs (1)(a) and (b) and (2) fail. This is sufficient to dispose of the claimants whole action had they not made alternative claims. I deal with these in the issues that follow.

(2) Whether AHC Ltd is liable to pay compensation to Gladys or Don William?

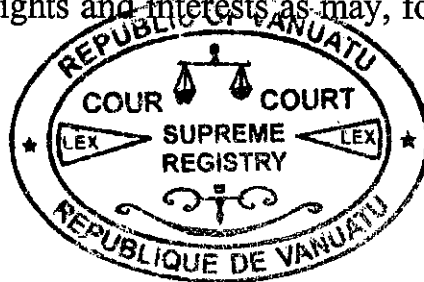
The burden of proof rested with the Claimants to show by relevant and admissible evidence that the Second Defendant was liable in either tort, contract or by statute. The Claimants have not discharged that burden. Their only evidence was that they were are still in occupation of the land. The Claimants did not plead properly or at all to these issues. This Court is bound to consider only what was pleaded.

The Second Defendant’s evidence which has now been accepted by the claimants was that they are the registered proprietors of Leasehold Titles No.04/2621/008 and 04/2621/009. They paid valuable consideration to the First Defendant in the sum of VT15,500,000. It has now been accepted that there was no fraud or mistake by AHC Ltd. It was their further evidence that subsequent to their being registered, AHC Ltd erected fences over the property. These fences were damaged by Don and Kenway William the Second Claimants.

The Law

Both counsels refer the Court to section 17(g) of the Land Leases Act which provides for overriding interest as follows –

“17 Unless the contrary is expressed in the register, the proprietor of a registered lease shall hold such lease subject to such of the following liabilities, rights and interests as may, for



the time being, subsist and affect the same, without their being noted on the register –

- (g) the rights of a person in actual occupation of land save where enquiry is made of such person and the rights are not disclosed.

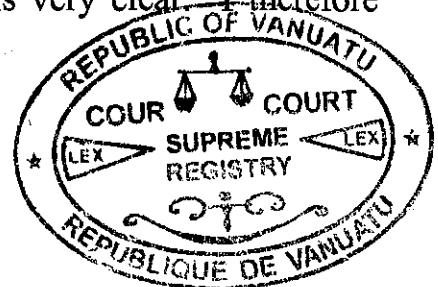
I am unable to find any liability against the Second Defendants based on section 17(g) of the Land Leases Act. None of the Counsels in this case made references to section 72 of the Act. This section provides for licenses as follows –

- “(1) Without prejudice to section 93 a licence shall not be capable of registration.
- (2) A licence relating to the use or enjoyment of the land comprised in a registered lease is in-effective against a bona fide purchaser for valuable consideration unless the licensee has protected his interest by lodging a caution under section 93”
(emphasis, mine)

Section 93 states –

- “(1) Any person who –
 - (a) Claims any interest in land under an unregistered instrument or otherwise;
 - (b) Claims a benefit under a trust affecting a registered interest;
 - (c) Claims a license affecting a registered interest; or
 - (d);
 may lodge with the Director a caution in the prescribed form forbidding the registration of any person as transferee of , or any instrument affecting that interest, either absolutely or conditionally.”

The Claimants did not plead sections 72 or 93 of the Act. And they did not produce any evidence showing that they have lodged a caution under section 93. As such, section 72(2) is very clear. I therefore



arrive at the conclusion that AHC Ltd are not in any way liable to pay compensation to either Gladys William or Don William.

3. Whether Ezra William is liable to pay compensation to Gladys or Don William?

The evidence of Gladys William is that she is the lawful wife of the First Defendant. The First Defendant does not dispute that. Gladys William said in evidence that she contributed to the purchase price of the property but could not and did not say how much. The First Defendant denied that claim and said he paid 150 French Francs for the property by himself. And it was registered in his sole name. Gladys William further said in evidence that in 1982 the First Defendant allocated individual plots to Don, Kenway, William, Kelsin and Tony. Don William confirmed that evidence. The First Defendant denied that claim and said he had overall authority over the property.

The First Defendant was the registered proprietor of the original land lease held in his sole name. It was admitted by Don William that that was a 'good lease' in his words. There was nothing wrong with it.

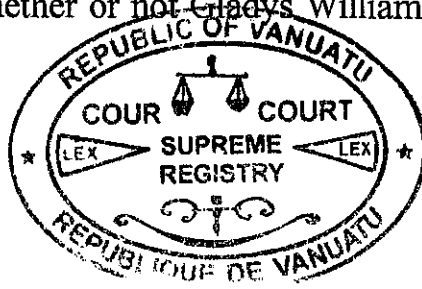
The Law

Mr Stephens submitted section 74 of the Act in addition to section 17(g). Section 74 states –

“(1) Where a registered interest is vested in proprietors in common, the proprietors shall be entitled to undivided shares in the interest on such proportion as may be registered and on the death of any of the proprietors in common his share shall be administered as part of his estate.

(2) No proprietor in common of a registered interest shall dispose of his undivided share in favour in common of the same interest, except with the consent in writing of the remaining proprietor or proprietors of the interest, but such consent shall not be unreasonably withheld.”

Applying the law to the facts, firstly in relation to Gladys William, this is not a Matrimonial proceedings. The Court is not being asked and is not entitled to determine whether or not Gladys William



is a proprietor in common. In any event the evidence is clear; Esra William was the sole registered proprietor. Secondly in relation to Don William, he is not a joint proprietor with his father. Neither he nor Gladys William have statutory entitlements under section 74 of the Act.

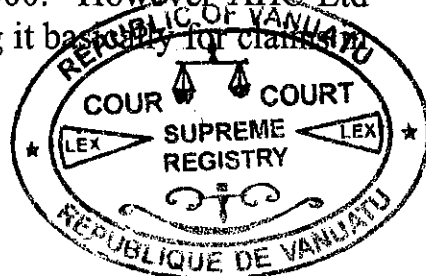
Don William claims for the sum of VT110,000,000 against his father. That claim is not substantiated. His claims for improvements assessed by the Agriculture Field Officer, John Bison amounted to VT3,721,300. This claim is uncertain.

This is not a claim based on customary ownership of land. As such it appears to me that section 74 is not applicable to claims subject of a leasehold tenure.

Based on these reasons, I arrive at the conclusion that the First Defendant is not liable to pay compensation to Gladys William or Don William. Kenway William did not testify or produce any affidavit evidence in relation to his claim. William, Kelsin and Tony William did not testify or produce any affidavit evidence in relation to their claims. All their claims for compensation fail against the First Defendant as well. As such the Claimants' action fails in its entirety.

Cross-Claim

- (1) The Second Defendant seeks a declaration that they are the lawful lessees of Leasehold Titles No.04/2621/008 and 04/2621/009. Having found on the evidence and on the Claimants admission that the Second Defendant committed no fraud and/or mistake, I therefore hereby declare that AHC (Vanuatu) Ltd are the lawful lessees of Leasehold Titles No.04/2621/008 and 04/2621/009 respectively.
- (2) They also claim for an Order evicting the Claimants from their property. The Second Defendants are entitled to this Order to be issued accordingly.
- (3) They further claim for an order for general damages for trespass and pursuant to the Magistrate's Court claim in Civil proceeding's No.6 of 2003. The total sum claimed was VT400,000. However AHC Ltd have reduced that sum to VT200,000 limiting it ~~basically~~ for claimants.



respect of damage to fences and new posts. This claim is made against Don and Kenway William only. I have heard the evidence and I am satisfied that the Second Defendants have suffered damage to their new wire fencing and posts. Accordingly there will be an order for the sum of VT200.000 against Don and Kenway William.

The second limb of this claim is for an order for general damages against all the Claimants for trespass. In his submissions Mr Malcolm submitted that the amount is VT2,000,070 based on ten percent (10%) of VT15,500.000 paid to the First Defendant as valuable consideration by the Second Defendant. This claim is for loss of use or benefit of the land over which the Second Defendants hold lawful leaseholds. There is no evidence before me showing that from the date of registration of its lease being 25th November 2002, AHC Ltd have caused any major or substantial developments, commercial or otherwise on the land in question. The only development done by AHC Ltd is the erection of new posts and fencing.

In any event the correct amount based on ten percent (10%) of VT15,500.000 is not VT2,000,070 but VT1,550.000. For the reason expressed above and in fairness to all parties it is my view that the rate should be reduced to five percent (5%). This places the amount of damages for loss of use at VT750.000.

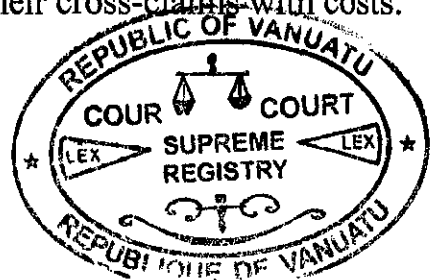
Accordingly I allow this claim and award the sum of VT750.000 as damages against Gladys and Don William.

(4) Costs

Mr Malcolm seeks costs against the Claimants on a full indemnity basis. While this is a valid claim, it is my view that having awarded general damages for loss of use of land in favour of AHC Ltd calculated at the rate of five percent, that the cost should be awarded in favour of the Second Defendant only on the normal basis. There will therefore be an order to that effect.

Conclusion

The Claimants' claims fail in their entirety and accordingly I dismiss them with costs. The Second Defendant succeed on their cross-claims with costs.



The Orders

1. The First and Second Claimants (the Claimants) and all their families and relatives currently occupying Leasehold Titles No.04/2621/008 and 04/2621/009 be evicted from the said Titles.
2. The Claimants and all their families and relatives will dismantle any or all of their structures within the said Titles within 28 days from the date of this judgment.
3. The Eviction Order shall be stayed for a period of 28 days to enable the Claimants to comply with (2) above.
4. Don and Kenway William will pay AHC Ltd the sum of VT200.000 within 28 days from the date of judgment.
5. The Claimants will pay AHC Ltd the sum of VT750,000 within 28 days from the date of judgment.
- 6. The Claimants will pay the Second Defendant's costs of and incidental to this action and Civil Case No.6 of 2003 in the Magistrate's Court on the normal costs basis.

DATED at Luganville this 26th day of February, 2004.

BY THE COURT



OLIVER A. SAKSAK
Judge

