IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

26/11/08

Civil Case No. 184 of 2006

BETWEEN: **VANUATU FISAMAN COOPERATIVE MARKETING CONSUMER SOCIETY LIMITED**
Claimant

AND: **JED LAND HOLDINGS & INVESTMENT LIMITED**
First Defendant

AND: **PHILIP KATING**
Second Defendant

AND: **DIRECTOR OF LANDS**
Third Defendant

Coram: ***Justice John von Doussa***

Counsels: *Mr. Daniel Yawah for the Claimants*
Mr. Edward Nalyal for the First Defendant
Mr. Hilary Toa for the Second Defendant
Ms. Florence Williams for the Third Defendant

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Date of Hearing: *17 – 18 September 2008*

Date of Decision: *19 September 2008*

REASONS FOR JUDGMENT

The claimant is a cooperative society registered on 1st May 2003. It was the registered lessee of lease No. 04/2644/001 for certain land Palekula. The land was at one time intended as a fishing base for use by the claimant. On 13th December 2004 the Assistant Registrar of Cooperative Societies pursuant to s. 58 (1) of the Cooperative Societies Act appointed the second defendant, Philip Kating, the administrator of the claimant.

Section 58 of the Cooperative Societies Act provides:-

> "***58. Dissolution of committee***
> *(1) If the registrar is satisfied that the committee of a registered society is not performing its functions in a proper and businesslike manner and, that in the circumstances of the case, it is fit for him to do so he may by order in writing –*

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(a) *dissolve the committee; and*

(b) *direct that the affairs of the society shall be administered by a person appointed by him for that purpose.*

.....

(5) *Subject to the general supervision of the registrar the person appointed to administer the affairs of the society shall have all the powers and functions conferred on the committee under this Act and under the by-laws of the society, and shall, in so far as it shall be practicable, arrange for the election or appointment of a new committee of the society before the expiry of the order referred to in subsection (1).*

....."

On 15th October 2005 the second defendant, as administrator, signed a contract to sell the leasehold interest in the Palekula land to the first defendant, Jed Land Holdings and Investment Limited, for the sum of VT11,000,000. Documents were prepared including a Consent to the registration of the transfer of lease by Suri Tarosa Tommy Wells (Mr. Wells) as the custom owner of the land. This document was signed on 7th November 2005 in the presence of Peter Pata, the senior lease officer at the Department of Lands.

The transfer of lease was executed on 15th November 2005. Completion of the sale occurred and the transfer of the lease was in due course registered.

On 29th September 2006 these proceedings were commenced in which the claimant seeks to have the transfer of lease to the first defendant declared "*null and void*" and for the leasehold interest be transferred back to the claimant pursuant to s. 100 (1) of the Land Leases Act [CAP. 163].

It is important to note that the power to order the rectification of a land lease registered under s. 100 is subject to the provisions of s. 100 (2). The full text of section 100 is as follows:-

"***100. Rectification by the Court***

(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."

By the statement of claim as amended, the cause of action and the particulars pleaded against the first defendant are as follows:-

"*8. The claimant claims the first defendant acted fraudulently and or mistakenly to obtain the lease from the second defendant.*

(i) The first defendant knew the second defendant then was acting without the Consent of the Board of Directors of the claimant company when he sold the said lease to her.

(ii) The first defendant knowingly but failed or mistakenly by passed the required procedure pursuant to the Land Lease Act to have the written Consent of Lessors in the claimants lease namely, Mr. James Tura and others to give their written consent to transfer document sign before the lease can be transferred from the claimant to her.

(iii) The first defendant by mistake and or fraudulently had one Mr. Suri Tarosa Tommy Wells signed the Consent of transfer to the said lease to her whom the first defendant know such person is not the registered lessor in the claimants lease 04/2644/001.

(iv) The first defendant acted deliberately contrary to the law when she knew that to have one Suri Tarosa Tommy Wells appear as a new lessor in the lease title 04/2644/001 an order of the Court must be obtained ordering first substitution of the former lessors with Suri Tarosa Tommy Wells firsts before Mr. Suri Tommy Wells can sign any Consent of transfer of the said lease."

No cause of action is pleaded against the second or third defendants. Affidavits filed before trial reveal a number of factual issues which are in dispute between the parties:-

(a) Several deponents for the claimant assert they were members of the committee (executive) of the claimant and no meeting had been held to authorize the sale of the Palekula land, and hence that the second defendant had no authority to make the sale;

(b) There has been a long standing dispute over the custom ownership of the Palekula land. The most recent Land Tribunal decision, being a decision

Supe Natavuitano Land Tribunal, declared Mr. Wells to be the custom but there are still proceedings on foot seeking to challenge this decision.

(c) The first defendant, by its director Emmanuel Foundas, and its other directors David Natuman and John Timakata say they made proper inquiry to ascertain the custom owner who is required to sign the consent. They identified Mr. Wells who produced documents confirming the decision of the Supe Natavuitano Land Tribunal declaring him to be the custom owner. They conferred with officers of the Lands Department to ensure that they were proceeding correctly as there was an old entry on the Palekula lease registering James Toura and others as representatives of the custom owners. The consent signed by Mr. Wells, and the transfer of lease were left with the Lands Department for consideration and in due course certified by them as correct for registration. The first defendant, through its directors, believed all had been done that was required to ensure that registration of the transfer of lease was strictly in accordance with law. They swear they had no knowledge of any mistake in the registration process. In defence of the claim they say that even if there was some administrative mistake or mistakes within the Lands Department which caused the registration to the first defendant to be made, the first defendant is protected from rectification by s.100 (2) of the Land Leases Act.

(d) The pleading of fraud against the first defendant depends on a finding that its directors knew that the registration process was not correct and in particular that they knew the transaction could only go ahead validly if there was an order of the Supreme Court to rectify the lease register by changing the name of the lessor from James Toura and others to that of Mr. Wells.

There are two matters to be noted about the claimant's case as pleaded which are of fundamental importance to the outcome. First, the pleadings do not attack the validity of the contract of sale. There is an allegation in the pleading that the second defendant was not authorized to sell the Palekula land but that is the pleading in support of the claim under s. 100 of the Land Leases Act. The pleadings do not attack the validity of the contract of sale itself which could be valid even if the allegation in the statement of claim are established because the administrator had ostensible authority to enter into the contract. Secondly, though the intent of the relief claimed is to have the lease returned to the claimant, neither the pleadings nor the affidavits make any offer to refund the purchase price. The evidence points to the fact that the Palekula land has increased its value considerably since the sale, and the claimant has had the use of VT11,000,000 for approximately 3 years. Rectification as claimed would not be ordered without a complimentary order to refund the purchase price together with interest to the first defendant.

The need to address the refund of the purchase price as a condition of the orders sought was brought to the attention of the claimant by an order of the Court made

at a conference on 1st August 2008. This was done so that the claimants were forewarned of this obstacle to their success.

Three options to achieve a repayment were put forward in the affidavit of the present administrator of the claimant, James Kalatei, in an affidavit sworn on 18th August 2008. However these options are unrealistic, as was pointed out to counsel who appeared for the claimant at a conference on 10 September 2008. Counsel was again advised of the need for the claimant to address this requirement.

It is convenient at this point to note two procedural matters dealt with at the trial. The defence of the second defendant pleaded a counterclaim for damages for hurt reputation. The counterclaim was based wholly and solely on allegations pleaded by the claimant in its statement of claim, and amended statement of claim. Allegations contained in the pleadings are privileged and cannot give rise to a cause of action in defamation. The counterclaim was misconceived, and it was struck out summarily on the second day of the trial.

The other procedural issue was an application at the commencement of the trial by the first defendant to have the claim struck out on the ground that the pleadings and affidavits of the claimant make no attempt to address the refund of the purchase price which would be a necessary precondition to the order for rectification sought. Whilst the need to address that issue had been brought to the attention of the claimant well before trial, I declined to struck out the proceedings at that stage. The application was not made until the commencement of the trial by which time many people had attended Court. Present were the directors of the first defendant, the second defendant, counsel for all the parties, and dozens of people who were members of the claimant cooperative society. I considered that in the interest of justice the claim should not be struck out in a summary way at that stage but that the claimant should be allowed to present its case and given the opportunity to address the two fundamental issues already identified. Accordingly the strike out application was refused, and the trial proceeded through 17 and 18 September until the claimant closed its case.

I turn now to the merits of the claimant's case.

At the closure of the claimant's case, counsel for the claimant asked for the trial to continue so that he could cross-examine deponents who had filed affidavits for the defendants. He sought to do so even though no notice had been given under rule 11. 7 (4).

At the start of the trial the question of notice under rule 11.7 (4) arose as the first defendant had given such notice late. The Court allowed the cross-examination of witnesses whose affidavits were relied on by the claimant notwithstanding the late notice. However, in answer to questions from the Court when the rule 11.7 (4) issue arose, the other parties acknowledged no other notices had been given, and left the Court with the understanding that no other party would want to cross-examine deponents.

The defendants opposed cross-examination of their deponents and argued that the evidence was complete as their affidavits were already part of the evidence under rule 7.4 (1).

I indicated my view to counsel for the claimant that on the state of affairs at the close of his case, the claimant was bound to fail on the merits. I ruled that the trial should end at that point as to proceed further would impose an unreasonable burden on the other defendants who had already been through two days of trial during which the claimant had done nothing to overcome the failure of its pleadings and evidence to address the two fundamental obstacles to success which were apparent at the start of the trial.

The following discussion of the merits expands the reasons for the ruling.

The power given to the Court under s. 100 (1) to order rectification of the Land Leases Register is discretionary. Courts should not make futile orders. In this case, even if the conditions of s. 100 (2) could be made out, it would be pointless to interfere with the Register whilst the contract of sale between the claimant and the first defendant remains on foot and valid. The due completion of the contract, which has happened and has not been challenged, would entitle the first defendant to specific performance, thereby leading in due course to the outcome already evident on the Register of Land Leases.

Turning to the pleadings, paragraph 6 of the statement of claim alleges that the second defendant acted contrary to the law and contrary to the constitution of the claimant in selling the lease without the consent of the majority of the Board of Directors; and paragraph 8 (i) alleges as a particular of the alleged fraud or mistake within the meaning of s. 100 (1) that the first defendant knew that the second defendant acted without the consent of the Board of Directors of the claimant.

The evidence led by the claimant's own case does not establish these allegations. The claimant's by-laws provide for a committee with executive authority to act between general meetings of members, but not for a Board of Directors. The evidence does not suggest there ever was a Board of Directors.

The appointment of the second defendant as administrator under section 58 of the Cooperative Societies Act dissolved whatever committee existed at the date of the administrator's appointment and gave the control of the claimant to the second defendant. As such, the administrator exercised the powers of the society which were otherwise to be exercised by the committee, and those powers include the power to buy and sell land and buildings. On the face of it, the second defendant had the legal authority to sell Palekula.

Section 58 (5) of the Cooperative Societies Act recognizes that the administrator will take steps to have another committee appointed before the expiry of the administrator's appointment. The apparent intention of the section is that the administrator will work towards restoring power to a committee, and when a new

committee is appointed it will take over the powers previously exercised by the administrator. The claimant's case however, does not suggest that another committee was at any time appointed. Mr. Roy Vira and Mr. James Kalatei who had filed affidavits on behalf of the claimant gave additional oral evidence and were cross-examined by the defendants. Whilst they each claim to have held executive positions on a committee of the claimant in 2005 their evidence showed that they held their positions not as members of a formal committee of the claimant constituted under its by-laws but as members of an informal grouping of fishermen who had been opposed generally to administration of the claimant by the second defendant.

What is very clear on their evidence is that there were at least two groups of fishermen with different objectives within the membership of the claimant. One group supported the actions of the second defendant and the sale of Palekula. The other group, a dissident group, was very much opposed to the second defendant and his administration generally. The dissident group supported by an official of the Vanuatu National Workers Union, is presently promoting this case rather to gain a possible further distribution of money for members of the dissident group than for the restoration of Palekula as a fishing base. The evidence does not disclose how much and how wide spread was the support the present dissident group had amongst the claimants' members in 2005 against either the administration of the second defendant, or the disposal of Palekula.

What does appear from the evidence, particularly that of Mr. Kalatei, is that in the five years preceding the sale of Palekula, the fishermen had not been able to successfully develop a fishing base there, fishermen members of the claimant had completely damaged whatever facilities were at one time on Palekula, the claimant could not achieve an investor to further develop the base, and that the claimant was not able to meet claims for monies outstanding to fishermen members. The evidence also shows that prior to the sale of Palekula to the first defendant, other steps had been taken to dispose off Palekula, including with the support of the dissident group reconveying the Palekula property to the Government in exchange for funds for distribution to the fishermen.

Notwithstanding the Court during the early part of the trial pointing out the importance of the claimant adducing evidence about its financial position leading up to the sale of Palekula, no financial information whatsoever was put into evidence. But the evidence, such as it is, suggests that the financial position was precarious. In short, there is no evidence to base a challenge to the judgment of the second defendant that it was in the interest of the good management of the affairs of the claimant to sell Palekula on the terms on which it was sold to the first defendant.

Furthermore, there is in evidence a petition signed by a substantial body of the members of the claimant indicating strong support in favour of selling Palekula in late 2002. Perhaps, as the claimant's witnesses suggest, the degree of support suggested by that petition was not representative of the total membership. However the document was available to the first defendant and the first

defendant was entitled to be comforted by it in its belief that the sale was an entirely regular one.

The claimant's evidence supports rather than challenges the regularity of the second defendant's actions in selling the Palekula land. It does not establish that the sale was contrary to law or the by-laws. At the close of the claimant's case there was no realistic prospect that this assessment of the situation would be changed through cross-examination of the defendants' witnesses.

In short, the claimant's case failed to establish the allegations in paragraph 6 and 8 (i) of the statement of claim.

There was no basis in the evidence to challenge the validity of the contract of sale, and no such challenge is made in the pleadings. Moreover, for the purposes of the claim under section 100 of the Land Leases Act, the issue is not whether the sale was made by the administrator contrary to the internal chain of authority within the management structure of the claimant. Rather, the question is whether the first defendant had knowledge that there was a lack of authority on the part of the administrator to enter into the contract. The principal person who conducted the transaction for the first defendant was John Timakata. He was sub-poenaed to give evidence as part of the claimant's case. His evidence supports the case of the first defendant, and in particular that he and the first defendant believed that the second defendant was authorized to make the sale. The limitation in s. 100 (2) of the Land Leases Act would therefore prevent rectification based on the ground pleaded in paragraph 8 (i) of the statement of claim.

The issues raised by paragraphs 8 (ii), (iii) and (iv) of the statement of claim revolve around who was the custom owner who should sign the Consent to the transfer of lease, and the administrative procedures that should be followed within the Lands Department when registering a transfer of lease.

The evidence, as well as earlier decisions of the Supreme Court, show that there have been disputes over the custom ownership of the Palekula land for a long time. Whether Mr. Wells has finally established that he is the custom owner remains to be seen. However as at October 2005 the decision of a Land Tribunal was, according to the evidence, in favour of Mr. Wells. The issue in these proceedings, however, is not the true identity of the custom owner, but whether the first defendant through its relevant officers knew that Mr. Wells may not have been the correct custom owner to sign the Consent. The first defendant and its directors relevantly gained their knowledge about the custom owner through John Timakata. As a lawyer he acted for the first defendant. In his evidence he explained that he actually attended Santo to confirm who was the correct custom owner, and on the information given to him by Mr. Wells and from documents he received about the Land Tribunal decision, he believed Mr. Wells was the correct person to sign the Consent. Moreover John Timakata conferred on two occasions with senior officers of the Lands Department, and discussed with them advice from the State Law Office and from the Attorney General, all of which led him to believe that the Consent was correctly given by Mr. Wells.

John Timakata believed, and conveyed this belief to the first defendant and his fellow directors, that as the papers relating to the transactions had been left with the Department of Lands for checking, and were approved by senior officers of the Department who had access to all the information about the Palekula lease, that due administrative processes required under that Land Leases Act had been followed. Whilst paragraph 8 (iv) in the statement of claim pleads that a court order must be obtained before the Register can be rectified by changing the lessor's name, that is not correct. Section 99 of the Land Leases Act provides a process for administrative rectification. Whilst John Timakata may not have turned his mind to the fine details of the requirements of that procedure, I consider his belief that all was in order with the registration was reasonable. I accept that he held this belief.

In summary at the close of the claimant's case I considered that the allegations of knowledge of fraud or mistake on the part of the first defendant alleged in the statement of claim had not been established, and that by allowing the trial to proceed there would be no realistic prospect that the state of the evidence would change in favour of the claimant's case.

More fundamentally, at the end of the claimant's case no offer to return the purchase price had been made, and the claimant's case did not seek to attack the validity of the contract of sale. Further, the evidence led by the claimant indicated that there was no prospect that it could return the purchase price. On the contrary the evidence suggested that the claimant is impecunious, and that its membership is hopelessly divided over whether the claimant should be seeking to have the land returned through the court process.

For all these reasons I consider that the claimant has failed to make out a case for rectification, and the proceedings must be dismissed.

Each of the defendants has claimed costs, and the first defendant has claimed indemnity costs for the trial on the basis that the weaknesses in the claimant's case were made known by the first defendant to the claimant's counsel, and an offer made one week before trial to allow the withdrawal of the claim.

The defendants have succeeded, and in the ordinary course are entitled to party and party costs of the proceedings.

I do not support the making of indemnity costs orders in contentious civil litigation, save in the most extreme cases. The risk is that by making an indemnity costs order the Court loses control over the extent of the costs which flow from the order. In my opinion, the better course in an appropriate case is for an order for solicitor and own client costs to be made. The court then retains the capacity to rule on the reasonable of the costs which are allowed.

In the present case, I think it is unlikely that there would be a significant difference between party and party costs and solicitor and client costs of the trial. Steps taken by lawyers in the last few days before trial, and during the trial process itself, are normally the necessary steps to ensure the litigation is properly

run. In the present case, even party and party costs in favour of the defendants would cover the expenses of witnesses.

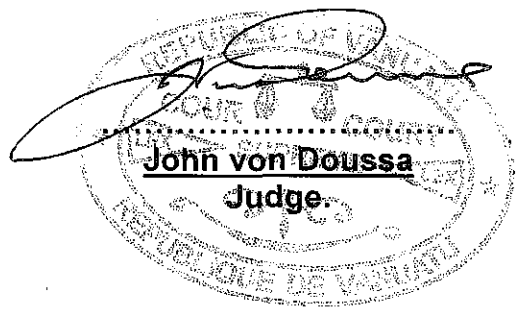
It is a contentious issue whether the costs of an overseas witness, who is a director of a company established in Vanuatu, is entitled to the costs of traveling to Vanuatu to give evidence about the Vanuatu affairs of the company. There is a strong argument to the contrary, and it is one which in this case, should it arise, should be left to the taxing officer.

As the defendants' pleadings did not assert as a positive defence the fundamental issues discussed in this judgment, I think the appropriate order is simply that the claimant pay the party and party costs of the defendants to be taxed.

The formal order of the Court is that Civil Case No. 184 of 2006 is dismissed with party and party costs in favour of the defendants.

DATED at Port Vila, this 19th day of September, 2008.

BY THE COURT



John von Doussa
Judge