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

Civil Case No.102 of 2010

BETWEEN: FAMILY FARM DEVELOPMENTS LIMITED
Claimant

AND: RENE LAURENT
First Defendant

AND: THE GOVERNMENT OF THE REPULIC OF VANUATU
Second Defendant

AND: PASTOR PIERRE NIKARA as representative of NIKARA FAMILY
Third Defendant

Coram: ***Justice D. V. Fatiaki***

Counsels: *Mr. N. Morrison for the claimant*
Mr. R. Sugden for the First Defendant
Mr. J. Ngwele for the Second Defendant
Third Defendant – in person

Date of Judgment: *3 September 2012*

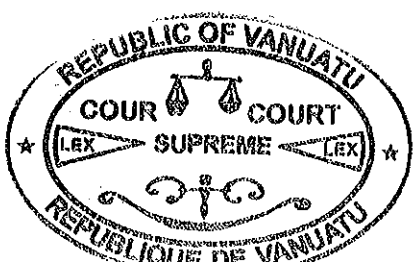
JUDGMENT

Introduction

1. This case concerns competing claims to a lease title No. **12/0631/001** which was registered in the first defendant's favour on **1st December 2009**.

Chronology

2. In order to better understand the case it is necessary to set out a brief chronology of material events gleaned from those provided by the claimant and the first defendant who are the principal protagonists in the case:



- 12 September 1983 - Agricultural Lease No. 12/0631/001 entered into between Mele Trustees Limited and Lucien Houdie over lands situated at Mele for 30 years;

- 14 November 1983 - Transfer of Lease No. 12/0631/001 from Lucien Houdie to Société Civile Familiale Nicholls;

- 3 April 1984 - The above lease and transfer were registered in the Land Records office;

- 23 August 1988 - Certificate of Incorporation (RE-REGISTRATION) of Société Civile Familiale Nicholls re-registered under the name of NICHOLLS LIMITED with the Registrar of Companies;

- 12 November 2002 - Change of name of Société Civile Familiale Nicholls to Nicholls Limited registered in the Land Records Office;

- 10 December 2002 - Mortgage entered into between Nicholls Limited and National Bank of Vanuatu (NBV) for a loan of VT8,744,000 secured over Lease No. 12/0631/001;

- 14 August 2003 - Variation of above Mortgage by increasing the principal sum secured to VT10,411,600;

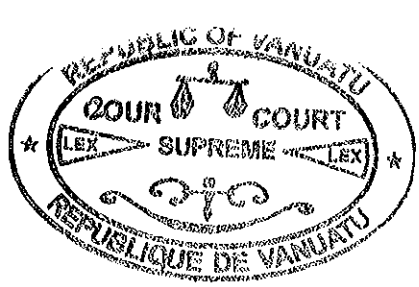
- 2 July 2009 - Above variation of Mortgage over lease No. 12/0631/001 registered in the Land Records Office;

- 3 November 2009 - Pastor Pierre Nikara on behalf of Family Nikara grants consent to transfer of Lease No. 12/0631/001 from Société Familiale Nicholls to René Laurent for VT20,000,000;

- 12 November 2009 - Sale & Purchase Agreement entered into between Nicholls Limited and the claimant for the purchase of Lease Title No. 12/0631/001 situated at Melektree, Efate for the sum of VT27,000,000;

- 22 November 2009 - Sale & Purchase Agreement entered into between Claude Nicholls representing La Société Familiale Nicholls and René Laurent for the purchase of "*land being the subject of a rural lease registered and known as Melektree, situated at MELE*" for the sum of VT30,000,000;

- 25 November 2009 - Transfer of lease from Société Familiale Nicholls to René Laurent for the sum of VT20,000,000 executed by Claude Nicholls on behalf of the transferor without a company seal; ('*the Laurent Transfer*')



- 1 December 2009 - The Laurent Transfer is registered in the Land Records Office after it was signed by the then Director of Lands Michael Mangawai;

- 31 December 2009 - Caution lodged by Family Farms Development Limited on title No. 12/0631/001;

- 11 January 2010 - Director of Lands (Jean Marc Pierre) writes to first defendant's solicitors advising inter alia:

"According to our records, we have the following to provide to you regarding lease title No. 12/0631/001:

1. *The ownership of the above lease title has changed from Société Familiale Nicholls to Nicholls Limited which is a company.*

2. *The current transfer of lease you are saying belongs to your client has not been registered. It was not proper to register same simply because it was made between Mr Claude Nicholls an individual and your client, Mr René Laurent instead of the Company, Nicholls Limited which is the proprietor of the said lease.*

3. *We have not seen any consent to transfer from the custom owners. Registering your client's transfer of lease without the consent would be contrary to the Land Lease Act [CAP. 163].*

4. *The variation of the lease conditions made between your client and Mr. Pierre Nikara was a flaw simply because your client had not obtained that legal interest provided by section 14 of the Land Reform Act [CAP. 123] and sections 14 and 15 of the Land Leases Act [CAP. 163] which would otherwise allow your client to engage in such an act.*

5. *There has never been any variation of lease documents lodged at the Lands Registry Section for registration.*

6. *While on the issue of consent by custom owners, it is proper that we advise on same. At this point in time, the issue is still outstanding as to who should issue the consent, Mr. Nikara or Mele Trustees Limited. We could not understand that in the absence of a consent, your client has gone ahead to produce a transfer and variation of lease without the custom owner's consent.*

7. *The caution lodged by Mrs Cornelia Wyllie we believe should not be removed at least at this point in time as the person requesting for its removal does not have any legal interest over lease title 12/0631/001.*

8. *We are of the view that Mrs Wyllie has an interest over the lease title 12/0631/001 through an agreement to purchase same while your*

client is trying to claim an interest which he has not obtained in order for him to deal with the lease.

We regret to inform that we will not process your client's documents and will not remove Mrs Wyllie's caution based on the above findings."

- 8 February 2010 - The Board of Nicholls Limited met and resolved as follows:

  "1. The Agreement for Sale and Purchase of a rural property Lease No. 12/0631/001 between M. Claude Nicholls representing the Société Familiale Nicholls and Mr René Laurent is now ratified. It was noted that at the time, the change of name of Société Civile Familiale Nicholls had not been yet registered at the Land Registry under its new name: NICHOLLS LIMITED. A copy of the Agreement is attached as Annexure "A".

  2. The Common Seal of the Company Nicholls Limited be affixed to the Agreement by its Directors of the Company.

  3. The Transfer of Lease dated 25.11.09 and registered on 01.12.09 between Société Familiale Nicholls and René Laurent is also ratified by the Company and its Directors.

  4. The Common Seal of the Company be affixed to a letter to the Director of the Lands Department clarify the situation with the above agreement and transfer. A copy of the letter is attached to the Minutes. Annexure "B"."

- 8 March 2010 - Claimant's caution withdrawn from Lease Title No. 12/0631/001 by Director of Lands;

- 12 July 2010 - Variation of lease 12/0631/001 extending its turn to 75 years registered in the Land Registry Office;

- 1 October 2010 - Nicholls Limited struck off the Register of Companies. In this regard the Court of Appeal said in **Hack v. Fordham** [2009] VUCA 6 (at para 9):

  "*The provisions of Section 335 of the Companies Act are clear. When a company is struck off the Register it is by force of law dissolved. That is it ceases to exist for all purposes.*"

3. From January to September 2010 there was a flurry of correspondence exchanged between the solicitors acting for the claimant and for the first defendant with the solicitors acting for Nicholls Limited, the Director of Lands and the National Bank of Vanuatu (NBV) and its solicitors. The essence of the correspondence besides verifying facts, was to either undermine or support the respective claims of the claimant and the first defendant to the **Lease Title No. 12/0631/001**.

4. Of particular significance is the correspondence relating to:

   (i) the specific written instructions from Claude Nicholls to Geoffrey Gee dated 25 March 2010 "*... to take all necessary steps to complete the contract the company (Nicholls Limited) has entered into with Family Farms Development Limited (the claimant) ...*" (orally confirmed at 2 p.m. on 4 May 2010);

   (ii) the unsuccessful attempts by the first defendant's solicitor's to discharge the NBV mortgage over Lease title No. 12/0631/001 including the return of an ANZ Bank cheque in favour of Nicholls Limited in the sum of VT30,184,520; and

   (iii) with the Director of Lands relating to the registration of the Variation of Lease Title No. 12/0631/001 increasing its term to seventy five (75) years with effect from 30 July 1980 in favour of the first defendant and the removal of the claimant's caution registered on the Lease Title on 31 December 2009.

Pleadings

5. By its amended claim of **27 September 2010** the claimant sought rectification of the relevant register by cancelling the Laurent transfer (to be effected by the second defendant) on the dual basis of fraud and/or mistake in obtaining the registration of the Laurent transfer.

6. In brief, the claimant invokes the provisions of **Section 100** of the **Land Leases Act** which provides:

   "***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

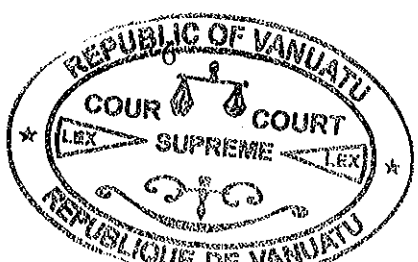
such proprietor had knowledge of the omission, fraud or mistake or substantially contributed to it by his act, neglect or default."

7. Besides questioning the validity of the signing and enforceability of the Laurent transfer and the absence of a proper consent to the transfer from a registered mortgagee, the claim pleads "*fraud*" against the first defendant in the following terms:

> "7. *The first defendant fraudulently procured a transfer of lease L. R. Form 11 dated 25 November 2009 (the "Laurent Transfer") and executed by Claude Nicholls as the purported representative of Société Familiale Nicholls as Transferor and the first defendant as Transferee purportedly transferring the lease.*
>
> *PARTICULARS*
>
> *(a) The first defendant knew that Société Familiale Nicholls, the named transferor on the Laurent transfer was not a legal entity.*
>
> *(b) The first defendant knew that any purported transfer from Société Familiale Nicholls was of no legal effect.*
>
> *(c) The first defendant knew that Société Familiale Nicholls, was not the registered proprietor of the lease.*
>
> *(d) Notwithstanding (a), (b), (c) and (d) (sic) the first defendant knew that there was a mortgage over the lease which prevented the registration of the transfer of lease without the consent of the mortgage.*
>
> *(e) The Mortgagee's consent to the transfer of the lease was not obtained.*
>
> *(f) Nothwithstanding (a) – (e), the first defendant proceeded to seek and obtain the registration of the Laurent transfer."*
>
> (my underlining)

8. All the above underlined particulars, which was the duty of the claimant to prove, refers to the first defendant's knowledge of given facts at the time that the Laurent transfer was prepared and executed by Claude Nicholls and, more especially, his understanding of the legal effect and consequences of those given facts.

> *"8. The Laurent Transfer was not executed by Claude Nicholls with the knowledge of nor with the approval of the Board of Nicholls Limited, the registered proprietor of leasehold title 12/0631/001 and is a forgery and therefore does not bind or was it enforceable (sic) against Nicholls Limited and should be expunged from the Register of leasehold titles.*
>
> *PARTICULARS*



(a) *The Laurent Transfer was not properly executed under seal of Nicholls Limited.*

(b) *"Société Familiale Nicholls", named as transferor, is not an existing entity nor is it the registered proprietor.*

(c) *The Board of Nicholls Limited did not approve or authorize execution of the said transfer."*

9. Notable by its absence in the above paragraph and particulars, is any averment that the Laurent transfer was obtained from or executed by Claude Nicholls under duress or was the product of coercion. Instead, the particular averment, is that the Laurent transfer "*... is a forgery*".

10. "*Forgery*" is defined in **Section 139** of the **Penal Code** as:

"making a false document, knowing it to be false, with intent that it shall in any way be used or acted upon as genuine ... or that some person shall be induced by the belief that it is genuine to do or refrain from doing anything ..."

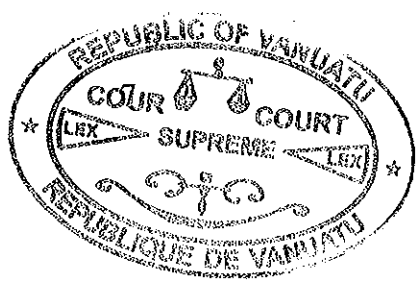
and **subsection (3)** defines a "*false document*" as including a document (so far as relevant for present purposes) –

"(d) of which the whole or some material part purports to be made by a fictitious or deceased person, or purports to be made on behalf of any such person; or which is made in the name of an existing person, either by him or by his authority, with the intention that it should pass as being made by some person, real or fictitious, other than the person who makes or authorizes it".

11. It cannot be doubted that the name and signature of the transferor on the Laurent transfer is a "*material part*" in the absence of which, the transfer would be incomplete and not registerable.

12. With all due regard to the claimant's pleadings and counsel's submissions which makes no reference to the above definitions, I am firmly of the view, that whatever the status of the "*Laurent transfer*" might otherwise be, it was **not** a "*forgery*" either in its making or intent. Whether Claude Nicholls signed it under duress or coercion however, is entirely another matter which I shall have more to say on later in this judgment.

13. With regards "***particular (a)***" above, it is common ground that the Laurent transfer was prepared in the name of Société Civile Familiale Nicholls as the transferor and was executed by Claude Nicholls on behalf of Société Civile Familiale Nicholls without affixing a seal.



14. It is unclear *why*? a transfer in the name of Société Civile Familiale Nicholls should require the seal of Nicholls Limited for it to be "*properly executed*", but, in any event, I cannot agree.

15. In this latter regard, **Section 193** of the **Companies Act** states:

> "*The act of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification*"
>
> and more relevantly, **section 50** provides:
>
> "*A document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorised officer of the company, and need not be under its common seal*".
>
> (my underlining)

16. As for "***particular (b)***" the question is – was Société Civile Familiale Nicholls a "*fictitious*" entity at the time that the "*Laurent Transfer*" was executed by Claude Nicholls? The claimant asserts that it was "*not an existing entity*". Counsel for the first defendant counters that it continued in existence despite the change in its registered name and whatsmore, the common majority shareholder and managing director at the relevant time was Claude Nicholls who executed the "*Laurent transfer*" as its living representative.

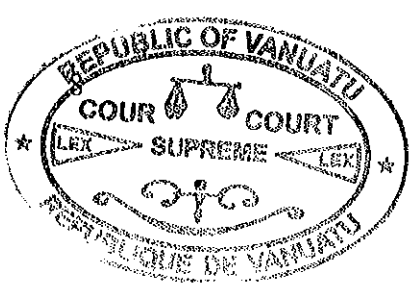
17. **Section 27 (4)** of the **Companies Act** relevantly provides:

> "*A change of name by a company ... shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name*".
>
> (my underlining)

18. In similar vein, **Section 386 (9)** of the **Companies Act** provides in respect of French Companies of which Société Civile Familiale Nicholls is an example, that:

> "*Re-registration of a company ... shall not alter the identity of the company or its corporate status, nor affect any rights or obligations of the company or render defective any legal proceedings by or against the company.*"
>
> (my underlining)

19. The final provision to which reference may be made is **Section 22 (6)** of the **Land Leases Act** which states:



"*The death of any person by or on behalf of whom any instrument of dealings has been executed shall not affect the validity thereof and any such instrument may be presented for registration as if the death had not occurred.*"

20. The cumulative effect of the above provisions is that the change of name from Société Civile Familiale Nicholls to Nicholls Limited did not "*alter*" its continued existence as a corporate entity or "*affect*" its proprietorship of **Lease Title No. 12/0631/001** or "*render* defective" the execution of the Laurent transfer by Claude Nicholls.

21. Finally "***particular (c)***". It is common ground that the Board of Directors of Nicholls Limited had not met and approved the execution of the Laurent transfer before it was registered. *Why*? Such an approval was necessary is unclear from the claimant's evidence and no reference was made to the provisions of the **Companies Act** or the Articles of Association of Nicholls Limited in claimant's counsel's submissions in this regard, as might be expected.

22. Be that as it may, **Section 46** of the **Companies Act** relevantly provides:

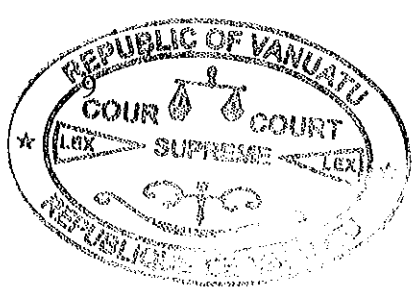
"46. Form of contracts

(1) Contracts on behalf of a company may be made as follows –
(a) ....;
(b) a contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied;
(c) ....
(2) A contract made according to this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto.
(3) A contract made according to this section may be varied or discharged in the same manner in which it is authorised by this section to be made."

23. Defence counsel also highlights in his submission that Claude Nicholls who executed the Laurent transfer "*owns 98% of the issued shares* (of Nicholls Limited) and is a managing director *('gérant')* of the Company. Furthermore **Article 15** of the Articles of Association of Nicholls Limited expressly states (in English translation):

"*In its relationship with the shareholders the Managing Director can accomplish all acts of management that are required in the interest of the Company.*

In its relationship with third parties, the Managing Director commits the Company for the acts included in its social object. The opposition of one Managing Director



by another Managing Director is without effect to third party, except if it is established that the third party knew about it."

24. In this latter instance there is no evidence that any other director of Nicholls Limited opposed or objected to the execution of the Laurent contract or the Laurent transfer. Indeed both transactions were subsequently ratified at a board meeting of Nicholls Limited held on **8 February 2010**.

25. As for "*mistake*", the claim asserts as follows:

"The second defendant through the DOLR was or was made fully aware that the registration of the Laurent Transfer was procured fraudulently by the First Defendant and/or by reason of a mistake on his part. By reason of the matters particularize (sic) in the DOLR either knew of the material defects in the registrability of the Laurent transfer or deliberately closed his eyes to the existence of such defects.

PARTICULARS

(a) By letter dated 11 January 2010 from the second defendant through the DOLR to the first defendant's counsel, the second defendant acknowledged the flaws contained in the Laurent Transfer and fully aware the Laurent Transfer was not properly executed unseal. (sic)

(b) By letter dated 17 March 2010 the claimant requested the DOLR to rectify the register pursuant to Section 99 (1) of the Land Leases Act.

(c) It was made known by letter from the registered office of Nicholls Limited to the first defendant on the 2nd June 2010 and the second defendant through the DOLR on the 3rd June 2010, that Nicholls Limited had no knowledge nor had it executed any agreements for the Sale of leasehold title 12/0631/001 to the first defendant and any transactions or documentations lodged for registration of a transfer in favor of the first defendant were invalid.

(d) It was apparent to the second defendant through the DOLR by the letters noted above (a), (b) and (c), that the registration of the Laurent Transfer was a mistake on his part and fully aware Nicholls Limited is the registered proprietor of the subject leasehold title, it was necessary for the Director to act to rectify the register when the said letters were brought to his attention. ".

26. Notably, particulars "*(a), (b) & (c)*" above, all refer to correspondence that post-dates the registration of the Laurent transfer. Furthermore the relevant Acting Director of Lands who signed the Laurent transfer prior to its registration namely, **Michael Mangawai**, was not called by the second

defendant nor was a sworn statement deposed by him in support of the second defendant's "*good faith*" defence as there should have been.

27. In his defence, the first defendant denies committing or knowing of any fraud or mistake in the registration of his transfer and asserts that he is a bona fide purchaser in occupation. The first defendant also counterclaimed for damages for injurious falsehood and trespass.

28. The second defendant for its part, claims that the first defendant's transfer was "*registered in good faith and based on the information supplied*" to it by the first defendant and it relies on the protective provisions of **sections 9** and **24** of the **Land Leases Act**.

29. The third defendant as the declared custom owner of the land confirms granting the necessary consents to the transfer of **Lease Title No. 12/0631/001** to both the first defendant and then to the claimant, but asserts, that he was co-erced and induced by the claimant's agent (Cornelia Wyllie) to sign the consent to its transfer of the lease.

The Trial

30. The history of these proceedings has been marked by numerous "*skirmishes*" between the claimant and the first defendant, including, urgent competing claims for injunctions; an application for particulars; an unsuccessful attempt by the first defendant to strike out various clauses of the claim, and, for leave to appeal the dismissal of its application to strike out the clauses in the claim.

31. In that vein, the parties have unfortunately been unable to agree a bundle of documents, a chronology of events, agreed facts, or the issues for determination as might be expected and, indeed, these tactics continued right up to and during the trial of the case.

32. For instance, during the course of counsel for claimant's opening, the Court became side-tracked by a belated application by the first defendant to exclude almost **all** of the contents and annexures of the two (2) sworn statements filed on behalf of the claimant.

33. After hearing both counsels on the application to exclude, I ruled:

> "*This application by the first defendant objecting to the claimant's sworn statement has taken in excess of 4 hours to reach this stage and amply demonstrates the limitations of a court attempting such an exercise on the basis of pleadings and in the absence of any agreement as to the facts or issues or even the chronology of the case. In such circumstances this*

Court recognizes that the objections are better left for counsel to test in cross-examination and then later to make submissions as to the effect and weight of the evidence. I do not accept that a witness' credibility and state of knowledge can or should be similarly confined by the pleadings and must necessarily be a matter for an inference to be drawn by the Court after hearing all of the evidence for the parties.

Accordingly I do not propose to rule on the application at this juncture on the narrow confined basis upon which the submissions have been addressed to the Court."

34. In my view the purpose of **Part 11** of the **Civil Procedure Rules** entitled EVIDENCE is not in doubt and is clearly intended to speed up the trial process and save costs. But unfortunately the mandatory provisions of **Rule 11.4 (2)** has given rise to an unintended and undesirable practice of parties taking objections at the trial, to the contents of sworn statements filed in a proceeding.

35. In the present case objections were contained in a document filed on **12 September 2011** the day before the trial was due to commence. The objections effectively challenged most paragraphs of the two (2) sworn statements filed on behalf of the claimant on the basis of irrelevance, hearsay and inadmissible opinions.

36. Traditionally, such objections are taken during the course of a witness' oral testimony and are ruled upon immediately with little impact on the length of a trial. However, with the introduction of "*evidence-in-chief*" by sworn statement, not only are parties able to file pre-trial sworn statements responding to the "*evidence in chief*" additionally, written objections are filed taking a pre-emptive strike at the contents of such sworn statements and the deponents are then subjected to oral cross-examination at the trial proper.

37. It is difficult to accept that by the introduction of **Part 11** of the **Civil Procedure Rules** it was intended that the parties to a civil proceeding would have, figuratively-speaking, not one, but "*three bites of the cherry*".

The Evidence

38. After the Court's ruling the claimant called and produced sworn statements from:

(a) Cornelia Wyllie a principal of the claimant company who produced a sworn statement dated 20 July 2010 with numerous attachments [**Exhibit P(1)**]; and

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX REPUBLIQUE DE VANUATU

(b) Geoffrey Robert Gee barrister and solicitor who acted for the Nicholls Family for over 25 years and who was a Director of Nicholls Limited until he resigned on 1 October 2002. His sworn statement is dated 28 February 2011 [**Exhibit P(2)**].

39. **Cornelia Wyllie** was sworn in and available to be cross-examined but **no** questions were asked of her. Likewise for **Geoffrey Gee** who was not immediately available for cross-examination, all defendants indicated that they did **not** wish to question him and his sworn statement was formally marked without objection as **Exhibit P(2)**. The claimant then closed its case with its evidence completely untested by cross-examination.

40. Of particular significance are the untested assertions and denials in **Geoffrey Gee**'s sworn statement concerning **Claude Nicholls**:

- "*... has been coerced into these proceedings ...*";
- "*... has been in fragile health for years ...*";
- "*... is normally good to deal with as long as he is not being placed under pressure ...*";
- "*... was the most regular client attendee at my practice and invariably it was concerning the issue of Lease Title 12/0631/001 ...*";
- "*... has made in manifestly clear to me on several occasions that he did not want to live in a subdivision but wanted to remain in a rural setting as it would remain with the Family Farms Agreement. He was adamant about it ...*";
- "*I understand from him he was under pressure ...*";
- "*... contacted me at the end of March and advised he still wanted me to definitely continue with the Family Farms contract and came in and signed the paper work accordingly to confirm this ...*";
- "*I have had regular communications with him and Claude concerning direct contract from the first defendant and his solicitors attempting on various occasions to deliver to him a cheque for 30 million vatu plus to complete the purchase by the first defendant.*"
- "*... that I had coerced Claude to deal with Family Farms in priority to the first defendant. These statements are totally incorrect ...*";

- *"... to state that any sort of persuasion or otherwise on my part was used in concert with Family Farms is a total travesty and not something I believe Claude would say unless it was written for him ...".*

41. The defendants were then called upon, in turn, to indicate what each proposed to do in their defence. Counsel for the first defendant indicated that he had no witnesses present in court and had only received 10 days notice from the claimant of the nine (9) defence witnesses that it wished to cross-examine including the first defendant and Claude Nicholls. The second defendant proposed to call the Director of Lands (Jean Marc Pierre) and the third defendant, who appeared in person, indicated his willingness to be cross-examined on the two (2) sworn statements he had filed in his defence.

42. The next day the second defendant with the agreement of all parties began its defence. **Jean Marc Pierre** the Director of Lands was called and after minor corrections, he produced his sworn statement dated 9 May 2011 [**Exhibit D(1)**].

43. The Director was cross-examined by counsel for the first defendant and for the claimant. He testified about the internal processes within the Lands Registry office. In particular, he described the process on initial receipt of a document for registration and the entries made in a "*presentation book*" and how the presentation date was maintained throughout the vetting process and is the date taken whenever the document is later registered **ie.** registration is "*back-dated*" to the date of presentation. [*see also:* Section 27 of the Land Leases Act].

44. Although the presentation book was an "*internal book not accessible to the public*", documents pending registration are kept in a "*green folder*" which could be accessed by "*a prudent clerk*" searching a particular title.

45. He described how the department introduced an electronic scanning system in 2009 and that there was a significant "*back log*" of pending documents for registration.

46. He confirmed that the entries in the "*presentation book*" created an order of priority for registration according to when each document was lodged and entered, and a registration that occurred "*out-of-sequence*" was "*an error in process not supposed to happen*".

47. He also confirmed how the department had dealt with a prior instance of a company change of name registration that occurred after a transfer had

been registered in spite of the fact that the lease had the wrong name on it and no company seal accompanied the company representative's signature.

48. Finally, over defence counsel's objections, the Director confirmed the contents of his letter to the first defendant's solicitors dated **11 January 2010** declining to further process the first defendant's documents for the transfer of **Lease 12/0631/001** or to remove the claimant's caution registered on the title. He also confirmed his view, at the time of writing the letter, that the first defendant's transfer documents were "*irregular*".

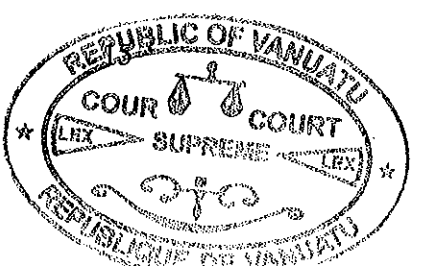
49. It is convenient to deal now with the third defendant **Pastor Nikara**. He tendered two (2) sworn statements and was only cross-examined by counsel for the claimant. He had signed two (2) consent forms firstly, for the registration of the Laurent transfer on 3 November 2009 and then, later, the consent form for the claimant's transfer of the same lease dated **7 April 2010**. In this latter regard, by letter of the same date, he had unsuccessfully sought to revoke his consent to the claimant's transfer.

50. **Pastor Nikara** deposed that he signed a blank consent form for the claimant. He confirmed that he had had business dealings with Cornelia Wyllie in 2008 and together they had incorporated a company called **Nikara Family Farms Development Limited** (later changed to Family Farms Development Limited) and he had entered into a mortgage with the company for "*a loan*" of VT8 million which he never received.

51. He had consented to the first defendant's transfer in 2009 "*because at the time nothing was happening on the lease*" and he "*liked his subdivision project dividing the land in agricultural blocks of 1 hectare for ni-vanuatus to acquire and cultivate with the help of specialists through some aid program*".

52. In cross-examination, he was adamant that he had not received any money for consenting to the transfers. His second sworn statement however, annexes a handwritten letter of his dated **27 February 2008** agreeing *inter alia*, to refund an amount of VT500,000 to Cornelia Wyllie if their agreement to grant a lease to the claimant did not proceed ("*SAPOS ME FELL LONG AGRIMEN IA*").

53. Although **Pastor Nikara** was very clear about preferring the first defendant's proposal for the land and about giving his consent to the Laurent transfer, his evidence about the circumstances surrounding his subsequent consent to the claimant's transfer and the receipt of any money is vague and unhelpful. He struck me as being somewhat naïve and easily swayed by the promise of money and I disbelieve him in his denials of receiving money for executing the consents.



54. I turn finally to consider the first defendant's evidence. He produced the following sworn statements in his defence:

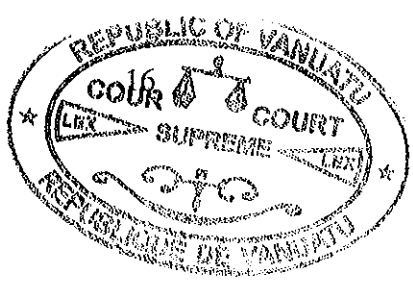
(a) **George Kirby** a Land Officer who witnessed Cornelia Wyllie's signature on a Sale & Purchase Agreement dated **13 November 2009** between Nicholls Limited and the claimant company for the purchase of **Leasehold Title No. 12/0631/001** for the sum of **VT27,000,000**;

(b) **Loic Bernier** the Managing Director of **Caillard Kaddour** a real estate company in Port Vila. At the request of the first defendant, he prepared the Sale & Purchase Agreement dated **4 November 2009** between Société Civile Familiale Nicholls and René Laurent (the first defendant) for the purchase of **Lease Title No. 12/0631/001** for the sum of **VT30,000,000**. He expected the transfer and consent documents to reflect this sum of money unless there were other assets involved;

(c) **Melisa Nicholls** is the wife of Claude Nicholls who confirmed that her husband suffers from "*bipolar disorder*". She usually accompanies her husband when he signs documents but not when he signed a document with Mrs. Wyllie. She confirmed that Geoffrey Gee was the legal advisor of the Nicholls family. She recalled personally delivering various documents on 8 February 2010 from Hudson & Co. to Geoffrey Gee after she and her husband had signed them and sealed them with the Nicholls Limited company seal which her husband had brought with him.

(d) **James Tari** a legal practitioner who had acted for **Pastor Nikara** in respect of the consent to the transfer of the relevant lease to the first defendant. His firm had conducted a search of the lease title at the Lands Registry Office and ascertained that the Société Civile Familiale Nicholls was still the registered lessee.

Under cross-examination, he testified that both the transfer of the lease and the consent to the transfer in favour of the first defendant was prepared outside his firm as they did not, then, have a machine that could print the transfer and consent documents and his firm had merely facilitated the transaction by witnessing the signatures. The Land Registry Office and Company Registry searches were conducted to make sure that Société Civile Familiale Nicholls still existed and was able to transfer the lease. He deposed that Pastor Nikara was paid for signing the consent to the Laurent transfer.



(e) **Yan Nicholls** is Claude Nicholls' brother. He knew nothing about the claimant's agreement to purchase **lease No. 12/0631/001** until mid-2010 but, he was happy with the arrangements made by the first defendant to purchase the lease in 2009. He was aware of Geoffrey Gee looking after the company's affairs and family business "*for many years*" and although he is a shareholder and director of Nicholls Limited, the last company meeting he attended was in 1999 after his brother (Claude Nicholls) got sick "*diagnosed with bipolar disorder*". He has not spoken to his brother since 2005.

(f) The following additional sworn statements were relied upon by the first defendant and were admitted without cross-examination:

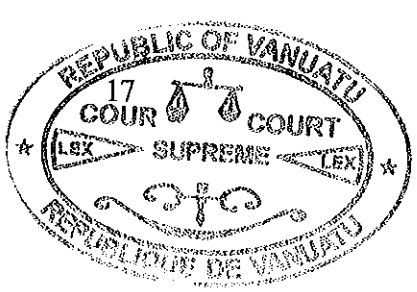
- **Sophie Tali** (with English translation);
- **Marina Nicholls** (a director of Nicholls Limited and sister of Claude Nicholls);
- **Sylvie Cevouard** (with English translations of three of Nicholls Limited articles of association);
- **Ian Shaw**.

Failure to Tender Defence Witnesses for Cross-examination

55. After the above witnesses were completed counsel for the first defendant indicated that he wished to rely on the sworn statements of three (3) more witnesses namely, **René Laurent** (the first defendant), **Claude Nicholls** and **Jenny Tari**. Counsel then indicated that he was unable to secure their attendance at that time, as the first defendant was still in Noumea undergoing medical treatment for kidney stones; **Claude Nicholls** "*is not being called because he is bipolar and doesn't handle stress or pressure*"; and **Jenny Tari** was in Santo and had not been summoned.

56. Counsel for the claimant then indicated that he wished to cross-examine all three (3) witnesses including the first defendant and that he had written to defence counsel on 2 September 2010 to that effect. However, no request or application was made under to the Court under either **Rule 11.3 (2)** or **Rule 11.15** to enforce the attendance of the witnesses at the trial.

57. Despite claimant counsel's indication and the court's offer to accommodate his "*difficulties*", counsel for the first defendant closed the first defendant's case without seeking an adjournment or tendering the witnesses for cross-examination as might be expected if their evidence was being relied upon.



58. In this particular regard, defence counsel writes in his final closing submission for the first defendant under the heading

> *"Witnesses Not Called:*
>
> *The claimant wanted to cross examine three of the first defendant's witnesses but failed to give the required 14 days notice.*
>
> *R. L. was offered the opportunity by the court to obtain an adjournment and call the witnesses but declined to do so.*
>
> *The motive of R. L. for doing so could have been because he had something under handed upon which he did not want to be cross-examined or it could have been because he genuinely took a tactical decision not to do so based on an assessment that the claimant had closed its case with insufficient evidence to prove what it had to prove and therefore it would be foolish to give it the opportunity to gain more evidence that might assist it or otherwise cloud what was already clear.*
>
> *The foregoing analysis of the evidence in relation to the unpleaded issue makes it clear the R. L has nothing to reproach himself with in his dealings that resulted in the registration of his transfer. His decision in relation to the three witnesses was not sinister but a purely legitimate tactical move."*
>
> (my underlining)

59. The Court then heard lengthy oral arguments from claimant's counsel and counsel for the first defendant on the meaning and effect of **Rules 11.7** and **11.3** of the **Civil Procedure Rules** and the failure of defence counsel to present the witnesses for cross-examination and the consequences on the uncalled witnesses' evidence.

60. In particular, claimant's counsel submitted that the Court had an unfettered overriding discretion to exclude a sworn statement and could rule it out as "*procedurally inadmissible in terms of **Rule 11.7 (1)**. This power was not dependant on relevance and was capable of being exercised at any time and the Court would consider the facts relevant to the reason(s) given for not calling a witness*".

61. Defence counsel was equally adamant that the Court could only rule a sworn statement "*inadmissible*" in accordance with the ordinary common law rules of evidence and **Rule 11.4** which deals with the contents of a sworn statement. There was **no** power to rule "*inadmissible*" a sworn statement that had been properly sworn, filed and served or after the party relying on the sworn statement has closed its case. In counsels' view "*reliance*" and "*filing*" are one and the same thing. I cannot agree and consider the use of the term "*inadmissible*" in **Rule 11.7 (1)** as unfortunate.

62. In **Dinh v. Polar Holdings Ltd.** [2006] VUCA 24 the Court of Appeal discussed **Rule 11.7 (1)** of the **Civil Procedure Rules** in the following relevant terms:

> *"... the trial judge did not make any orders ... under Rule 11.7 (1) that the sworn statements filed on behalf of the Appellants are 'ruled inadmissible' owing to a failure to present the deponents for cross-examination as requested by Respondent's counsel's written notice.*
>
> *In this latter regard Rule 11.7 (1) expressly provides that 'a sworn statement that is filed and served becomes evidence in the proceedings'. The Rule uses the present active tense 'becomes' not, may or will become. In the absence of a ruling of inadmissibility, the sworn statements filed and served by or on behalf of the appellant become evidence in the proceeding and could not be simply ignored by the trial judge because the appellant or the deponents did not appear at the trial to be cross-examined. Needless to say absence of cross-examination goes to weight not the admissibility of the sworn statement.*
>
> *We are fortified in our reading of Rule 11.7 (1) when one considers the meaning and effect of the Rules which makes it clear that evidence* (in chief) *at a trial may be given either in the form of sworn statements filed and served on the opposite party [Rule 11.3 (1)] or '.. be given orally' [Rule 12.1 (4) (a)]."*
>
> (my underlining)

63. As to the meaning and effect of **Rule 11.3 (2)** defence counsel submitted that the Court's discretion to order oral evidence was confined by **subrule 11.3 (1)** to "*evidence in chief*" and, in any event, could not be exercised after the closure of a party's case. Again, I cannot agree. Likewise, failure to give the requisite minimum 14 days notice to cross-examine in terms of **Rule 11.7 (4)** was fatal in this instance, as there was no application for a shorter period. However, claimant's counsel's submission, which I accept, is that **Rule 11.7 (4)** is directory and not mandatory in nature.

64. Without determining these difficult and interesting questions, I am content to consider the weight (if any) that should be given to the three (3) contested sworn statements that are relied on by the first defendant.

65. In doing so I am mindful of what the Court of Appeal said in **Hack v. Fordham** [2009] VUCA 6 (at **para. 21**):

> *"In considering whether the termination was unjustified, counsel for Mr. Hack contends that the trial judge should have given weight to other matters asserted by Mr. Hack in sworn statements filed by him and a witness on his behalf, including that the respondent had been guilty of a serious misconduct, and was at the time of his dismissal conducting another business on his own account. The*

difficulty with this contention lies in the way the trial was conducted. At trial counsel for both of the claimant and the defendants tendered the sworn statements filed before trial on their clients' behalf, and, apparently by agreement, then did not cross examine the deponents. This procedure deprived the Court of the opportunity to see and hear the deponents respond to the challenges made to their evidence. Without seeing and hearing the witnesses cross-examined on disputed facts the court was in no position to decide issues of credit between the witnesses. In particular the disputed allegations of misconduct and other business activities made against the respondent were not tested. Not surprisingly, the Court has made no findings about them. Rather the trial judge confined his findings to matters which appeared to be common ground. As the disputed allegations made by Mr. Hack were not tested by cross-examination, the trial judge was correct not to make findings on those topics. For the same reason, it is not possible for this court to resolve the disputed evidence."

(my underlining)

And later at (**para. 30**) where it said:

"We have already mentioned the procedure adopted by the parties in this case of not cross examining on sworn statements where the facts deposed to are in dispute. Counsel in a trial must appreciate that when a deponent is not cross examined, a trial judge will not be in a position to reject the deponent's evidence in favour of a different version of the facts where the dispute turns on the credit of the witnesses."

(my underlining)

66. Furthermore in **Barrett & Sinclair v. McCormack** [1999] VUCA 11 although referring to the failure by a party to give evidence or to call a material witness the Court of Appeal in words that, in my view, are equally apposite to the situation where a party consciously and tactically declines to present a witness for cross-examination, observed:

"*The unexplained failure by a party to give evidence or to call witnesses* (in this case, for cross-examination) *may, although not necessarily must, in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted the party's case. The failure may also be taken into account in deciding whether to accept any particular evidence that relates to a matter on which the absent witness could have spoken, and entitles the trier of fact the more readily to draw any inference fairly to be drawn from other evidence that could have been explained had the opposing party chosen to do so by calling the absent witness. However, this principle cannot be employed to fill gaps in the evidence (Jones v Dunkel [1959] HCA 8; (1959) 101 CLR 298 at 308, 312, 320-21). In Fabre v Arenales (1992) 27 NSWLR 437 at 449 Mahoney JA, with whom the other members of the Court of Appeal of New South Wales agreed, observed:*

> *"The significance to be attributed to the fact that a witness did not give evidence will in the end depend upon whether, in the circumstances, it is*

to be inferred that the reason why the witness was not called was because the party expected to call him feared to do so."

In our opinion the evidence in this case justifies the inference that the appellants chose not to call Mr Barrett and other employees of the appellants because to do so would have been detrimental to their case. Indeed, it is difficult to conceive of any other reason for the failure to call these witnesses."

(my underlining & insertion)

67. As for drawing inferences from the evidence the Court of Appeal recently observed in **Colmar v. Rose Vanuatu Ltd.** [2011] VUCA 20 (at para. 48):

> *"In drawing inferences from those proved facts, there are two additional principles that apply. One is that all evidence must be weighed accordingly to the proof which it was within the power of one side to have produced and the other to have contradicted:- Fairchild v Glenhaven Funeral Services Ltd [2003] 1 AC 32 (HL) at 46, para 13. The other, ... is that, in limited circumstances, it is permissible to draw an inference from the absence of a witness who could have given evidence to clarify a material fact."*
>
> (my underlining)

68. I accept at once, that calling the first defendant and Claude Nicholls to orally testify in court and subject themselves to cross-examination could have clarified or answered, for the court, the question of whether or not the Laurent transfer had been executed under coercion, and/or undue influence and therefore, presumably, whether Claude Nicholls truly knew and agreed with its contents or alternatively, had merely signed it under pressure without any real consent or awareness of either its true nature or contents.

69. In this latter regard, claimant's counsel submits that:

> *"The claimant's case was at all times prior to trial well known by the defendants. That was that the Laurent transfer was wrongly registered considering mistakes within it, coercion which existed and pre-existing mortgage and variation which were ignored."*
>
> (my underlining)

70. Defence counsel's submission however, is that Claude Nicholl's state of mind and understanding at the time of signing the Laurent transfer are **not** "*a material fact*" or issue raised in the claimant's pleadings and, therefore, did not require to be clarified by the evidence. I cannot agree.

71. In my view, it is disingenuous to suggest that the Laurent transfer was not being challenged. It might be that the claim could have been better

expressed or particularized as to the precise nature of the challenge for fraud, but there can be no doubting that the legal status of Société Civile Familiale Nicholls (the named transferor of the Laurent transfer) and the signing of the transfer by Claude Nicholls was always at the forefront of the claimant's challenge.

72. From the very early stages of this action every attempt was made by the first defendant to isolate and insulate Claude Nicholls from the principals of the claimant company on the basis of his concerns about the fragile state of Claude's health and an allegation that he was under pressure to retract his sworn statement in support of the first defendant. This desire to insulate Claude Nicholls was continued at the trial and effectively denied the Court the opportunity of seeing and hearing Claude Nicholls under the pressure of cross-examination.

73. Similarly, through a deliberate tactical choice of counsel for the first defendant, he too, was not called for cross-examination not only as to the circumstances surrounding the execution of the Laurent transfer by Claude Nicholls but also as to true state of his knowledge of important and material facts concerning the status of Société Civile Familiale Nicholls and the undischarged outstanding mortgage of **NBV** on the lease title that was being transferred to him. Most crucially, the evidence of **Geoffrey Gee** remained uncontradicted.

74. Needless to say, the intentional lodgment of a transfer for registration which the person lodging it knows, was signed under coercion and improper pressure, is a dishonest act within the accepted meaning of "*fraud*" under Section 100 of the Land Leases Act, and, if such a transfer is registered, then, in my view, such registration was obtained by fraudulent means and, subject to the exclusion of Subsection (2) of Section 100, is rectifiable.

75. In this regard in an earlier ruling discussing the first defendant's application to strike out various clauses of the claimant's claim (after setting out the provision of section 100 of the Land Leases Act) I observed:

> "*9. I accept that a superficial reading of the section does tend to indicate that the alleged fraud or mistake must be causative of the challenged registration but that is far from saying that proof or evidence of fraud and mistake is necessarily confined to events, actions and utterances that occurred **before** registration.*
>
> *10. Proof of fraud or mistake is necessarily a matter of inference from proven facts and, whereas a person's actions **before** registration may appear innocuous and innocent when viewed in isolation, consideration of events,*

*actions and utterances **after** registration may render such apparently innocuous actions and utterances, fraudulent.*"

and later, in relation to the meaning and effect of **Rule 4.1 (2)** and **Rule 4.2 (1)** of the **Civil Procedure Rules** I said:

"*15. The underlined parts of the **Rules** makes clear beyond a doubt that in the pleading of its claim, the claimant's view of what facts it relies upon or considers relevant to its claim is a matter entirely for the claimant to determine 'as (he) sees them'.*

*16. It is **not** the function of either the court or the defendant to dictate to the claimant how to plead its claim **or** to limit the facts that the claimant may consider relevant or may rely upon. If the claim, as pleaded by the claimant, discloses **no** reasonable cause of action, then clearly, the court has the necessary power to strike out the entire claim but, there is in my view, **no** power to strike out particular clauses or paragraphs of a claim unless it is clearly abusive, contemptuous, and/or vexatious. That is not suggested in the application."*

76. Despite the above-mentioned observations and the comments of the Court of Appeal in **Turquoise v. Kalsuak** [2008] VUCA 22 which will be familiar to counsel for the first defendant who was counsel for the appellant in that appeal, where the Court said in dismissing the appeal:

> "*We consider the appellant's grounds of appeal based on alleged inadequacy in the pleadings* (viz the failure to plead the failure of the Minister to consult the claimant) *and on the trial process* (viz the calling of a witness by the trial judge) *to be without merit and must fail.*"
>
> (my insertions)

counsel for the first defendant maintained his submission and tactically declined to call Claude Nicholls and the first defendant for cross-examination.

77. The failure of defence counsel to cross-examine **Geoffrey Gee** disables me from rejecting his evidence, and, the deliberate failure to tender the first defendant and Claude Nicholls for cross-examination undermines their sworn statements (evidence in chief) and leads me to the unfavourable conclusion that defence counsel feared to call them for cross-examination because to do so would have been detrimental to the first defendant's case which depended entirely on the authenticity and voluntariness of the Laurent transfer.

78. In all the circumstances, which includes two (2) Sale and Purchase Agreements and two (2) transfers for the same Lease Title signed by Claude Nicholls; as well as conflicting and contradictory instructions from Claude Nicholls to Geoffrey Gee, I am satisfied that the Laurent transfer

was executed by Claude Nicholls under the influence of improper pressure knowingly exerted by the first defendant, his agents and advisors and was therefore registered "*by fraud*".

79. Accordingly, I order and direct the Director of Lands to rectify the register kept in respect of **Lease Title No. 12/0631/001** by cancelling the registration of the Laurent transfer dated 25 November 2010 and registered on 1st December 2010. For completeness, I dismiss the first defendant's counterclaim.

80. The first and third defendants are hereby ordered to pay the claimant's costs of the proceedings in the following proportions, **90%** by the first defendant and **10%** by the third defendant. I make no costs order for or against the second defendant.

DATED at Port Vila, this 3rd day of September, 2012.

BY THE COURT

D. V. FATIAKI
Judge.