

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

Civil Case No. 247 of 2011

**BETWEEN: MIHA LEONG AND BETTY LEONG**  
*First Claimants*

**AND: BRED (VANUATU) LIMITED**  
*Second Claimant*

**AND: HUANG XIAO LING**  
*First Defendant*

**AND: THE REPUBLIC OF VANUATU**  
*Second Defendant*

**Hearing:** *6 -7 March 2013*

**Before:** *Hon. Justice Robert Spear*

**Appearances:** *John Malcolm for the Claimants*

*Saling Stephens for the First Defendant*

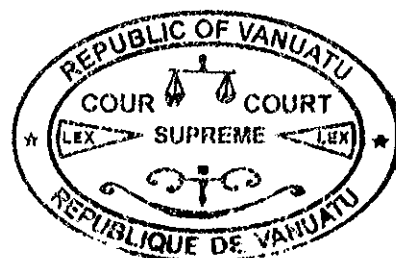
*Frederic Gilu and Christine Lahua for the Second Defendant*

**Delivered:** *22 March 2013*

---

**JUDGMENT**

---



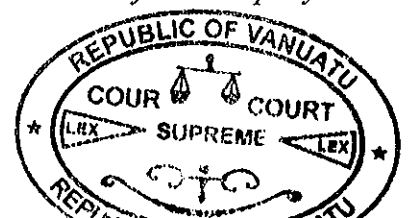
1. This is a claim by Mr and Mrs Leong for rectification of the land leases register under section 100 of the Land Leases Act [Cap.163]. There is also a counterclaim by the first defendant Mrs Ling also seeking both rectification of the land leases register and damages. Bred Bank's involvement is simply to protect its loan to Mr and Mrs Leong which is secured by a mortgage over the Mr and Mrs Leong's lease.
2. The dispute between the parties arises because Mr and Mrs Leong is the proprietor of a registered lease (the 012 lease) over a particular block of land at Luganville town. Mrs Ling is the proprietor of another registered lease (the 051 lease) over the same block of land. As will become clear in due course, this case highlights deficiencies within the systems employed by the Department of Lands.
3. On 1 October 1987, the Luganville Urban Land Corporation, as nominal lessor for the Republic of Vanuatu, entered into a lease over this particular block of land with Botleng Island Trading Ltd. Lease title 03/OI74/012 was duly issued. This was indeed 1 of 2 leases granted to Botleng Island Trading Ltd at that time although this case is only concerned with the 012 lease.
4. During 1993, Botleng Island Trading Ltd fell into financial difficulties and it was struck off the Register of Companies on 14 June 1994. However, on 12 August 2005, this Court ordered that Botleng Island Trading Ltd be restored to the register of companies pursuant to section 335(4) of the Company's Act [Cap.191]. Pursuant to section 335(4), a company that is restored in these circumstances to the register of companies is deemed to have continued in existence as if its name had not been struck off.
5. The order of the Supreme Court of 12 August 2005 for the restoration of Botleng Island Trading to the Register of Local Companies further stated that upon, *"an office copy of this order being delivered to the Registrar of Companies for registration, the company shall be deemed pursuant to section 335 (4) of the Act of continued in existence as if its name had not been truck (sic) off."*
6. I pause to mention now that it was perhaps unnecessary for that order to state more than that the company had been restored to the register of companies. Section 335(4) explicitly provides for that outcome in the event of the Court making the order that the company be restored to the Register of Companies:

**335. Registrar may strike defunct company off register**

*(1) Where the registrar of companies of his own knowledge, or upon information supplied by an officer or member of a company or any other person, has reasonable cause to believe that a company is not carrying on business or in operation, he may publish in the Gazette and send to the company by post, a notice that at the expiration of 3 months from the date of that notice the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved.*

*(2) - (3) . . .*

*(4) If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the court on an application made by the company*

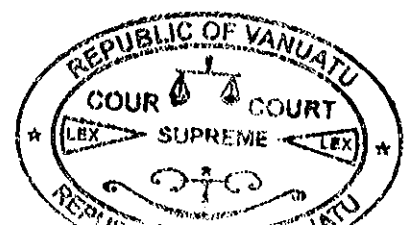


*or member or creditor before the expiration of 20 years from the publication in the Gazette of the notice aforesaid may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and upon an office copy of the order being delivered to the registrar for registration the company shall be deemed to have continued in existence as if its name had not been struck off; and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.*

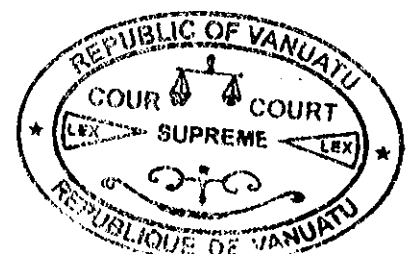
(5) – (8) . . .

7. While there then appears to have been some administrative attention given by the Department of Lands to the status of Botleng Island Trading Ltd in relation to the 012 lease as a result of the company having been struck off, the land leases register in respect of the 012 lease discloses no formal steps as having been taken in respect of the 012 lease prior to the restoration of the company on 12 August 2005.
8. On 28 August 2006, the 012 lease was noted on the lands leases register as having being cancelled. As this occurred just over a year after Botleng Island Trading Ltd had been restored to the register of companies, this cancellation could not lawfully have had anything to do with the difficulties involving the status of that company. As at 28 August 2006, Botleng Island Trading was required by law to be treated as if it had never been struck off the register of companies.
9. There was a suggestion by counsel that the cancellation of the lease must have arisen from the non-payment rent and there is some evidence that Botleng Island Trading was in default in respect of the rent for this lease around this time.
10. A lessor has the statutory right to forfeit the lease in the event of certain defaults under a lease by the lessee which defaults includes the non-payment of rent. There are, however, certain provisions in the Land Leases Act that relate to the forfeiture procedure and there is no evidence to suggest that those particular and necessary steps were carried out such that forfeiture could be considered as having been lawfully achieved<sup>1</sup>. It is unnecessary to examine that issue further.
11. Indeed, all that a consideration of the lands leases register for lease title 03/OI74/012 reveals in this respect is the entry “*cancellation of lease*” recorded on 28 August 2006. That entry then has a line ruled through it and the words “*entry cancelled – removed*” then appear immediately below but within the same entry box. At the bottom of the lease register page is a standard form statement, “*Any entries struck through in red no longer subsist.*”
12. Accordingly, it is somewhat unclear why the 012 lease was cancelled having regard to the entries on the Land Leases Register but in any event it appears that that entry of cancellation was subsequently annulled.

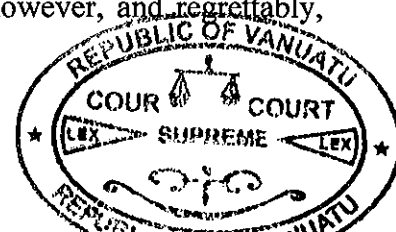
<sup>1</sup> See ss 43 – 46 of the Land Leases Act [Cap 163]



13. Furthermore, the next entry on the lands leases register for the 012 lease is "*restoration of lease*" which is noted to have been entered on 25 January 2008.
14. A matter of some critical importance, and emphasised accordingly by Mr Malcolm, is that certainly by 25 January 2008, the lands leases register for this lease shows the 012 lease to Botleng Island Trading as duly existing over this particular block of land. There was no other lease in existence over this block of land at that time.
15. Mrs Ling (the first defendant) did not give evidence. However, her husband Mr Tony Chen submitted 4 sworn statements and he was cross examined on his involvement in this matter. It appears that Mr Chen effectively looked after this part of the family business and he can conveniently be considered as her agent in this respect.
16. Mr Chen and Mrs Ling operated a shop in Luganville by way of a sub-lease. In 2007, their landlord gave them notice to quit. They then started to look for land to build a shop. The particular block of land that Botleng Island Trading was leasing 03/OI74/012 was vacant land and it was situated adjacent to the land on which Mr Chen and Mrs Ling had had their shop.
17. On 10 May 2007, Mr Chen and Mrs Ling (either of both) entered into an agreement with Botleng Island Trading for the purchase of that company's interest in the 012 lease for a consideration of Vt 7 million. However, Mr Chen stated that he subsequently cancelled the agreement because Mr Botleng failed to produce a copy of the lease title. Mr Chen also indicated that he had "become aware" at about that time that Botleng Island Trading Ltd had been struck off from the register of companies and that it had accordingly ceased to exist. Of course, at that time Botleng Island Trading had been restored to the register of companies for well over a year and it was required to be treated by law as if it had never been struck off.
18. Mr Chen then decided to make a direct approach to the Minister of Lands in the belief that Botleng Island Trading had nothing to sell; that is, that it had no lease over the land. Clearly, Mr Chen was operating at that time under a misunderstanding as to the status of Botleng Island Trading Ltd and by extension the 012 lease. Mr Chen and/or Mrs Ling submitted an application for a negotiator's certificate to enable Mrs Ling to deal directly with the Minister towards negotiating a new lease. However, they received a response from the Department of Lands' (Santo Office) in November 2007 advising that their application had been refused. The explanation given and recorded for that decision was that negotiations were being conducted at that time between Botleng Island Trading Ltd and the Government regarding outstanding land rent. Mr Chen was informed that a further application could be made in 3 months time.
19. In February 2008, Mr Chen and Mrs Ling reapplied, their application was successful, and a certificate of registered negotiator was issued to Mrs Ling by the then Minister of Lands on 28 March 2008. That certificate simply permitted Mrs Ling to enter into negotiations with the Minister of Lands towards a lease being taken over the land in question. A new lease was then prepared by the Department of Lands and that was executed by the Minister of Lands as lessor on 14 July 2008 in favour of Mrs Ling. Interestingly, the title reference on that lease (as produced) is 03/OI74/012 which of course is the same lease title reference to the lease then held by Botleng Island Trading Ltd.



20. Mr Chen explains that it took a long time for the Department of Lands to register Mrs Ling's lease. He understood that this was because the old title 03/OI74/012 had to be cancelled and a new lease title to be issued. Eventually, Mrs Ling was informed that her new lease with lease title reference 03/OI74/051 was registered on 10 September 2009.
21. While Mr Chen and Mrs Ling's dealings with the Department of Lands were continuing from late 2007 through to registration of the 051 lease on 10 September 2009, Botleng Island Trading sold its leasehold interest by the 012 lease to the claimants Mr and Mrs Leong for Vt 10 million.
22. It is of some significance that the premium (purchase price) paid by Mrs Ling for the 051 lease in September 2009 was Vt 1,163,000 for a new 75 year lease. The 012 lease held by Botleng Island Trading was for a 50 year term as from 15 September 1987.
23. Mr Malcolm argued that the Court should take particular notice of the disparity in the purchase prices. In particular, that in 2007 Mrs Ling had agreed to pay Vt 7 million to Botleng Island Trading Ltd for the balance of the 50 year term (with 40 years to run) of the 012 lease. Mr and Mrs Leong paid Vt 10 million to Botleng Island Trading Ltd in 2010/11 for the 012 lease which then had 36-37 years to run. Against that, Mrs Ling paid only Vt 1,163,000 to the Minister of Lands / Department of Lands for a new 75 year lease from September 2009.
24. The purchase by Mr and Mrs Leong of Botleng Island Trading Ltd's interest in the 012 lease received Ministerial consent on 12 March 2010. The transfer of the 012 lease to Mr and Mrs Leong was registered against lease title 03/OI74/012 on 1 February 2011.
25. Prior to the purchase of the 012 lease by Mr and Mrs Leong in 2010, Mr Chen became aware that a local Luganville real estate agency was marketing the property for sale on behalf of Botleng Island Trading. That appears to be the first occasion that Mr Chen became aware that the 012 lease to Botleng Island Trading had not been, or may not have been, cancelled. Mr Chen took legal advice from a Port Vila Lawyer, Nigel Morrison. Mr Chen acknowledged that Mr Morrison undertook a search of the lands leases register and informed him that there was already a lease (the 012 lease) registered over this block of land. That notwithstanding, Mr Morrison felt that he should be able to recover the Vt 1.1 million that Mr Chen/Mrs Ling had paid to the Minister/Department of Lands as the premium for the new lease.
26. Mr Chen was not satisfied with this advice from Mr Morrison. He consulted another Port Vila Lawyer, Saling Stephens.
27. On 9 July 2009, Mr Stephens wrote directly to the Minister of Lands. That letter is entitled, "*Intention to acquire land title No. 03/OI74/012 situated in Luganville, Santo.*" I am unable to understand why the letter had to be sent directly to the Minister of Lands rather than to the Director of Lands although perhaps this was by way of a complaint at the Department's seeming inaction to register the new lease in favour of Mrs Ling.
28. In that letter, Mr Stephens set out a chronology of events in respect of the lease title 03/OI74/012 in support of a submission that Mrs Ling had an equitable interest in the title. The chronology of significant events tabulated by Mr Stephens, however, and regrettably,



made no mention of the dealings registered against lease title 03/OI74/012 as mentioned above. Specifically, it failed to mention that there was an existing lease 012 over the land in favour of Botleng Island Trading Ltd:

*"9<sup>th</sup> July 2009*

*The Honourable Minister of Lands*

...

***Re: Intention to acquire Land Title NO. 03/OI74/021 situated in Luganville Santo***

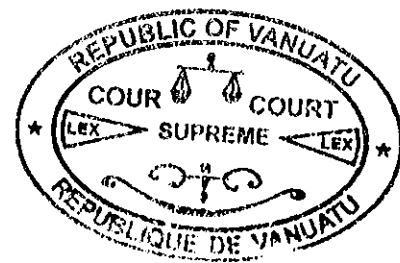
*We act for Mr Huang of Daming Store Santo.*

*Our client instructs it has an equitable (sic) interest on the above said title.*

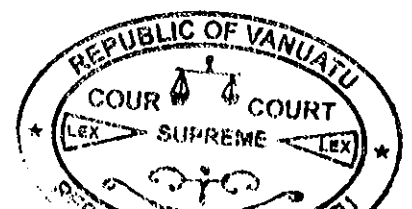
***History of this Land Title***

- 1987 This lease (03/OI74/012) was previously granted by – the Minister of Lands to Botleng Island Trading Co. Ltd*
- 1993-1994 During this period, Botleng Trading Co. Ltd was liquidated*
- 1995-2007 Unpaid land rent started to accumulate up to some million vatu*
- March/2006 Lease was deregistered due to outstanding land rent by Botleng Trading Co. Ltd*
- 7/8/07 Mrs Huang Xiao Ling applied for the lease through Urban Land in Santo*
- 28/3/08 Minister of land granted a negotiator certificate for Ms Huang Xiao*
- 29/5/08 Ms Huang paid the lease preparation, land rent, land premium, register premium, register lease and stamp duty totaling the sum of Vatu 1,500,000*
- 04/07/08 Minister of Land signed a lease for Mrs Huang on 04/07/2008, lodged with Director of Lands for registration but the registration has been reasonably withheld for unknown reasons.*
- 12/08 Mr Neil Slater (an Australian) put the land on sale which was act by first national SANTO for 15 million (no one knows what is the story)*
- 2/09 Some has interested and signed an agreement on it*

... ”

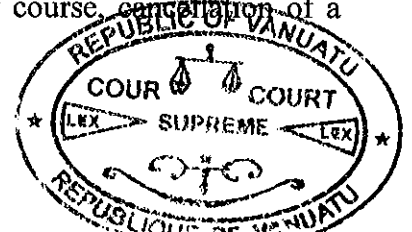


29. That letter is unfortunately expressed for a variety of reasons. Principally, it indicated that Botleng Island Trading had been liquidated when that had not occurred either in fact or in law. It failed to mention that the cancellation of lease entry had itself been cancelled and furthermore that the 012 lease had indeed been restored. It furthermore failed to mention that the land leases register relating to the 012 lease (and this letter is in respect of that 012 lease) showed that Botleng Island Trading Ltd was the proprietor of a registered interest in the 012. It is clear that the letter misled the Minister in a number of respects as to the current leasehold status of the land.
30. Mr Stephens concluded his letter with the indication that unless (effectively) the lease was registered within 14 days, court proceedings would follow.
31. That letter certainly met with a relatively prompt response as the 051 lease to Mrs Ling was registered on 10 September 2009 just two months later.
32. It is unnecessary to go further into the evidence as to what has happened except in respect of the actual internal workings of the Department of Lands. One side, there is the 012 lease that was "sold" to Mr and Mrs Leong for Vt 10 million with the consent of the Minister of Lands in late 2010 and registered on 1 February 2011. On the other side, is a completely new lease 051 issued by the Minister to Mrs Ling on 14 July 2008 as the 012 lease but not registered until 10 September 2009 and then as the 051 lease. In short, the untidy position was then reached where the same physical block of land appears to be subjected to different registered leases that are in competition to each other.
33. Mr Malcolm's core submission is that the 012 lease remained alive and registered at all material times and certainly from the time that the Director of Lands "restored" it on 25 January 2008. The registration or purported registration of the 051 lease over this block of land must accordingly be by mistake and the lands leases register should be rectified to ensure that there is no reference to an 051 lease. Furthermore, the transfer of the lease by Botleng Island Trading to Mr and Mrs Leong was clearly a bona fide transaction for good value and the registration of that transfer should be recognised accordingly.
34. Mr Gilu for the State conceded that a mistake had been made by the Department of Lands in its registration of the 051 lease and he confirmed that the position of the State is that the 012 lease was and remained the operative and continuing lease over this particular block of land. Furthermore, that Mr and Mrs Leong were now the proprietors of the registered interest in the 012 lease.
35. In his closing address, Mr Stephens argued that Botleng Island Trading Limited had not been lawfully restored to the register of companies, that the Director of Lands had no power to "restore" the 012 lease, that there was nothing for Botleng Island Trading Ltd to sell to Mr and Mrs Leong and the 051 lease to Mrs Ling now governed the leasehold status of the land.
36. The submission that Botleng Island Trading Limited had not been lawfully restored to the register of companies met with a somewhat sharp response from Mr Malcolm who pointed out that this issue had never been pleaded, it had not been dealt with in the course of the evidence and indeed the first time it had ever been mentioned was in the course of Mr Stephens closing address. That is all correct. It is, however, sufficient to observe that the restoration of the company was pursuant to an order of this court and that order has not been



cancelled either by review or appeal. It was not open to Mr Stephens to challenge the legality of that order in this proceeding.

37. All in all, what resulted was and remains an extremely untidy state of affairs that should not have occurred at all. It is now necessary to have regard to the explanation given by various members of the Department of Lands as to how this has come about.
38. The Court heard from the Director of Lands, Jean Marc Pierre who filed an extensive sworn statement beforehand through the State Law Office. Additionally, Benuel Tabi and Peter Pata were called by Mr Stephens under subpoena to give evidence. Mr Tabi stated that he *"looks after the lease section of the Lands Officer on Santo and has done for some years."* Mr Pata is a senior member of the Department of Lands and was Acting Director of Lands during occasions when Mr Jean Marc Pierre was suspended.
39. The most coherent explanation that has been provided as to how this confused state of affairs arose came from Mr Pierre. He explained that when a lease is cancelled, the lease title then is considered to have ceased to exist in so far as registration of further instruments affecting the physical block of land are concerned. When the lease to Mrs Ling was presented for registration, it was necessary to create the new lease title 03/OI74/051 notwithstanding that this was over the same property to which the 012 lease applied. Neither Mr Pierre, Mr Tabi nor Mr Pata was, however, able to explain to me why that needed to happen. Why was it necessary to cancel one lease title and then create a completely new title with a different reference over the same block of land?
40. Mr Pierre explained that a lease title reference is broken up into three parts. Mr Pierre explained that for 03/OI74/012: (1) the 03 refers to Luganville Town; (2) OI74 refers to the cadastral plan involved; and (3) 012 refers to the actual lot number on the plan
41. Mr Pierre explained that what likely occurred is that the Land Survey Division heard, rightly or wrongly, that the 012 lease had been cancelled and that a new lease had been granted. The next available and unassigned lot number (in this case 051) was then assigned to this particular block of land on the survey plan.
42. Mr Gilu may well have been closer than any other counsel, or witness, towards providing an explanation as to the need for that practice of creating a new lease title for a new lease when an existing lease is cancelled. Mr Gilu suggested that it probably stemmed from the fact that if a lease was cancelled, and no new lease was to be registered, the land would revert to the custom owners; in this case, the reversion would be the State because this was municipal land.
43. The land registry system here is different in Vanuatu to that in New Zealand and certain States of Australia that have a "Torrens" land registration system. In New Zealand, it is well understood that a title reference is to a particular block of land defined as a lot number on a certain deposited plan. Dealings on the title are then registered on the title; such as leases, transfers, mortgages and suchlike. What appears to occur here in Vanuatu is that when a lease is entered into and presented for registration, a lease title is issued which relates just to that particular lease. When that particular lease is cancelled for whatever reason, and a new lease (or leases) is presented for registration over the same block of land, a new lot number is inserted in the title reference to create a new title reference. Of course, cancellation of a



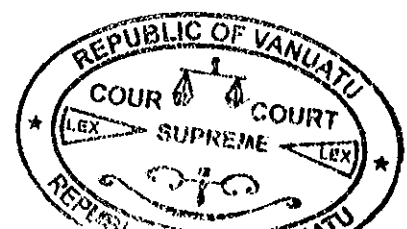


lease may arise not just through forfeiture but also because the lease is surrendered for a subdivision or suchlike.

44. This practice of creating a completely new lease title reference when a lease is cancelled should not cause complication or confusion providing that this is appropriately noted on the lands leases register together with the necessary cross referencing and all in a timely fashion. This is to ensure that anyone who searches the lands leases register to ascertain the status of the block of land in question will be able to ascertain the exact status of the land with confidence.
45. Mr Pierre produced two "e-survey forms" which relate respectively to the 012 lease and the 051 lease. Those e-survey searches are each dated the 7<sup>th</sup> of March 2013 being the day that they were produced in Court. They can accordingly be considered the most up-to-date information available at least from the Survey Division of the Department of Lands.
46. The first e-survey search relates to lease title 03/OI74/012 and it simply shows "cancellation of lease on 28/08/2006". There are no further entries. There is nothing to suggest that the cancellation was itself cancelled or that the lease restored all as noted on the lands leases register for the 012 lease. There is also nothing that indicates that a new lease 051 now governed leasehold dealings on that block of land.
47. The second e-survey search relates to lease title 03/OI74/051. It contains a bare cross-reference to lease title 03/OI74/012.
48. There was also another record produced by Mr Pierre which he described as a copy of the index for 03/OI74. That has a reference to the 012 lease with a line struck through it. The same handwritten page has a later reference to the 051 lease and alongside that reference appears a cross-reference to 03/OI74/012.
49. These records were produced by Mr Pierre in his attempt to explain what had happened to lease title 03/OI74/012 at least according to the survey records. That is, it had been treated as having been cancelled and replaced by the 051 lease. That, of course, is to be taken as the current understanding of the Lands Survey division of the Department of Lands. Mr Pierre could not explain why the e-survey material and thus the Survey Divisions records had not been updated in this respect since 25 January 2008 to show the restoration of the 012 lease.
50. What then is the correct legal status of each of the two leases?
51. Mr Malcolm's case is based primarily on the provisions of the Land Leases Act which create (what is often called) a system of *indefeasibility of title* dependent on registration.
52. The relevant sections from the Land Leases Act are as follows:-

**14. Interest conferred by registration**

*Subject to the provisions of this Act, the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease together with all implied and expressed rights belonging thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.*



### **15. Rights of proprietor**

**The rights of a proprietor of a registered interest, whether acquired on first registration or subsequently for valuable consideration or by an order of the Court shall be rights not liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all rights, privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –**

(a) to the encumbrances and to the conditions and restrictions shown in the register;

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

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

### **21. Evidence**

**(1) Every document purporting to be signed by the Director shall, in all proceedings be presumed to be so signed until the contrary is proved.**

(2) Every copy or extract from a document certified by the Director to be a true copy or extract shall, in all proceedings, be received as prima facie evidence of the contents of the document.

**(3) Every entry or note in or on any register shall, subject to the provisions of sections 99 and 100, be received in all proceedings as conclusive evidence of the matter or transaction which it records.**

(4) No process for compelling the production of the register or of any filed instrument, plan or document shall issue from the Court except with the leave of the Court which leave shall not be granted if a certified copy will suffice and any such process, if issued, shall bear thereupon a statement that it is issued with the leave of the Court.

### **23. Protection of persons dealing in registered interests in land**

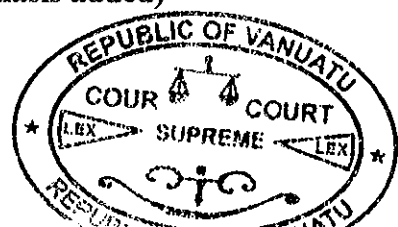
**(1) No person dealing or proposing to deal for valuable consideration with a proprietor of a registered interest shall be required or in any way concerned –**

(a) to inquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor was registered; or

(b) to see to the application of any consideration or any part thereof; or

(c) to search any register kept under any previous law.

(2) Where the proprietor of such an interest is a trustee, he shall in dealing therewith, be deemed to be the absolute proprietor thereof and no disposition by such trustee to a bona fide purchaser for valuable consideration shall be defeasible by reason of the fact that such disposition amounted to a breach of trust. **(Emphasis added)**



53. The principle of indefeasibility of title establishes a form of statutory protection from attack by adverse claims in respect of the interest which a registered proprietor enjoys. Once title is registered by a bona fide purchase for value without notice, indefeasibility is acquired inclusively with immediate effect – see *Frazer v. Walker*<sup>2</sup>
54. The question of indefeasibility in Vanuatu under the Land Leases Act was considered by the Court of Appeal relatively recently in *Ratua Development Ltd v. Ndai*<sup>3</sup>. While that case turned more exactly on whether a claimant for custom ownership had the right to lodge a caution under section 93 of the Act, the Court of Appeal made some general observations about the land registration system that operates in Vanuatu which, with respect, I adopt and apply here without hesitation:

*“15. The Act creates in Vanuatu a “Torrens” system of land registration similar to the systems which have operated with conspicuous success in terms of simplicity and certainty of land tenure in New Zealand, most of the Australian states and territories and elsewhere for well over 100 years. In one striking respect, however, the Vanuatu Act is unique: it applies to leasehold estates or interests in land only. This feature is the source of the difficulty in this case.*

*16. The Act is an integral part of the land legislation enacted in Vanuatu shortly after Independence in order to establish by statute the system of land tenure for Vanuatu which is mandated in Chapter 12 of the Constitution. The most important of these interrelated enactments are the Alienated Land Act (Cap. 145), the Land Reform Act (Cap. 123) and the Land Leases Act itself. They all flow from and reflect the provisions of Chapter 12 particularly Articles 73, 74, 75, 79 (1) and 80 . . .*

*17. The result of those Articles is that only indigenous citizens and the Government may own land in Vanuatu. There is, however, nothing in the Constitution to prevent land being leased to other persons, indigenous or non-indigenous, citizen or non-citizen or for such leasehold estates to be sold, mortgaged or otherwise dealt with by their proprietors. Indeed, immediately after Independence, Parliament passed the legislation referred to above to enable that to happen and in particular to provide the opportunity for non-indigenous persons who held freehold titles over land before Independence to acquire leasehold titles over that land. However, the only persons who can be lessors are indigenous citizens who are custom owners or the Government.*

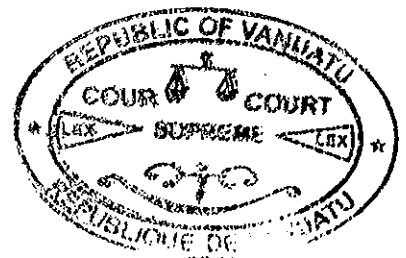
*18. The essential feature of any Torrens system is the indefeasibility of the title of the registered proprietor. Indefeasibility of title is enshrined by the provisions of Part 4 of the Act relating to the effect of registration. The primary provision is s. 15:*

***‘RIGHTS OF PROPRIETOR***

*15. The rights of a proprietor of a registered interest, whether acquired on first registration or subsequently for valuable consideration or by an order of the Court shall be rights not liable to be defeated except as provided in this*

<sup>2</sup> [1967] 1AC569 (PC).

<sup>3</sup> [2007] VUSA 23: Civil Appeal Case 32 of 2007 (30 November 2007)



*Act, and shall be held by the proprietor together with all rights, privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-*

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

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

*Essential corollaries are ss. 18 and 23:*

***'ENTRIES TO CONSTITUTE ACTUAL NOTICE***

*18. Every proprietor acquiring any registered interest shall be deemed to have had notice of every entry in the register relating to the interest and subsisting at the time of acquisition.*

***PROTECTION OF PERSONS DEALING IN REGISTERED INTERESTS IN LAND***

*23. (1) No person dealing or proposing to deal for valuable consideration with a proprietor of a registered interest shall be required or in any way concerned-*

- (a) to inquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor was registered; or*
- (b) to see to the application of any consideration or any part thereof; or*
- (c) to search any register kept under any previous law.*

*(2) Where the proprietor of such an interest is a trustee, he shall in dealing therewith, be deemed to be the absolute proprietor thereof and no disposition by such trustee to a bona fide purchaser for valuable consideration shall be defeasible by reason of the fact that such disposition amounted to a breach of trust.'*

*19. The effect of all these provisions is that the register is everything. The title of the registered proprietor and anyone acquiring any interest from him is protected against any adverse claims or interests not entered in the register "except as provided in (the) Act".*

*20. This is the basic purpose and effect of the Act. However because the register is everything, it is necessary for provision to be made to protect those claiming an existing interest in the title which is liable to be defeated by registration of an interest acquired for valuable consideration from the registered proprietor. This function is provided by the provisions in the Act relating to cautions contained in Part 14 . . ."*



21 . . .

22. *The system of registration and protection of title created by the Act applies to one type of estate in land only, the leasehold estate. That is evident from both the short and long titles of the Act:*"

55. It is accordingly clear that that it is "*the register*" (the land leases register) that is sole record for the identification of any registered interest as dealt with particularly by s. 15 of the Act and as explained, with respect, so clearly by the Court of Appeal in *Ratua*.
56. What then is meant by, "*the register*". It is defined in s. 1 of the Act as, "*the leaf of the Land Leases Register kept in respect of a registered lease*".
57. The "*Land Leases Register*" is defined in s. 1 as, "*the Land Leases Register established under s.4*".
58. Section 1 also defines "*to register*" to mean "*to make an entry in the Land Leases Register under the Act and 'registered', 'unregistered' and 'registration' shall be construed accordingly*".
59. Section 2 of the Act requires that the Land Leases Register is to be maintained (with other certain land records) at Port Vila
60. Sections 4 – 8 of the Act prescribes the form that the Land Leases Register is take (s. 4), the manner of registration (s.5), and the powers bestowed on the Director of Lands in relation to the required maintenance of the Land Leases Register (s.8).

#### **4. The Land Leases Register**

(1) *The Land Leases Register shall comprise a register maintained in both the English and French languages in respect of each lease required to be registered by this Act.*

(2) *Each register shall be divided into three sections as follows –*

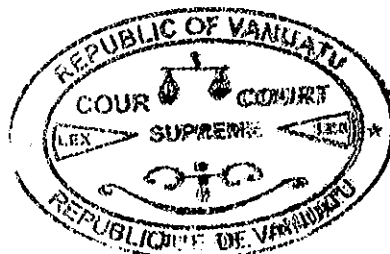
(a) *the property section, containing a brief description of the lease together with particulars of its appurtenances; and*

(b) *the proprietorship section, containing the name, postal address in Vanuatu of the proprietor and a note of any caution or restriction affecting his right of disposition; and*

(c) *the encumbrances section, containing a note of every encumbrance affecting the lease required by this Act or any other law, to be registered.*

#### **5. Manner of registration**

*Registration shall be effected by an entry in the register in such form as the Director may from time to time direct and by the cancellation of the entry, if any, which it replaces.*



**6. New editions of register**

*The Director may at any time open a new edition of a register showing only subsisting entries and omitting therefrom all entries which have ceased to have any effect.*

**7. Cancellation of obsolete entries**

*The Director may cancel any entry in the register which he is satisfied has ceased to have any effect.*

**8. General powers of Director**

*The Director may exercise the following powers in addition to any other powers conferred on him by this Act –*

*(a) he may require any person to produce any instrument or other document or plan relating to the registered interest and that person shall produce the same;*

*(b) he may summon any person to appear and give any information or explanation respecting a registered interest, and such person shall appear and give such information or explanation;*

*(c) he may refuse to proceed with any registration if any instrument, or other document, or plan, information or explanation required to be produced or given is withheld or any act required to be performed under this Act is not performed;*

*(d) he may administer oaths or take a declaration in lieu thereof, and may require that any proceeding, information or explanation affecting registration shall be verified on oath or by declaration;*

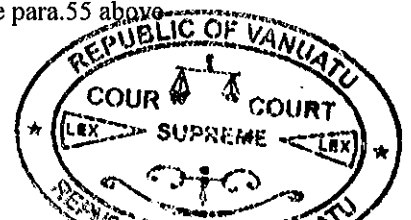
*(e) he may order that the costs, charges and expenses incurred by him or by any person in connection with any investigation or hearing held by him for the purposes of this Act shall be borne and paid by such persons and in such proportions as he may think fit;*

*(f) he may, at his discretion, dispense, with the production of any signature, or the supply of any information or any advertisement or notice required by this Act; and*

*(g) he may state any case or reserve any question for consideration by the Court.*

61. Bearing in mind in particular the definition of “the register”<sup>4</sup>, and the other provisions referred to, it is clear that what is contemplated as the land leases register by the Act is manual or hard copy record rather than an electronic record.

<sup>4</sup> “the leaf of the Land Leases Register kept in respect of a registered lease” – s.1 and see para.55 above



62. It is perhaps timely to set out a chronology of material events:

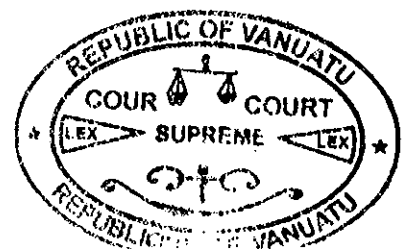
- 1 October 1987** Lease 03/OI74/012 registered between Luganville Urban Land Corporation as lessor and Botleng Island Trading Ltd as lessee
- 14 June 1994** Botleng Island Trading Ltd struck off register of companies.
- 12 August 2005** Botleng Island Trading Ltd restored to the register of companies by order of the Supreme Court.
- 28 August 2006** The cancellation of lease title 03/OI74/012 entered on the land leases register
- 25 January 2008** The restoration of lease title 03/OI74/012 entered on the land leases register
- 10 September 2009** Lease title 03/OI74/051 registered between the Minister of Lands and Natural Resources as lessor and Huang Xiao Ling as lessee
- 1 February 2011** The transfer of lease title 03/OI74/012 from Botleng Island Trading Ltd to Miha Leong and Betty Leong entered on the land leases register in respect of that lease.

63. Mr Stephens argued that the Director of Lands did not have the power to restore the 012 lease to the land leases register. I do not accept that submission. A consideration of ss 2 - 8 of the Act not only places the Director under a statutory duty to maintain the land leases register, it also reposes in the Director a discretion as to the form that an entry in the register is to take<sup>5</sup>.
64. Section 7 permits the Director to cancel any entry that he is satisfied has ceased to have any effect which is likely to be the authority for the cancellation of the 012 lease on 28 August 2006.
65. Section 99 of the Act (which is subject to section 100 (2)) permits the Director to rectify the Register in certain circumstances. Section 99 (Director's power to rectify) needs to be considered alongside s.100 (Court's power to rectify the register) and s.106 (appeals against a decision of the Director):

**99. Rectification by the director**

*(1) Subject to section 100(2), if it appears to the Director that any register does not truly declare the actual interest to which any person is entitled under this Act or is in some respect erroneous or imperfect, the Director after taking such steps as he thinks fit to bring to the notice of any person shown by the register to be interested his intention so to do, and giving every such person an opportunity to be heard, may as from such date as he thinks fit, rectify the register:*

<sup>5</sup> Section 5



*Provided that it shall not be necessary for the Director to take steps to bring the rectification to the notice of any person shown by the register to be interested nor to give any such person an opportunity to be heard in formal matters and in the case of errors and omissions not materially affecting the interests of any person.*

*(2) Upon the written application of any proprietor accompanied by such evidence as the Director may require, the change of name or address of that proprietor shall be recorded in the register.*

*(3) The Director shall rectify the register to give effect to an order of rectification of the register made by the Court.*

#### **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.*

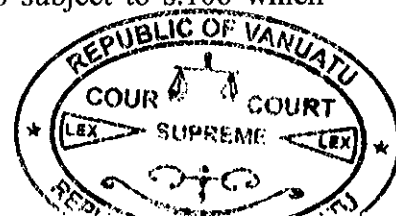
*(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the interest for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.*

#### **106. Appeals against the Director**

*Any person aggrieved by a decision of the Director given in pursuance of his powers under this Act, may, within 6 months from the notification of the decision appeal to the Court which may confirm, quash or vary the decision as it thinks just, and may under section 100 order rectification of the register:*

*Provided that no appeal shall lie under this section where the decision of the Director has been given in conformity with the determination by the Court of a case or question stated or reserved by him in connection with the same matter for its consideration under section 8(g).*

66. Mr Malcolm submitted that the restoration of the 012 lease on 25 January 2008 was well within the powers of the Director provided by s. 99(1).
67. While there is no clear evidence of the reasons for the cancellation of the 012 lease or its subsequent restoration, I agree that such an entry on the register to restore a lease would be within the scope of the Director's statutory powers if it was determined that the cancellation of the lease was by way of a mistake or that the lease should otherwise not have been cancelled. The restoration in such circumstances would be to ensure that the register declared the actual interest in the 012 lease of Botleng Island Trading.
68. The Director's power to rectify is not absolute. It is expressly subject to s.100(2) which provides protection to a bona fide purchaser for value. It is also subject to s.106 which





provides for an appeal to be brought against any decision of the Director. There is no evidence that an appeal was ever brought against the decision of the Director to restore the 012 lease and it can be safely assumed that this did not occur.

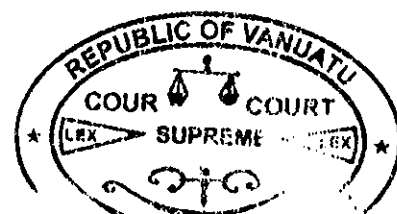
69. The evidence adduced of the entries on the register for the 012 lease is also required by s.21 (3) of the Act to be conclusive evidence of the matter which those respective entries record. That is, the court has no option but to accept the entries for the cancellation of the lease and then the restoration of the lease as correctly and lawfully explaining the status of the lease subject only to rectification pursuant to ss. 99 and 100:

*(3) Every entry or note in or on any register shall, subject to the provisions of sections 99 and 100, be received in all proceedings as conclusive evidence of the matter or transaction which it records.*

70. As the Court of Appeal explained in *Ratua*, "... the register is everything. The title of the registered proprietor and anyone acquiring any interest from him is protected against any adverse claims or interests not entered in the register 'except as provided in (the) Act'" (para 19)
71. Botleng Island Trading was the registered proprietor of lease 012 certainly as at 25 January 2008 and arguably from 1 October 1987 when the 012 lease was first registered. That company accordingly had a protected or indefeasible leasehold interest in the land as at 25 January 2008.
72. The unfortunate circumstances that led to the Minister's intervention in or about July 2009 and the "registration" of the 051 lease cannot, however, defeat the registered leasehold interest in the land held at that time by Botleng Island Trading. To do so would be to undermine the clear provisions as to indefeasibility of title by s. 15 of the Act and it would be against the consistent high authority arising from many cases in Vanuatu, New Zealand and Australia which have considered the concept of indefeasibility of title within a "Torrens" based land registry system.

*"15. The rights of a proprietor of a registered interest, whether acquired on first registration or subsequently for valuable consideration or by an order of the Court shall be rights not liable to be defeated except as provided in this Act ..."*  
*(emphasis added)*

73. In short, Mrs Ling could only have purchased a leasehold interest in the land from Botleng Island Trading which, of course, she initially endeavoured to do. Whatever the circumstances that saw her make a direct approach to enter into a new lease with, as it turned out, the Minister of Lands, this could never have resulted in an interest in the land that was adverse to the interest held by Botleng Island Trading. Of course, the 051 lease was completely and directly adverse to the registered interest held by Botleng Island Trading under the 012 lease.
74. It therefore follows that the registration of the 051 lease, however that may have come about, cannot be allowed to remain on the land leases register. The registration of the 051 lease has come about through a misunderstanding on the part of the Minister of Lands that he was able to grant a new lease to Mrs Ling and a mistake then by the Director of Lands that this 051



lease could be registered. That mistake may have arisen because of the failure by the Department to keep its records up to date in respect of this block of land as evidenced by the "e-survey" search of 7 March 2013 (produced as exhibit 2) for the 012 lease which still recorded that the 012 lease as cancelled. That indicates that at least the survey records had not been updated since the lease was restored on 25 January 2008; over five years later.

75. I note again that Mr Gilu for the State conceded that this mistake had been made in respect of the registration of the 051 lease.
76. The subsequent sale by Botleng Island Trading of its interest in the 021 lease to Mr and Mrs Leong was with the required consent of the Minister of Lands (a different Minister of Lands to that which granted the 051 lease to Mrs Ling) as nominal lessor and the legality of that transaction, and the registration of the transfer of the 012 lease is unimpeachable.
77. Mr Malcolm also submitted that Mrs Ling could not, in any event, be considered a bona fide purchaser for value and thus have the protection against rectification available under s.100(2). Mr Malcolm's argument in this respect paid regard to (what was argued to be) the inadequate consideration paid by Mrs Ling for the lease (Vt 1,163,000) whereas she had earlier agreed to pay Botleng Island Trading Ltd Vt 7 million. Mr and Mrs Leong paid Vt 10 million some three years later.
78. Furthermore, it was argued that Mrs Ling had actual knowledge of the 012 lease as a result of her husband's dealings with Mr Morrison, the letter from Mr Stephens to the Minister expressly referring to the 012 lease, and the memorandum of lease held by Mrs Ling initially bore the 012 title reference. Accordingly, a simple search of the register for the 012 lease would have revealed that the 012 lease had been restored notwithstanding what the circumstances surrounding the restoration might have been. The register has the entry that the 012 lease was restored on 25 January 2008 and the court is required to accept that entry as conclusive evidence that the 012 lease had been restored<sup>6</sup>.
79. Mr Stephens did not attempt to challenge that submission notwithstanding that it had to be central to his counterclaim seeking rectification by removal of the 012 lease.
80. While Mr Malcolm's submission has considerable force, it is unnecessary to deal further with it in view of my conclusions as to the legality of the 051 lease.
81. The counterclaim by Mr Stephens seeks damages only against the first and second claimants and, curiously, not against the Republic of Vanuatu under section 101 of the Act. Be that as it may, Mr Gilu conceded that Mrs Ling had suffered loss as a result of the 051 lease being granted by the Minister and then registered. Mr Gilu requested that an undertaking be recorded to the effect that, if Mrs Ling lost her defence to the claim and notwithstanding the pleading deficiencies (which have her counterclaim directed at Mr and Mrs Leong and Bred Bank) the Republic of Vanuatu will pay to Mrs Ling by way of reimbursement for both the premium that she paid to the Minister of Lands for the grant of the 051 lease (Vt 1,163,000) and any land rates paid by her together with interest thereon at 5% per annum from the dates of the various payments.

---

<sup>6</sup> Section 21(3)



82. This responsible approach by Mr Gilu obviates the need for Mrs Ling to either amend her counterclaim or commence a new proceeding. This undertaking is noted accordingly.

### **Conclusion**

83. For the above reasons, I find for Mr and Mrs Leong in respect of both the claim and the counterclaim.

84. I order rectification of the land leases register by the cancellation of the registration of lease 03/OI74/051 and, by extension, any dealings entered in respect of that lease. For the avoidance of doubt, I record that I find that lease 03/OI74/012 remains the only lease lawfully registered and operative in respect of this particularly block of land and that Mr and Mrs Leong are the lawful proprietors of a registered interest as lessees under that lease.

### **Costs**

85. I have not yet heard from counsel as to costs. However, I propose that costs between the parties be ordered on the basis set out below. If any of the parties is not in agreement with this proposal, I will receive memoranda from counsel with their submissions as to costs by 5 April 2013 and a decision will then be made on the papers filed. If no memorandum is filed by 5 April 2013, the following orders as to costs will become final:

- a) Costs to the first claimants (Mr and Mrs Leong) against the First Defendant (Mrs Ling) as to the claim and the counterclaim on the standard basis as agreed or taxed.
- b) No costs awarded to the second claimant (Bred Bank) – its involvement was to safeguard its interest arising from its mortgage over the 012 lease which was attended to by the advancement of the claim by Mr and Mrs Leong;
- c) The second defendant (The Republic of Vanuatu) to bear its own costs – it was the mistake on the part of the Department of Lands which created this confusion.

**BY THE COURT**

