

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

Civil Case No.61 of 2008

BETWEEN: MOTUKA SOSUE & TUI SOANE
Claimants

AND: HORIZON DEVELOPMENT LTD
First Defendant

AND: FIAKAIFONU NAZARIO
Second Defendant

AND: MINISTER OF LANDS
Third Defendant

**AND: DIRECTOR OF LAND, SURVEY AND
RECORDS**
Fourth Defendant

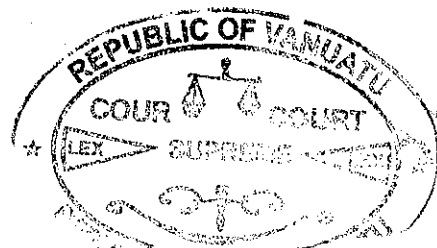
Coram: Chief Justice, Vincent Lunabek

***Counsel: Mr Daniel Yawha for the Claimant
John Malcolm for the First Defendant
Mrs Marie Noelle Patterson for Second Defendant
Mr Ismael Alatoi Kalsakau for the third and fourth Defendant***

JUDGMENT

Introduction

1. In this proceedings the Motuka Sosue and Tui Soane claim that a transfer of lease 12/0742/022 ("Lease 022") from the trustees of the Wallis and Futuna community in Vanuatu to Horizon Development Ltd was obtained by fraud. The land, the subject of lease 022 has now been sub-divided into over 80 leases. A number of these leases have been sold to third



parties. None of these third parties were served with these proceedings or involved in this hearing.

2. The claimants seek rectification “of the said lease back to the original owners lessees and trustees of the Wallis and Futuna community in Vanuatu”.
3. They also seek an order to have the leasehold titles created under the sub-division of the lease property be “surrendered”.
4. Whatever the merits of the claim that the transfer of lease 022 from Wallis and Futuna trustees to Horizon was obtained by fraud, the sub-division of the lease 022 into over 80 new leases and the sale of a number of these leases to innocent purchasers for valuable consideration means rectification by reestablishing the previous lease 022 is no longer possible. The claimants therefore cannot succeed in their claim for rectification of the 022 leasehold title. Nor can they obtain an order that the sub-division of the said lease property be “surrendered”.
5. I will first set out the background to the claim and then identify why the claim for rectification by the claimants cannot succeed. I note that in their pleadings the claimants have not sought any remedy other than rectification and accordingly the claimant’s claim must fail.

Background

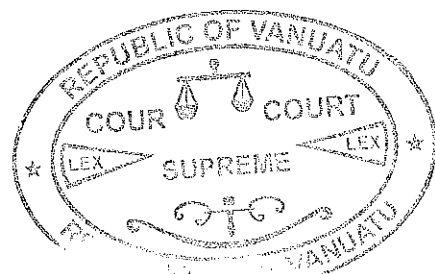
6. A community of 28 Wallis and Futuna families were brought to Forari in Vanuatu in the late 1950’s to work in a mine. Following the mine closure the Wallis and Futuna Families live and occupy land at Forari and at independence in 1980, some Wallis and Futuna families chose to keep



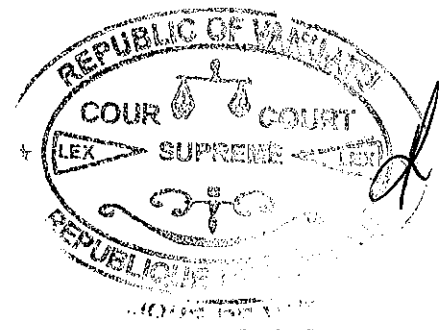
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their French citizenship and return to France. Other families chose to go to New Caledonia. These families were paid by the French Government to assist in repatriation. Other Wallis and Futuna families stayed in Vanuatu.

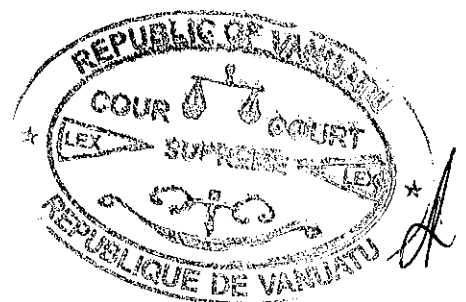
7. When they arrived in Vanuatu in the late 1950's the Wallis and Futuna families had occupied land in Forari. They continued to do so right through and after independence in Vanuatu. At Independence all land in Vanuatu was declared the custom land. Eventually the custom owners of the land at Forari wanted rental from the land. A committee was formed by the Wallis and Futuna community in Vanuatu who negotiated a lease with the custom owners of the Forari Land. Eventually this committee formed an Association with trustees. In 1995 these trustees were granted a lease of the Forari Land by the custom owners. Eventually two leases were created Leases 022 and 013 with respect to the Forari Land.
8. The Association was called the Wallis and Futuna Community living in Vanuatu. The representatives of the Community were the second defendant, Fiakaifonu Nazario, as President, the Chief of the Wallis and Futuna community in Vanuatu (elected by popular vote from the Wallis and Futuna community in Vanuatu) and Tui Soane representing the Wallis and Futuna community in Port Vila and Sosue Motuka representing the Wallis and Futuna community in Forari. These were the trustees of the Association and they were the lessees of the two leases.
9. After the leases 022 and 013 were registered, the Minister of Lands paid the outstanding rent on the Forari Land (up until 1995) to the custom owners.



10. Unfortunately the Wallis and Futuna Community were not in a position to pay any rent to the custom owners of the land from 1995 to 2006. By 2006 the custom owners had advised the Wallis and Futuna Community that they risked forfeiture of the lease. As a result of this advice Mr. Fiakaifonu Nazario the second defendant and the President of the Wallis and Futuna Association approached Mr. Jose Franconiera a developer to inquire about the possibility of a joint venture relating to the 022 lease land.
11. A number of meetings were held between the Wallis and Futuna Community in Vanuatu, Mr. Franconiera and the Euphon Trust who represented the custom owners and were the lessors of the 022 lease.
12. What was proposed was that the 022 lease would be transferred from the Wallis and Futuna Community to a new company to be set-up (ultimately called Horizon Development Ltd). The Wallis and Futuna community would own 45% of shares in the new company and Mr. Franconiera would own 55% of the shares. In addition Mr. Franconiera would pay all of the arrears of rent relating to the 022 lease from 1995 until 2006. Mr. Franconiera would be responsible for the development of the 022 lease land. The 022 lease would be surrendered and the land subdivided into a number of smaller leases. The new leases would then be sold and the profit from the sale would be shared between the Wallis and Futuna Community and Franconiera through Horizon Developments. Further a sum of money would be paid to the Wallis and Futuna Vanuatu Community to be distributed to the members of that community for the surrender of the 022 lease.



13. By this time Mr. Sosue had left Vanuatu for New Caledonia where he lived. He did not subsequently participate in the affairs of the Wallis and Futuna Community in Vanuatu until the discussions about the development of the 022 lease began.
14. A meeting was held by the Wallis and Futuna Community about the proposed sale of the 022 lease and the development land. Mr. Nazario's evidence at trial was that all of the Wallis and Futuna Community in Vanuatu except Mr. Tui Soane supported the proposed development and the community decided to proceed with the sale.
15. Mr. Nazario travelled to New Caledonia to discuss the proposal with Mr. Sosue. Mr. Nazario's evidence was that Mr. Sosue signed a Power of Attorney in favour of Mr. Nazario for Mr. Sosue voting rights with regards to a proposed sale of the 022 lease. However Mr. Nazario's evidence was that Mr. Sosue eventually came to Vanuatu himself and voted in favor of the proposed sale and development of the 022 lease.
16. Mr. Sosue however claimed that he was tricked into signing the Power of Attorney by Mr. Nazario and that he had never supported the proposal and did not sign any document consenting to the arrangement.
17. As to Mr. Tui Soane he says that he does not sign the agreement to transfer the lease or to sell the lease 022. Mr. Soane says that someone forged his signature on the document which transferred the 022 lease to Horizon.



What are the interests of Wallis and Futuna islanders who no longer live in Vanuatu?

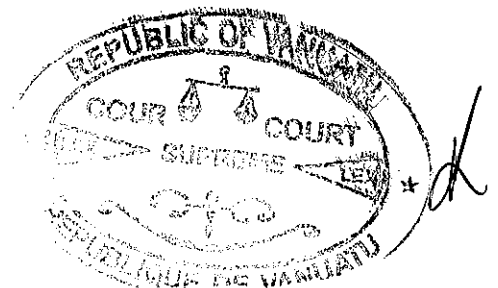
18. A number of Wallis and Futuna islanders who now live in New Caledonia have sworn statements in this proceeding. They all say essentially the same thing. That when they left Vanuatu in the 1980's they considered they owned land in Vanuatu in Forari under lease 12/0742/022.

19. I am satisfied much of their evidence about the land at Forari is mistaken. I set out below why that is so. When independence came in 1981 in Vanuatu all land was declared custom land. Only Ni-Vanuatu could own this land outright.

20. The people from Wallis and Futuna had settled on land at Forari in the 1950's. They occupied this land. But they did not own this land. The custom owners of the land at Forari are today represented by the Euphon Trustees.

21. It seems that people from Wallis and Futuna continued to live on the land at Forari from 1981 onwards. But they did so without any lease (as lessees) in their name.

22. By 1995 it was clear the custom owners of the land wanted rent for the land and a registered lease. Members of the Wallis and Futuna Community in Vanuatu and especially Mr. Nazario set up a trust to represent all Wallis and Futuna islanders resident in Vanuatu. A formal Association was incorporated.



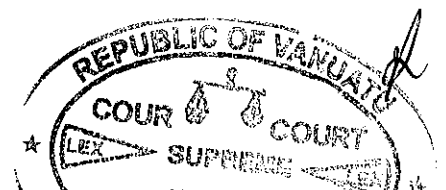
23. The Association and their Trustees applied for a lease (as lessees) of the Forari land. As I have explained two leases were granted including the 022 lease. The Government paid to the custom owners the rent due from 1981 to 1995. From 1995 onwards the rent was the Associations responsibility.

24. Those from Wallis and Futuna who prior to 1995 went to live outside Vanuatu and indeed those who left Vanuatu subsequently and are not members of the Association have no legal rights with respect to the Forari land. The lessors and custom owners are the Euphon Trust. The lessees are the Association which is the Wallis and Futuna islanders who live in Vanuatu and are members of the Association. Those Wallis and Futuna islanders living outside of Vanuatu including New Caledonia therefore have no rights to the Forari land.

Further Background

25. There seems no doubt on the evidence that a vast majority of the Wallis and Futuna community agreed with the proposed development of the 022 lease land. The evidence given was that the Wallis and Futuna Community decided major questions such as this by a majority vote (including the election of their chief). The evidence established that the majority of the Wallis and Futuna community in Vanuatu supported the development and sale of the 022 lease. And so even assuming both claimants did not validly sign the transfer of the 022 lease that would not have affected the community decision.

26. In any event, in October 2006 the transaction involving the transfer of the lease from the Wallis and Futuna community to Horizon Developments, which involved the consent of the lessors, the surrender of the 022 lease



for subdivision and the creation of over 80 new leases began. It was completed by 2007. By December 2007 the 022 lease to Horizon had been registered and the 022 lease was then surrendered. Eighty new leases were then created. Each new lease was registered when sold by Horizon to new lessees. By 2009 it seems that at least 10 of new leasehold properties had been sold. These 10 leasehold interests therefore had new owners and they each had a lease of land which had not been part of the original 022 lease.

27. The parties throughout this proceedings treated the registered lessees of these 10 leases as bona fide purchasers who knew nothing of any fraud or mistake in relation to the transfer of lease 022 from Wallis and Futuna to Horizon Developments or from Horizon Developments to themselves. The claimants made no attempt to prove any fraud or any knowledge of fraud in relation to these 10 lessees.

28. As I have noted at the commencement of this judgment (paragraph 4) the claim for rectification relating to the 022 lease cannot succeed even if the claimants could establish the transfer of the 022 lease from Wallis and Futuna to Horizon arose from fraud or mistake. Given these conclusions, I am not required to make any finding as to whether there was fraud or mistake. However as I have said it is clear the vast majority of the Wallis and Futuna community supported the development.

29. The only way in law in which the 022 lease could be reinstated by rectification is if the claimants could establish that all the new titles issued as a result of the subdivision of the lease 022 and then transferred to a new lessee were also obtained by fraud, or by knowledge of fraud. No such evidence has been called by the claimants at trial.



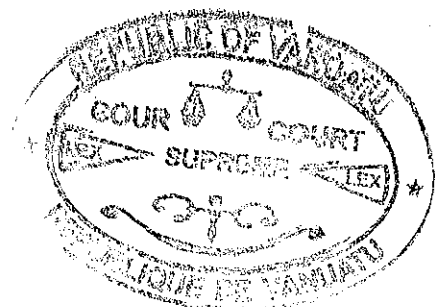
30. Section 15 of the Land Leases Act (CAP 163) sets out the circumstances under which the Court makes orders of rectification of the Register of leasehold interests (section 100 (1)). The Court must be satisfied that any registration has been obtained by fraud or mistake before rectification can occur. However section 100 (2) provides that the Register should not be rectified so as to effect the title of a proprietor in possession who has acquired their interest for valuable consideration and who has not committed any fraud or caused or contributed to the fraud which gave rise of the registration of the leasehold interest.

31. As I have noted in this case the registered proprietors of the 10 leasehold interest are proprietors in possession of the land who paid for the leasehold interest (or agreed to do so) and who knew nothing of any fraud affecting their title. Section 100 (2) therefore would prevent any rectification order affecting their title.

32. These 10 titles were part of the original 022 lease land. And so it is not possible for the 022 lease to be reinstated by rectification whether the 022 lease was transferred by fraud or not.

33. In those circumstances it is not necessary for me to reach any conclusion as to the claimants claim that the transfer of the land from the Wallis and Futuna Community to Horizon Development Ltd was made by fraud.

34. The claimants only prayer for relief was rectification or reinstatement orders relating to the 022 lease. For the reasons given such orders are not available on the facts of this case.



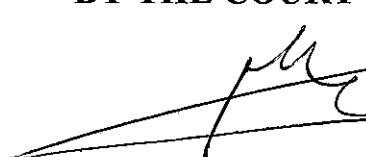
35. The claimants claim therefore must fail and is dismissed.

Costs

36. Each of the defendants are entitled to costs on the standard basis against the claimants. Such costs shall be agreed or determined. If no agreement as to costs is reached and a determination (taxation) is required then, each of the defendants should file any application for cost within 14 days from the date of this judgment, the claimants may respond within a further 14 days.

Dated at Port-Vila, this 10th day of December 2014.

BY THE COURT


Vincent Lunabek
Chief Justice

