

**IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU
(CIVIL JURISDICTION)**

JUDICIAL REVIEW CASE NO. 16 OF 2013

**BETWEEN: VANUATU ROWING ASSOCIATION
(INC.)**

Claimant

AND: MINISTER OF LANDS

First Defendant

**AND: DIRECTOR OF LANDS, SURVEY AND
RECORDS**

Second Defendant

AND: SANDY KALO

Third Defendant

Coram: Justice Mary Sey

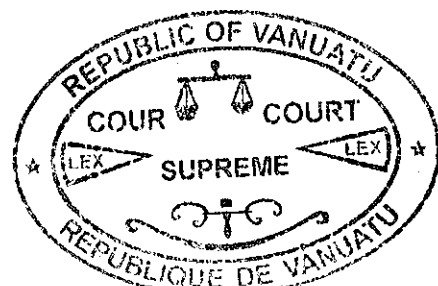
Counsel: John Malcolm for the Claimant
Kent Ture Tari (SLO) for the First and Second Defendants
Justin Ngwele for the Third Defendant

Date of Judgment: 29 July 2015

RESERVED JUDGMENT

Introduction

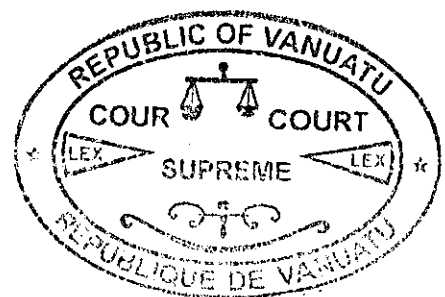
1. The Claimant is the Vanuatu Rowing Association (Inc.) (VRA) which operates its domestic rowing under the style *Port Vila Rowing Club*. The VRA's claim is for review of the decision of the Minister of Lands made between 15 and 20 November 2012 to grant a lease over certain land in Port Vila bearing lease Title



11/OD41064 to the Third Defendant, Sandy Kalo and someone or something described in the lease as SPK. The lease purports to be an urban residential lease over Title 11/OD41/064 for a term of 75 years from 15 November 2012. The lease specifies that the sum of VT500,000 has been received by the lessor (the Minister of Lands) from the lessees (the third defendant and "SPK") for the grant of the lease. The lease further specifies that a rental of VT15,000 was payable annually.

Background

2. Subsequent to Independence, the area in Port Vila known as Tassiriki was subdivided for residential purposes by the previous alienator of the land, late Pierre Bourgeois (deceased), the father of Thierry Bourgeois.
3. The subdivision included numerous green areas for use by the residents and people of Vanuatu for access to the lagoon. The green areas were held in trust by the Government and, on his father's death, by Thierry Bourgeois for such purpose.
4. In or about 2009 - 2010, Thierry Bourgeois granted permission to the VRA to build a club premise on the property and use the water front area for launching their boats. The project was approved by the Government and a club house was built.
5. The land comprises 33a 44ca and it is a thin slither of land situated in Tassiriki, Port Vila, between Holiday Inn golf course and the First Lagoon (the land). The VRA has since 2010 occupied part of the land on which the lease has been granted.
6. On or about 20 November 2012, the Minister of Lands of the time, Stephen Kalsakau, granted a lease to "SPK and Kalo Sandy" over the land in question.



The Claim

7. The Claimant filed its Judicial Review Claim dated 19 August 2013 against the First, Second and Third Defendants and sought the following reliefs:

A. That the decision of the Minister of Lands to grant the lease to the Third Defendant over lease Title 11/OD41/064 be quashed as being ultra vires the powers of a Minister of Lands and otherwise unlawful.

B. That the lease by the Minister of Lands to "SPK and KALO SANDY" over lease Title 11/OD41/064 be declared null and void.

C. That the Director of Lands rectifies the land leases by cancelling the registration of that lease.

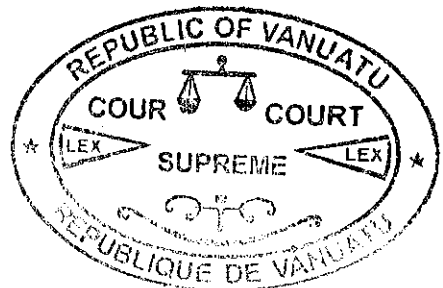
D. Costs are sought primarily on an indemnity basis because the VRA is a non-profit-making, charitable and supporting association dedicating to providing for the sport for the Vanuatu community. Additionally, the VRA is representing the interests of the public at large by taking this stand against this decision.

8. Paragraph 5 of the Claim for Judicial Review reads as follows:

The decision of the Minister of Lands of the time, the said Stephen Kalsakau, to grant the lease was unlawful being outside his powers as a Minister of Lands and an arrogant abuse and misuse of his powers as Minister of Lands arising under the Land Reform Act or howsoever.

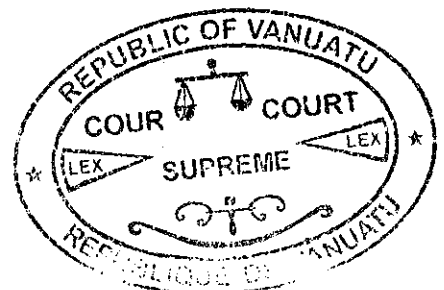
Particulars:

a. The said Stephen P. Kalsakau, as a Minister of Lands, purported to grant the lease for and on behalf of the Government of the day in reliance on s.9



(1) of the land Reform Act [CAP 123] and Article 80 of the Vanuatu Constitution.

- b. Article 80 provides that the Government may own land acquired by it in the public interest.*
 - c. Accepting that this is a public land and s.9 of the Land Reform Act applies, s.9 (1) simply declares that on the day of Independence, the land vests in the Government and is to be held by the Government for the benefit of the Republic of Vanuatu. As such, this section reinforces Article 80 of the Constitution.*
 - d. Subsection 9 (3) permits the Minister of Lands, on the advice of Council of Ministers, by statutory order to vest any public land in, "indigenous citizens or communities referred to in the order."*
 - e. Ultra Vires. The decision of Minister Stephen Kalsakau to grant the lease was not such a vesting of land, it was not undertaken by statutory order and it was not a decision made on the advice of the Council of Ministers. It was instead the conferring of private leasehold right to his associate Sandy Kalo and accordingly outside the powers reposed in the Minister of Lands under s.9 (1) of the Land Reform Act.*
 - f. Not in the public interest/ not for the benefit of the Republic of Vanuatu. Additionally, the decision of Minister Stephen Kalsakau to grant the lease to his associate Sandy Kalo was neither in the public interest nor the benefit of the Republic of Vanuatu.*
9. The Claimant further contends that both the price of VT500,000 specified as having being paid for the grant of the lease as well as the annual rental of VT15,000 represent a gross undervalue of a lease for this particular land if

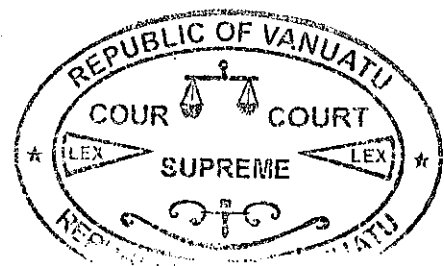


considered for residential purposes. Furthermore, that the use of just initials "SPK" to identify one of the lessees indicates an attempt to conceal the identity of that person or that entity from anyone undertaking an inspection of the public land records and it is highly irregular.

10. It is further submitted by the Claimant that this is the last area remaining of green-space or public reserve on the Port Vila side of the First Lagoon and it is thus of substantial value to the public. That this attempt to lease the land for residential purposes, and at such a gross undervalue, amounts to an attempt to deprive the public and thus the Republic of Vanuatu of the full benefit of this land and, if allowed to stand, will destroy the ability of the VRA to provide for the sport of rowing in Port Vila.

The Defence

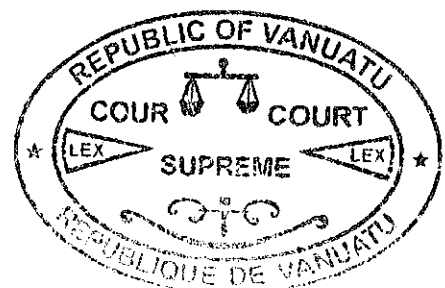
11. The First and Second Defendants say that the First Defendant's decision to grant the lease at a reduced or negotiated premium of VT500,000 was *ultra vires* the Act and unlawful and that the amount of premium that should have been paid on the lease is VT15,400,000.
12. Furthermore, the First and Second Defendants say that the circumstances surrounding the registration of the said lease were done by mistake and that the Claimant is entitled to the reliefs sought except as to costs.
13. In his defence, the Third Defendant says he negotiated with the First Defendant for a lease in respect of land formerly referred to as part of Old Title 2078 at Tassiriki. He says that on 15 November 2012, the First Defendant approved leasehold Title 11/OD41/064 in his name and that of his 12 year old son Sandy Pakoa Kalo (SPK).
14. Mr. Sandy Kalo contends that the premium of VT500,000 which he paid was determined by the Minister of Lands and that under the Land Leases Act [CAP163]



it was within the Minister's power to make such a decision. Mr. Kalo says that there was nothing unlawful concerning the registration of his lease and that he had complied with all lawful requirements set out under the Act.

The Evidence

15. The evidence adduced was by way of sworn statements and cross-examination of some of the deponents of the statements.
16. The Claimant relies on the following sworn statements:
 - a) Mr. Alan Kalfabun filed on 21 December 2013 (Exhibit C1)
 - a) Mr. Alan Kalfabun filed on 19 August 2013 (Exhibit C2)
 - b) Mr. Jeremy Dick filed on 21 August 2013 (Exhibit C4)
17. At paragraph 5 of his sworn statement filed on 19 August 2013, Mr. Kalfabun says that the First Lagoon is ideally suited to rowing as it is about four kilometres long and it is a sheltered waterway. Further, that no other waterway close to Port Vila (including the Second Lagoon, Port Vila Harbour or Mele Bay) comes close to being as suitable for rowing as the First Lagoon and that it is the obvious suitability of the First Lagoon for rowing that has enabled the sport to start up in Port Vila.
18. The witness went on to say (at paragraph 7) that the VRA understood that Thierry Bougeois, a local businessman, had an entitlement to the land as alienator given that this general area of land was developed many years ago by his late father, Pierre Bourgeois. He says that discussion took place which resulted in Mr. Bourgeois giving permission for the VRA to build a rowing clubhouse or shed on the land to house its boats and provide a club house for its rowing activities.
19. Mr. Kalfabun referred to a document annexed to his sworn statement as "AK3" which is a letter from Kapapa Lawyers & Consultancies dated 12th August 2013 and addressed to Mr. John Malcolm, Geoffrey Gee & Partners. It reads:



"Dear Sir,

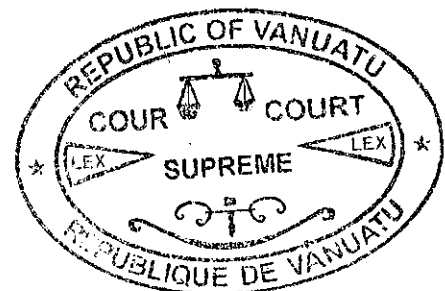
Re: Kalo Sandy & Ors v Vanuatu Rowing Association as Incorporated
Magistrate Court Civil Case No. 95 of 2013

1. We write in relation to the above hereto matter.
2. Our clients are registered lessee to land title 11/OD41/064 and has the legal rights to evict your clients from his property.
3. However, as pursuant to our conversation, our client is willing to sell the lease title at 35,000,000 Vatu. Such amount is negotiable within 14 days of the date of this letter.
4. We kindly request your clients to accept our clients offer as offered.

Respectfully,

Robin Tom Kapapa"

20. Evidence by the First and Second Defendants was by sworn statements of:
 - a) Mr. Paul Gambetta (Acting Director of Lands) filed together with annexures "PG1", "PG2", "PG3" & "PG4" on 17 January 2014 (Exhibit D1)
 - b) Mr. Menzies Samuel (Valuer General) filed on 17 January 2014 (Exhibit D2)
21. Mr. Gambetta gave evidence from matters within his own knowledge as Acting Director of Lands and from the records of the Department of Lands. At paragraph 4 of his sworn statement filed on 17 January 2014, he said that the Department's Land Leases Register green file for lease Title no. 11/OD41/064 contains the following documents:

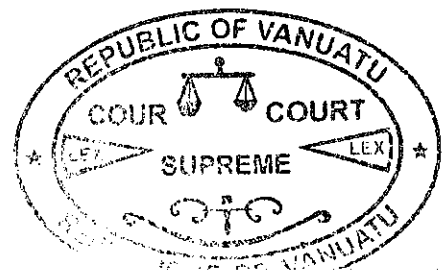


- I. Application for Registration, a true copy of which is attached and marked "PG1";
 - II. Lease instrument, a true copy of which is attached and marked "PG2"; and
 - III. Various other documents, true copies of which are attached and marked "PG3", including a letter dated 22 October 2012 from Hon. Steven Kalsakau, Minister of Lands to the Acting Director of Lands purporting to give an instruction to reduce the premium payable for the lease, stating that upon negotiation with the client, he had agreed to VT500,000 deal on the premium.
22. The witness went on to say that on 13 March 2013, the Second Defendant registered the lease between the First Defendant acting for and on behalf of the Government as lessor and SPK & Kalo Sandy as lessees.
23. Mr. Gambetta was cross-examined by Mr. Ngwele on the contents of his sworn statement. He maintained that the lease was unlawful. He also said that he goes through so many survey plans every day and looking at what should be the signature of the Surveyor General he can say that this signature does not reflect the signature of the Surveyor General.
24. Under cross-examination by Mr. Malcolm, the witness was asked whether the lease was unlawful. Mr. Gambetta responded:

"I say the lease was unlawful because of:

- 1. The survey plan;*
- 2. The letter from the Minister instructing the reduced premium i.e. "PG3";*
- 3. According to the lease document there was no proper valuation of the lease. The premium was not based on any valuation.*

25. Mr. Gambetta went on to say that he has been working for the lands department for over 20 years and that he was aware that this land in Tassiriki is within the



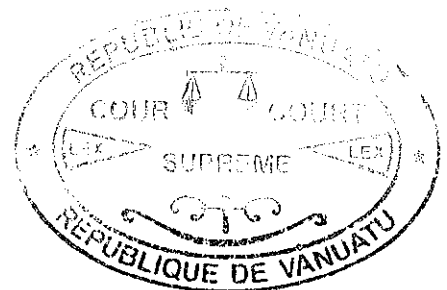
Municipality of Port Vila and this is state land as opposed to custom land. He agreed with counsel's suggestion that it would be public land. The witness also agreed that there are requirements that should be met under section 9 of the Land Reform Act before the Minister can take the land from the public to be leased. Mr. Gambetta confirmed that the Minister can only do so under the advice of the Council of Ministers (COM) and he said he was not aware of any COM's decision to that effect.

26. Mr. Gambetta was asked whether he knew of any other land dealings between Mr. Sandy Kalo and Minister Steven Kalsakau and he answered in the affirmative. He was shown leases in the name of Kalo Maraki and he said:

"Yes I see the leases to Kalo Maraki who is also Sandy Kalo. Yes that premium for VT1.4 Million refers to the house of the former Minister of Finance.

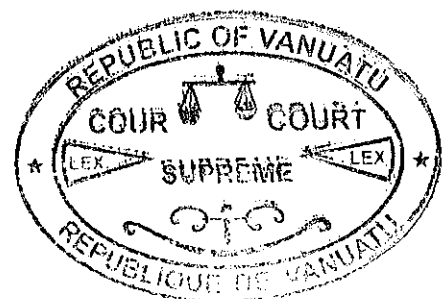
The other title of 11/OE21/037 was sold to Mr. Kalo for VT1.2 Million. Yes I am aware that he sold it 2 days later to the Chinese for VT16 Million. Yes he got over VT15 Million profit. Yes that was also done by Mr. Steven Kalsakau. Yes that property was the old Mental Hospital. Yes I am aware of other properties that were transferred cheaply by Mr. Kalsakau."

27. The second witness for the First and Second Defendants was Mr. Menzies Samuel. He gave evidence about his involvement with land valuation in Vanuatu for over 10 years.
28. At paragraph 6 of his sworn statement, Mr. Samuel states that in order to assess the premium for any given lease, the following methodology should be followed by a valuer:

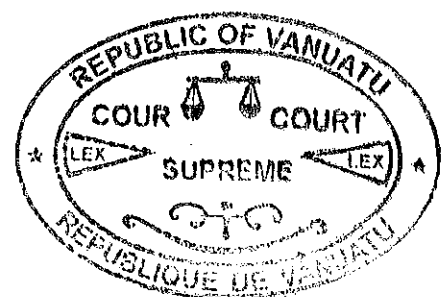


- a) *Assess the land value based on recent market evidence making adjustments as may be necessary for any differentiation between the sales evidence and the subject property.*
- b) (i) *After arriving at the value of the land, a valuer needs to assess the fair market rent [full rental value] of the land which percentage has been determined by the Minister of Lands by Order dated 19 August 2009.*
- (ii) *Where parties to a lease reached agreement that the lessee should pay the fair rent [full market rent], it is said that the full rental value is equal to the contract rent. As such the lessee does not enjoy a "profit rent" or the lessor does not lose out on the rent on the other hand.*
- (iii) *In the situation that the lessee is paying a lesser rent other than the full rental value it is said that the lessee is enjoying a "profit rent"*
- (iv) *Profit rent represents the lessee's interest in a lease on one hand and on the other hand the lessor's loss per annum over the period of the lease. To offset the lessor's loss of annual income streams, the annual income flows are discounted to their present value over the term of the lease. The capitalisation rate used in discounting the income streams is determined by a valuer depending on his/her opinion. The resultant of the discounted income loss or profit rent becomes the premium that a lessor could ask a lessee to pay upfront in order to enjoy a lesser rent.*
- c) *The premium is normally assessed from the point of view of the lessee and the lessor. Where there is a difference between the two opinions a median is reached by taking the average of the two.*

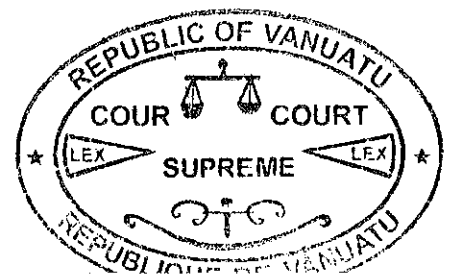
29. Under cross examination by Mr. Ngwele, Mr. Samuel said that the valuation is different from the premium and the mechanism of assessing the premium is based on rent depending on whether it is high or low. He said he had put the valuation at VT32 Million and based on the contractual rent he had arrived at a figure of VT15,400,000 for the premium.



30. In answer to questions put to him under cross-examination by Mr. Malcolm, the Valuer General said that according to the Lands Leases Act, premiums should be calculated as he has done. He also said that he did not agree that VT500,000 was a fair premium and he said that Mr. Kalo got the property for 1.5% of the market value of the property. He agreed with counsel's suggestion that Minister Steven Kalsakau's decision to grant the lease to Mr. Kalo for VT500,000 was unreasonable when the market value of the lease was VT 35 Million and the premium calculated was VT 15,400,000.
31. In his defence, the Third Defendant, Mr. Sandy Kalo, filed a sworn statement on 2 December 2013 and a further sworn statement on 21 August 2014 and these were admitted in evidence as Exhibit D4 and Exhibit D5 respectively. Mr. Kalo also produced and tendered a copy of his birth certificate (Exhibit D3) in which his name is shown as "Sandy Kalo Samuel Maraki Arelang".
32. Under cross-examination by Mr. Malcolm, Mr. Kalo confirmed that all these names are his and that anytime one of them appears on a document it refers to him. He also confirmed that he negotiated with Minister Steven Kalsakau for the seafront land next to Holiday Inn and he said he believes they are custom owners of the land. When it was put to him by counsel that the land is public land Mr. Kalo said: *"the Government got the land from us the custom owners"*.
33. Mr. Kalo went on to say that the premium of VT500,000 was fair and reasonable and he then gave three reasons for being given the lease at a low premium. First, it was a *bona fide* purchase and there is no evidence of fraud or mistake; Secondly, he says that he is a special person being the son of a Chief and therefore he has special entitlements; Thirdly, he is a purported custom owner of some of the land in Port Vila because his father and others had applied to be joined applicants in Land case 3 of 1995.



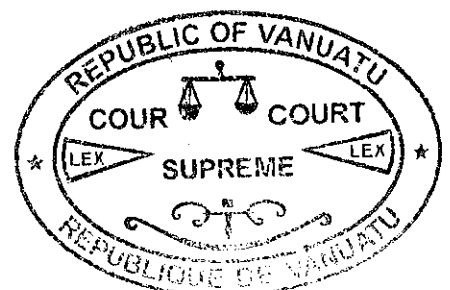
34. Mr. Kalo contends that during his negotiations for the lease the Minister of Lands was made aware of his customary claims. He said his father was Chief Marakipulemata and that his father had bestowed the title Marakiatelang on him as a Chief. He said he has the right to go and buy land under the Constitution and that he has another piece of land at Teouma which was given to him through the same process by Minister Korman. Mr. Kalo said that the Minister of Lands then issued an instruction to the Acting Director of the Department of Lands in which he stated that "upon negotiation" he had agreed for premium on the lease to be VT 500,000.
35. At paragraphs 5 and 6 of Mr. Kalo's sworn statement filed on 21 August 2014 (Exhibit D5) he deposes as follows:
- 5. My father claims part ownership of land within the Port Vila Municipal boundary. My father and his family have never been compensated by the State regarding their claims. Annexed hereto and marked as "A" is a true copy of my father's application to join as a party in Land Case No. 3 of 1995.*
- 6. I consider our claims genuine and the Island Court and the Land Tribunal have taken so long and have delayed to determine our claims. Notwithstanding the above any land which is within the Port Vila Municipal boundary is land which we claim part ownership of and we are entitled to."*
36. Mr. Kalo was asked whether he had heard Mr. Menzies' evidence that the premium value is VT15 Million. His response was: *"Yes I heard Mr. Menzies' evidence that the premium value is VT15 Million. Yes he referred to the valuation of Jeremy Dick at VT32 Million as the market value. As custom owners we do not look at money".*
37. Mr. Kalo was asked whether he thought Mr. Menzies' premium value of VT15 Million was a fair value and he said "yes". Then he went on to say that he paid



VT500,000 because when he negotiated with the Minister the latter had agreed that he should pay VT500,000 and since the Minister was acting on behalf of the custom owners he paid accordingly. He was asked whether he thought that a sale of public land for 1.4% of its value is fair to the people of Vanuatu and he said *"I think that is okay because if the Minister had agreed to it what could I say."* Mr. Kalo also contends that Minister Steven Kalsakau's decision to grant the lease to him for VT500,000, was not unreasonable because the Minister took into consideration the fact that the Government wanted the airport land at Tangoa.

38. During further cross-examination by counsel Mr. Malcolm, it was put to Mr. Kalo that upon being granted a lease for VT500,000, he had (through Yoan Kalsakau) immediately demanded VT500,000 for rental from the Claimant and that he had then threatened eviction when payment of the money was refused. However, Mr. Kalo denied knowledge of this and he said he did not send Yoan to Alan Kalfabun. He also denied knowledge of the letters written by his former counsel Mr. Kapapa offering to sell the lease to the Rowing Club for VT35, 000,000.
39. Mr. Kalo was questioned about other leases he had acquired from the former Minister of Lands Steven Kalsakau and he confirmed that he had paid VT1.4 Million for lease Title 11/0031/050 situate at Joint Court Area and that such land belonged to the ex Finance Minister. Mr. Kalo also confirmed that he had paid VT1.2 Million for the old Mental Hospital lease Title 11/OE21/037 and that he had sold the property a few days later to a Chinese for VT16 Million. Mr. Kalo agreed that he got a profit of almost VT15 Million on the sale of lease Title 11/OE21/037.
40. When Mr. Kalo was cross-examined about forgery of the survey plan and the alteration of the area on the Negotiator Certificate from 1000 to 3544m² he said:

"I don't know who changed it. It was the people at survey department who changed that figure. If they had advised me that the land was not appropriate I would not have taken it. The admin fee was VT2000 which I paid."



41. Mr. Kalo was re-examined by his counsel Mr. Ngwele. He maintained that his father was a special group of people who had received compensation of VT600,000 from Government for Port Vila town. He said maybe it was in 1987 because the PM was Mr. Korman and the Minister of Finance was Mr. Wilfred Jimmy. On the issue of the Negotiator Certificate, Mr. Kalo said that when he negotiated for it the Minister instructed the Secretary of the LMBC to prepare the document and after it was ready he was called to collect it. He said that at the survey's department he had spoken to Mr. Paul Gambetta who had sent two of his staff to do the survey and that the secretary of the LMBC prepared his lease.

The Issues

42. The Issues posed for determination in this application for judicial review are:

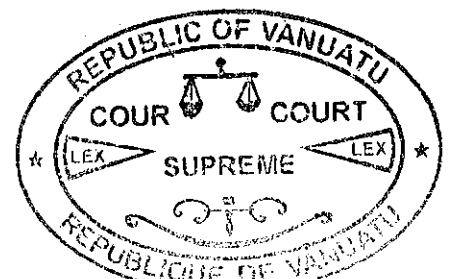
- a) **Whether the decision of the Minister of Lands to grant the lease was lawful in terms of the Land Reform Act and other legislation;**
- b) **Whether the Minister acted *ultra vires* the powers conveyed on him pursuant to subsections 32D (2) and (3) of the Land Leases Act.**
- c) **Whether the registration of the lease was unlawful to warrant a rectification by cancellation pursuant to section 100 of the Land Leases Act.**

43. It is perhaps timely to look at the following relevant statutory provisions:

- **The CONSTITUTION**

- **ARTICLE 80**

- *"Notwithstanding" articles 73 and 74 the Government may own land*



acquired by it in the Public Interest.

ARTICLE 77 - COMPENSATION

“Parliament shall prescribe such criteria for the assessment of compensation and the manner of its payment as it deems appropriate to persons whose interests are adversely affected by legislation under this chapter”.

(4) *When an Order is made under subsection (3) it shall provide for payment of compensation to the custom owners by the Government and the amount of such compensation shall be set out in the Order.*

- **LAND REFORM ACT [CAP 123]**

8. Minister to have general management and control of certain land

(1) *The Minister shall have general management and control over all land –*

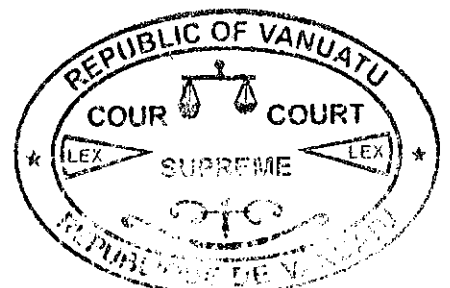
a) *Occupied by alienators where either there is no approved agreement in accordance with sections 6 or 7 or the ownership is disputed; or*

b) *not occupied by an alienator, but where ownership is disputed; or*

c) *not occupied by an alienator, and which in the opinion of the Minister is inadequately maintained.*

(2) *Where the Minister manages and controls land in accordance with subsection (1) he shall have power to –*

a) *consent to a substitution of one alienator for another;*



- b) *conduct transactions in respect of the land including the granting of leases in the interests of and on behalf of the custom owners;*
- c) *take all necessary measures to conserve and protect the land on behalf of the custom owners.*

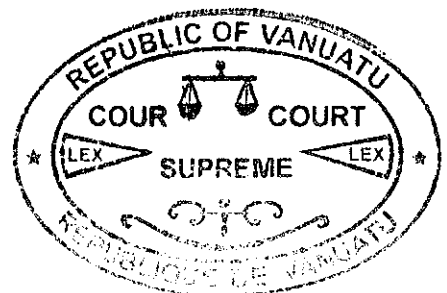
9. Vesting of state land

- (1) *On the Day of Independence all state land shall vest in the Government and be public land and be held by it for the benefit of the Republic of Vanuatu.*
- (2) *The Minister, on the advice of the Council of Ministers, may by Order declare that any land described in the Order ceases to be public land.*
- (3) *In accordance with Article 81 of the Constitution the Minister may, on the advice of the Council of Ministers, by Order vest any public land in indigenous citizens or communities referred to in the Order.*

• Land Leases Act [CAP 163]

32A Application of sections 32B and 32C

- (1) *Sections 32B and 32C apply only to leases of public land.*
- (2) *In subsection (1), public land means land:*
 - (a) *declared to be public land under the Land Reform Act [Cap. 123] or any other Act; or*
 - (b) *acquired for a public purpose under the Land Acquisition Act [Cap. 215].*



• **Land Leases (Amendment) Act No. 5 of 2007**

32D Premium payable for the issue of a new lease

(1) *This section applies to:*

(a) *a new lease on land not previously subject to a lease; or*

(b) *a new lease as part of a subdivision; or*

(c) *a new lease as part of a strata title development.*

(2) *A new lease is not to be issued unless the lessee or the registered proprietor pays to the Minister a premium based on the full rental value of the unimproved value of the land as determined by the Minister from time to time and the contract rent as agreed to by the lessor and the lessee.*

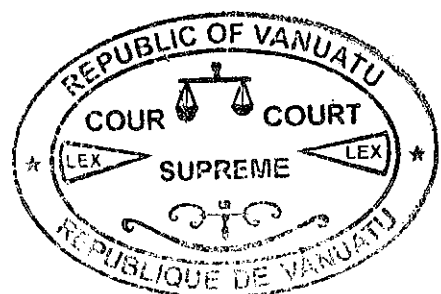
(3) *A lessee must pay to the Minister the premium referred to in subsection 32D (2) before the lease is issued to the lessee.*

(4) *The Minister may by order, prescribe the full rental value of the different classes of leases which are to be reviewed every 5 years.*

• **Section 100 Land Leases Act**

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*

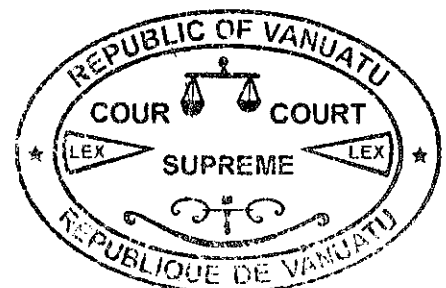


satisfied that any registration has been obtained, made or omitted by fraud or mistake.

(2) *The register shall not be rectified so as to affect the title of a proprietor or 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."*

Discussion and Determination

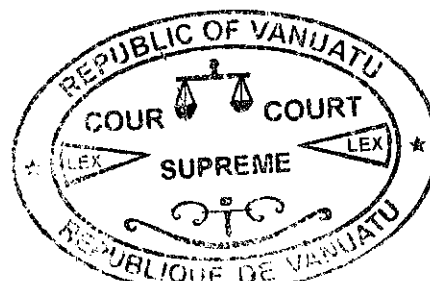
44. As was said by Aronson & Dyer in Judicial Review of Administrative Action 2nd Edition at p. 674, "...one of the most fundamental assumptions underlying the law of judicial review is that it is the duty of superior Courts of general jurisdiction to ensure that public power is exercised according to law."
45. Mr. Justice Simon Brown in **R v HM the Queen in Council, ex parte Vijayatunga** [1988] QB 322 put it thus: "judicial review is the exercise of the Court's inherent power at common law to determine whether an action is lawful or not; in a word, to uphold the rule of law." This present case is arguable under that principle as it relates to the exercise of public power by the Minister of Lands of the time. The first step is to accept what Brennan J. conceded in **Attorney-General (NSW) v Quin** [1990] 170 CLR 35, namely that the duty of the Courts "extends to judicial review of administrative action alleged to go beyond the power conferred ... by the prerogative or alleged to be otherwise in disconformity with the law."
46. What the Claimant has applied for before this Court are Orders that the decision of the Minister to grant the lease to the Third Defendant be quashed as being ultra vires and for the Director of Lands to be directed to rectify the said lease by cancelling its registration.



47. The First and Second Defendants' position in this matter is unequivocal. They clearly submit that the Minister's decision to grant the lease at a reduced or negotiated premium of VT500,000 was *ultra vires* the Act and unlawful and that the amount of premium that should have been paid on the lease is VT15,400,000. Furthermore, the First and Second Defendants say that the circumstances surrounding the registration of the said lease were done by mistake and that the Claimant is entitled to the reliefs sought except as to costs.
48. For his part, Mr. Kalo contends that the premium of VT500,000 was fair and reasonable on the basis that it was a *bona fide* purchase and there is no evidence of fraud or mistake; Secondly, he says that he is a special person being the son of a Chief and therefore he has special entitlements; Thirdly, he is a purported custom owner of some of the land in Port Vila because his father and others had applied to be joined applicants in Land case 3 of 1995.
49. I am inclined to agree with Mr. Malcolm's submission that there is no class of people in the Constitution of Vanuatu or anywhere designated as "*special people*". No one in Vanuatu is of any special status and is above the law and, for the purposes of this judicial review, the question as to whether Mr. Kalo is a Chief's son, is irrelevant. Furthermore, there is no law granting the son of a Chief from somewhere, the entitlement to a section/portion of land worth VT35,000,000 for VT500,000 where there is no valid and subsisting Court ruling or Tribunal decision or any decision whatsoever as to entitlement.

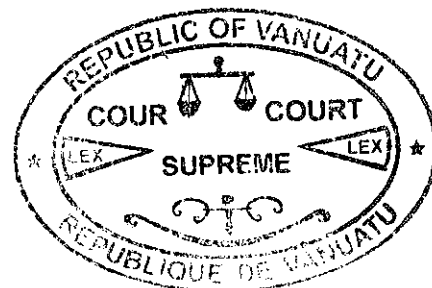
Submission on Wednesbury Principle

50. Mr. Malcolm submitted that the unlawful use of the Land Reform Act by the Minister of Lands on his own, and without the advice or consent of the Council of Ministers, to grant a lease of public land to the Third Defendant, without reasons, deprives the public from the only right to access the entire first lagoon. Counsel further submitted that the decision is at a public loss of VT34,500,000 with no



explained benefit to the Republic of Vanuatu and that it is an unreasonable and unlawful decision and, as such, it is a reviewable decision along lines sought in the application.

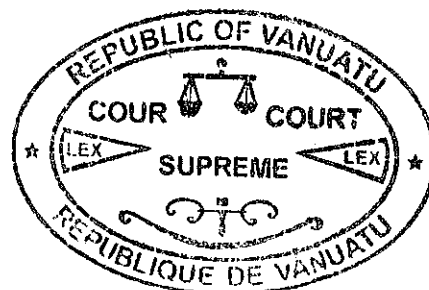
51. For his part, Mr. Ngwele cited the case of **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1948] 1 KB 223 and he submitted that the decision to grant the lease to the Third Defendant for VT500,000 was not unreasonable.
52. I am mindful of the fact that the doctrine of Wednesbury unreasonableness is regularly relied upon by the Courts and they can interfere with a decision if it is so absurd that no reasonable decision maker would in law come to it. Invariably, the Courts will intervene to quash as being illegal the exercise of an administrative discretion.
53. The pivotal question for determination by this Court in this judicial review claim is **whether the decision of the Minister of Lands to grant the lease was lawful in terms of the Land Reform Act (LRA) and other legislation?** S.8 LRA states that the Minister shall have general management and control of certain land in Vanuatu. Thus the section allows for the Minister of Lands to issue leases if:
 - a) It is in the interest of the custom owners and,
 - b) It conserves and protects the interest of the custom owners,
 - c) It is done pursuant to advice from the Council of Ministers.
54. Mr. Tari (SLO) has referred me to the case of **Family Kalsakau v Chief Manto Kalsakau III** [2006] VUSC 72 which involved an application for Judicial Review. In his judgment, the Chief Justice said *"there is no doubt in law that the Minister of Lands has powers under Section 8(1) (2) of the Land Reform Act [CAP.123] to*



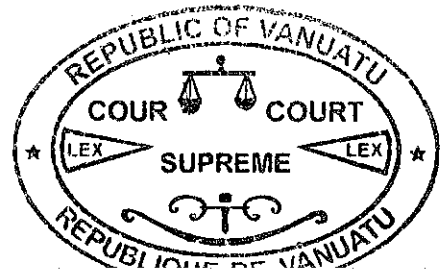
manage and control the land on behalf of the disputed custom owners. The existence of the power is established. However, the exercise of such powers cannot be made in contravention of the basic procedural requirements set out under the Land Leases Act [CAP.163]." Although of course the facts in that case were different, I am of the view that the principle applies equally to this present case.

55. I have also considered the provisions of **S.9 (1) LRA** which states that *on the "Day of Independence all state land shall vest in the Government and be public land and be held by it for the benefit of the Republic of Vanuatu"*. The Minister of Lands is only able to *declare that any land described in the Order ceases to be public land* by an Order issued under the advice of the Council of Ministers pursuant to **s. 9 (2). Subsection (3)** provides that in accordance with Article 81 of the Constitution the Minister may, on the advice of the Council of Ministers by Order vest any public land in indigenous citizens or organisations (underlining mine) referred to in the Order for such payment by them and on such terms and conditions as may be referred to in the Order.
56. The lease itself stipulates and highlights that Hon. Steven Kalsakau, Minister of Lands is acting under **S.9 (1)** of the **Land Reform Act** for and on behalf of the Government as the "LESSOR". **S.9** only gives the ability to the Minister to vest public land to indigenous people or, an organization, only on the advice of the Council of Ministers. However, in this case:
- a) It is public land
 - b) There is no Council of Ministers advice to vest the land
 - c) To Indigenous people or an organization

It is interesting to note that Mr. Kalo is not an organization and Mr. Kalo and "SPK" are not a group of indigenous people. Mr. Kalo is merely an individual and the section does not allow for a vesting in an individual



57. Having regard to the evidence now before the Court, it is clear to me that this land in Tassiriki is public land without custom owners and therefore the Minister had no right to control or lease the land other than under **S.9** of the **LRA**. Equally, the Minister did not act on the advice of the Council of Ministers as he is required to do in accordance with **s. 9(3)** since the land, which is the subject matter of the lease, is public land. I find that, without such advice, the Minister had no right to deal with the land or to issue a lease for 1.4% of its value and thereby deny the VRA access to the only beachfront property with access to the first lagoon. **Such a decision is on its face ultra vires and consequently the lease is an unlawful lease and is null and void.**
58. I now turn to the next issue which is **whether the Minister acted ultra vires the powers conveyed on him pursuant to s. 32D (2) and (3) of the Land Leases Act (LLA)?** The section clearly spells out that a new lease is not to be issued unless the lessee or the registered proprietor pays to the Minister a premium based on the full rental value of the unimproved value of the land as determined by the Minister from time to time and the contract rent as agreed to by the lessor and the lessee. A lessee must pay to the Minister the premium referred to in subsection **32D (2)** before the lease is issued to the lessee. In this case however, the premium paid by Mr. Kalo is by far less than the assessed premium amount of VT15,400,000. **Suffice to say that, in negotiating the premium with the Third Defendant, the Minister failed to observe the requirement of s. 32D (2) and (3) and thus he acted ultra vires the powers conveyed on him under the LRA.**
59. It is also in evidence that the survey plan did not follow the formal survey procedures of the Department of Lands as specified under **s.18** of the **Land Surveyors Act [CAP 175]**. It provides that *“Every survey of land for the purposes of the Land Leases Act [Cap. 163] shall be carried out under and in accordance with the directions of the Director”*. In cross-examination, Mr. Paul Gambetta clearly explained that for a survey plan to be completed it has to be approved by the Director of Lands or if that duty has been delegated it should be approved by

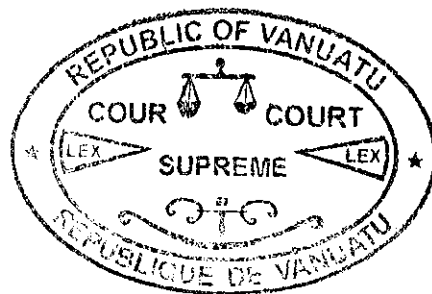


the Surveyor General. He confirmed that the Third Defendant's survey plan did not carry with it the approval of the Director and/or the Surveyor General and their signatures were not imprinted on the survey plan. He said he feels that the Third Defendant's survey plan did not pass through the formal survey procedures of the Department of Lands. I must say that I am satisfied with Mr. Paul Gambetta's evidence and I accept it as credible.

60. In his closing submissions, Mr. Ngwele referred the Court to the Department of Lands Public Counter Acceptance Checklist (i.e. annexure "PG1" of Exhibit D1) and counsel forcefully submitted that the Third Defendant had complied with all the procedures and obtained all the approvals to have his lease registered as evidenced from the check list. This contention in my view is misconceived as it fails to take cognizance of the application of **section 100** of the **LLA** which empowers the Court to order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.

Conclusion

61. Upon considering all the evidence adduced as well as the written and oral submissions, I have reached the following conclusion:
- a) The Minister of Lands is in breach of his Wednesbury responsibility and his decision to deprive the public of the only public access to the first lagoon for a price of 1.4% of its actual commercial value, where there is no benefit to the public, is an unreasonable decision.
 - b) The Minister of Lands is in breach of the law as stipulated in the Land Reform Act and Land Leases Act.

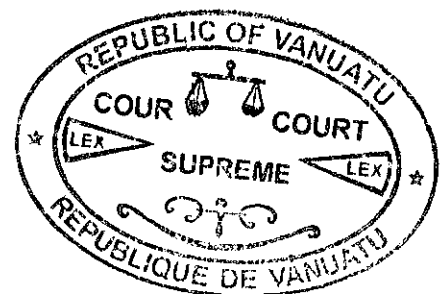


- c) The Government agrees the Minister of Lands acted in breach of his Wednesbury responsibility and in breach of the law.
- d) The Minister of Lands' decision to grant the lease to the Third Defendant is on its face ultra vires and consequently the lease is an unlawful lease and is null and void.
- e) The answer to the third question for determination i.e. **whether the registration of the lease was unlawful to warrant a rectification by cancellation pursuant to section 100 of the Land Leases Act is Yes.**

62. In the circumstances, **Orders** are made accordingly as follows:

1. The decision of the Minister to grant the lease to the Third Defendant is hereby quashed as being ultra vires.
2. Lease Title Number 11/0D41/064 is hereby declared null and void.
3. The Director of Lands is directed to rectify the lease by cancellation pursuant to section 100 of the Land Leases Act.
4. The Claimant is entitled to costs against the Third Defendant on the standard basis. Such costs shall be taxed failing agreement.
5. The First and Second Defendants are to refund the monies that were paid by the Third Defendant for the processing of the lease.

DATED at Port Vila, this 29th day of July, 2015.



BY THE COURT


M.M. SEY
Judge

