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

Civil Case No. 193 of 2011

BETWEEN: RICKY TORO & TONY TORO representing Family Toro
Claimants

AND: SAM KIRI as representative of The Estate of the Late KALCHILI KIRI
First Defendant

AND: THE REPUBLIC OF VANUATU
Second Defendant

AND: MEDICI INVESTMENT LTD
Third Defendant

AND: ZHENG YU PENG
Fourth Defendant

AND: THE OPERATION EDUCATION VANUATU COMMITTEE (INC)
Fifth Defendant

Dates of Hearing: ***Thursday 25 and Friday 26 February 2016***
Dates of Submissions: ***Friday 4 and Wednesday 9 March 2016***
Date of Judgment: ***Tuesday 15 March 2016***

Before: ***Justice S M Harrop***

Appearances: ***Mary Grace Nari for the Claimants***
No appearance for the First Defendant
Hardison Tabi (SLO) for the Second Defendant
Leon Malantugun and Wilson Iauma for the Third Defendant
No appearance for the Fourth Defendant

Christina Thyna for the Fifth Defendant

RESERVED JUDGMENT OF JUSTICE SM HARROP

Introduction

1. From 4 December 2006 the Land Leases Register showed in respect of leasehold title 12/0633/059 that the lessor was the claimants and the lessee was Kalchili Kiri.

2. Section 36 of the Land Leases Act [Cap 163] ("the Act") provides that:

> *"....any disposition of land leased under a registered lease or any disposition of any part of such land or interest comprised therein shall not be registered until the written consent of the lessor for such disposition verified in accordance with section 78 has been produced to the Director".*

3. In breach of section 36, on 10 February 2009 the Director of Lands registered a transfer of lease 059 from Mr Kiri to Medici Investment Ltd, the third defendant ("Medici"), without having had produced to him the written consent of the claimants. He *did* have produced to him the written consent of the then Minister of Lands, Raphael Worwor, who had no right to purport to consent to the transfer and who made a false statement within that document that he was registered as lessor of leasehold title 059. The Minister of Lands had been the lessor from 15 May 2000 until 4 December 2006 but after that he was not, the claimants were.

4. This case demonstrates how badly matters can go wrong when both a Minister of Lands and the Director of Lands act unlawfully in relation to the registration of dealings on a leasehold title. Without either one of them acting unlawfully the various problems that have ensued could not have occurred. There is no doubt that the Republic of Vanuatu has to take at least prima facie responsibility for the unlawful actions of both the Minister of Lands and the Director and for the consequences of those actions. Whether that translates into an award of damages against the Republic is to be determined in this judgment.

5. The unlawful registration of the transfer was accompanied by a surrender by Medici of the lease it had just acquired. Consent to that surrender was given to by the then Minister of Lands, John Morsen Willie. He acted unlawfully in doing so because he represented to the Director that he was registered as lessor when he was not, the claimants were. The surrender document itself contained a further unlawful purported lessor's consent, from Mr Worwor in his capacity as Minister of Lands, again something he had no right to do because he was not the lessor.

6. By registering the surrender the Director again acted in breach of section 36 so these were further examples of the Minister of Lands (twice) and the Director acting unlawfully.

7. Following the surrender of the lease, a subdivision of the land previously contained in leasehold title 059 was carried out and 28 new leasehold titles were created. Then 28 new leases were signed with numbers 12/0633/863 – 890. Eight were signed by the Minister of Lands as lessor and 20 were signed

by Mr Kiri as lessor. Medici was the lessee in each case. The declared custom owner and formerly registered lessor of that land, the claimants, unsurprisingly given the history, were not recorded as lessor on any of these leases of their land and had no idea that this had occurred. However, to be consistent with the position at the time of surrender one would at least have expected the Minister of Lands to have been the lessor in respect of all 28 new leases. There is no basis on which Mr Kiri as *lessee* of the 059 lease could properly have become the *lessor* of 20 of the titles.

8. In the course of this proceeding Justice Spear, in an interim reserved judgment dated 18 November 2013, made orders ensuring that the registered lessor on each of the 28 titles was the claimants and preventing further dealings with those leases without further order of the Court or the prior written consent of the claimants. At that point, and still, 14 of the titles remained in the name of Medici, those numbered 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881 and 882. A further 13 had been transferred to Zheng Yu Peng the fourth defendant and he still holds them. They were numbered 863, 864, 865, 866, 867, 868, 884, 885, 886, 887, 888, 889 and 890. Finally, lease title number 883 had been transferred to, and remains held by, The Operation Education Vanuatu Committee (Inc), the fifth defendant.

9. After investigation of the circumstances in which Zheng Yu Peng acquired his 13 leases, the claimants accepted that he likely had available to him a defence under section 100 (2) of the Act i.e. he was a purchaser in possession who had acquired his interests for valuable consideration without knowledge of or substantial contribution to the wrongful registration of those leases.

Accordingly, on 13 October 2015, the claimants discontinued their claims against the fourth defendant.

10. In their second amended claim dated 30 September 2014 the claimants seek an order for rectification by way of cancellation of the registration of the 15 leases held in the name of the third and fifth defendants. They also seek damages against the second defendant, but not against any other defendant. None of the defendants offered any opposition to the cancellation of the leases held in the name of the third and fifth defendants and appropriate orders will be made at the end of this judgment, the focus on which is accordingly on whether damages should be awarded to the claimants against the second defendant and, if so, in what sum.

11. Against this background, at the outset of the trial and as recorded in two trial bench notes, I excused counsel for the third and fifth defendants. Each of those parties reserved the right to take a fresh claim attempting to recover losses they have allegedly suffered.

Chronology

12. To set the scene for the making of the orders under section 100 of the Act and to contextualise the opposed claim for damages against the second defendant, it is necessary to set out the essential events in chronological order.

25 April 2000

Mr Kiri as lessee signs a lease for title 12/0633/059 with the then Minister of Lands Maxime Carlot Korman signing as lessor pursuant to section 8 of the Land Reform Act [Cap. 123] i.e. in circumstances where the custom

ownership of the land was disputed, he signed *"in the interests of and on behalf of the custom owners"*. The term of the lease was 50 years commencing on 28 March 2000 with annual land rent of Vt6, 400. No premium was paid.

15 May 2000

The 059 lease from Minister of Lands to Mr Kiri is registered.

30 November 2005

The Ifira Village Land Tribunal declares Family Toro the custom owner of part of the land known as Laviskoni Land.

24 January 2006

The Secretary of the Ifira Council of Chiefs writes to the Director of Lands saying that lease title 12/0633/059 is not within the portion of land declared to Family Toro by the Tribunal.

4 December 2006

Pursuant to the Tribunal's declaration of 30 November 2005 (and despite the letter of 24 January 2006) leasehold title 059 is rectified by the Director as to the lessor. It records the claimants as registered lessor.

31 January 2007

The claimants as lessor issue a notice before forfeiture to Mr Kiri as lessee on the ground that he had not been paying the land rent and that squatters were residing on the land.

8 February 2007

Mr Willie Daniel, a lawyer in the then firm of Kilu, Daniel and Warsal, writes to the Director of Lands saying that they act for Mr Kiri the lessee and complaining that the notice before forfeiture was baseless as the claimants should not have been inserted into the leasehold title as lessors because the 059 lease land is not within the boundaries of Laviskoni Land of which they had been declared custom owner. Mr Daniel referred to the earlier letter of 24 January 2006. He requested that the Director cancel the registration of the claimants as lessor forthwith so as to bring the forfeiture action to an end and further to allow Mr Kiri to transfer the title to one Adam Smith with whom he had already reached agreement. The Director does nothing to change, or attempt to change, the register. The claimants remain as registered lessor at all material times.

6 June 2008

The Valuer-General, Menzies Samuel, issues a determination in the forfeiture case. He accepts that the ground for forfeiture by way of non-payment of rental was made out but considers that forfeiture would be Draconian. Accordingly relief against forfeiture was granted but on the basis that Mr Kiri pay the claimants directly the current annual rent and future rent in accordance with the lease.

22 December 2008

The Minister of Lands, Raphael Worwor, consents to the transfer of lease title 059 from Mr Kiri to Medici.

10 February 2009

The transfer of the 059 lease from Mr Kiri to Medici is registered. The consideration is Vt 1 million and (apparently) half of the shares in Medici. Also on this day lease title 059 is surrendered with the written consent of Minister Worwor, there having been an earlier written consent to the surrender by another Minister of Lands John Morsen Willie (the date of which is unclear). There is a subdivision of the land previously contained in title 059 and 28 new leasehold titles are created.

The following eight new leases are registered on this day: 12/0633/863, 864, 865, 866, 867, 868, 869 and 883, having been signed on 21 November 2008 between the Minister of Lands as lessor and Medici as lessee.

3 September 2009

Registration of the transfer of lease title 883 from Medici to The Operation Education Vanuatu Committee. Consent to that transfer had been given on 11 June 2008 by Minister of Lands Maxime Carlot Korman.

3, 6 and 7 June 2011

The balance 20 new leases are registered between Mr Kiri as lessor and Medici as lessee for 75 years commencing on 10 or 11 May 2011, these being titles numbered 870-882 and 884-890.

26 October 2011

Registration of transfer of lease 867 from Medici Investments Ltd to Zheng Yu Peng.

28 October 2011

Registration of transfer of seven leases from Medici to Zheng Yu Peng, these being titles 884-890.

Unknown date

Registration of the transfers of a further five leases by Medici to Zheng Yu Peng, numbers 863-866 and 868.

Procedural History of this Claim

13. After the claim was issued on 14 October 2011, there were various conferences before Justice Spear where efforts to confirm service, representation and other procedural issues were addressed. Ultimately the first defendant and third defendant took no steps and the case was set down for trial before Justice Spear on 7 November 2013. In the judgment dated 18 November 2013 His Lordship noted that there was no dispute about the essential facts and that it was *"crystal clear"* that the Minister of Lands did not have the lawful power to consent to the transfer of lease 059 from Kalchili Kiri to Medici Investment Ltd. His Lordship also noted that Mr Kiri became a 50% shareholder in Medici with Mr Dominique Dinh holding the remaining shares and that accordingly:

> *"Kalchili Kiri must have known that the consent of Family Toro was required for the transfer of the lease to Medici Investments Ltd yet his failure to obtain their consent is telling. Furthermore, given that Kalchili Kiri received 50% shareholding in Medici Investment Ltd, clearly as part and parcel of the overall transaction, the Court has no difficulty at all inferring that Medici Investment Ltd was well aware at the time it took the transfer of the lease from Kalchili Kiri that*

Family Toro was the lessor and that the consent of Family Toro was required."

14. His Lordship concluded that if matter had stopped there i.e. there had been no subdivision, then the case could have been brought to a conclusion. His Lordship observed:

"Without question, the registration of the transfer of the lessee's interest from Kalchili Kiri to Medici Investment Ltd occurred as a result of either mistake or fraud which should have been easily appreciated by the Director of Lands at the time the transfer was tendered for registration. The "mistake" or "fraud" is the registration of the transfer with the consent endorsed from the Minister of Lands rather than the registered lessor being Family Toro."

15. I respectfully endorse and adopt everything that Justice Spear said. However, the Court was unable to finalise the matter in 2013 because it emerged that following the subdivision Medici had onsold some of the titles and there was the potential for such purchasers to have a defence under section 100 (2) i.e. that they had acquired their interest in the leasehold titles in good faith, for value and without knowledge or contribution to earlier mistake or fraud.

16. During 2014 and 2015 there were frustrating delays and extensive efforts to clarify the position of the third, fourth and fifth defendants.

17. As noted above eventually, on 13 October 2015, the claim against Zheng Yu Peng, the fourth defendant, was discontinued.

18. The first defendant , the nominal executor of Mr Kiri's estate, has taken no step and no relief is sought against him. The third defendant has also taken no step to oppose the claim although it did file sworn statements from Mr Dinh about the relevant onsales. Mr Malantugun and Mr Iauma appeared at the trial but confirmed that the third defendant had no opposition to the cancellation of the registration of the leases which it still retained. In passing, I observe that concession is in itself revealing. It amounts to an acceptance by Medici that it could not possibly contend under section 100(2) of the Land Leases Act that it received those titles without notice of the fraud or mistake which allowed them to be issued following the transfer of title 059 to Medici, no doubt for the reasons identified by Spear J. As I pointed out to Mr Malantugun, in the event that Medici considers it has or will suffer a loss which ought to be recoverable from another party following the cancellation of the registration of its titles, it will have the opportunity to issue a fresh proceeding.

19. The fifth defendant instructed Mrs Thyna only two days before the trial but she helpfully filed a defence and counterclaim, a sworn statement in support from Stanley Alick and opening submissions. The essence of the fifth defendant's position is that it received the land from one Moise Kaloris who apparently had some connection with the third defendant. It made no payment for the land but has been operating its charitable business there since 2009. Mr Alick noted that if its lease is cancelled then it will suffer a loss by way of the development undertaken on the land and it seeks reimbursement in the sum of AUD$37,260 plus costs.

20. The fifth defendant accepted that it was not in a position to dispute that the registration of its title was obtained through mistake or fraud; rather it knew nothing about the history. Further, it paid nothing for the land so it accepted that it could not avail itself of the protection of section 100(2). Accordingly it could not oppose the cancellation of its lease. However, it wished to reserve its right to make a claim. I declined to accept its counterclaim at that very late stage of the proceeding but there was no resulting prejudice because any cause of action it may have against any party will only accrue following the implementation of the orders I will make at the end of this judgment. It will then have a right to launch a separate claim if it thinks fit. Whether it has any sort of claim against the claimants who themselves are victims of the improper conduct of a number of parties is debatable but that is a matter for the fifth defendant to consider. I did urge the claimants and the fifth defendant to discuss the situation to see whether some form of agreement could reached about the way forward, including whether on some basis the fifth defendant might remain in occupation of leasehold title 883.

21. The second defendant also accepted at the outset of the trial that it could not oppose the cancellation of the registration of the leases which remain in issue i.e. those in the names of the third and fifth defendants. It accepted that these had been registered at least by mistake, if not fraud, following on from the registration by mistake, if not fraud, of the transfer of the 059 lease from Mr Kiri to Medici and the surrender of that lease. It accepts the rulings made by Justice Spear. There has been no appeal and His Lordship noted in his judgment that the orders were made without opposition from the State. Because it will be relevant in considering submissions later, I note this means the Republic accepts that the claimants were from 4 December 2006 properly

registered as lessor and later properly registered as lessor of the 28 new leases. It also means - necessarily- that the Republic accepts, despite the 24 January 2006 letter, that the Tribunal did declare the claimants as custom owners of the 059 lease land.

22. The second defendant however denies any liability for the losses claimed by the claimants and pleads that whatever errors there may have been by staff at the office of the Director of Lands, these were made based on information provided to them and in good faith; accordingly section 9 (in particular) and section 24 of the Act protect it from any liability for damages. It also contends (in submissions, though this is not pleaded) that in any event the registration in favour of the claimants on 4 December 2006 was itself a mistake, which led to the various other mistakes. That is because - it says- the Tribunal decision did *not* declare that the Toros were custom owners of the 059 land. This submission is clearly at odds with the Republic's acceptance of the correctness of the orders of Spear J.

23. The only witness who was called for cross-examination at the trial was Jean-Marc Pierre, the Director of Lands both now and at all material times. In summary he accepted there had been a number of errors on the part of the staff of his Department. I will discuss his evidence in more detail in connection with the damages issue.

Is the second defendant liable in damages to the claimants?

24. It is first necessary to detail the particular conduct of the various Ministers of Lands and the Director and/or his staff which is said to give rise to liability

for damages. This may be summarised as follows, these having been set out in my Minute to counsel of 29 February 2016:

> *"1) On 22 December 2008 the Minister of Lands (Mr Worwor) consented to the transfer of lease title 059 from Mr Kiri to Medici. That document asserts that he as Minister was registered as lessor of the land. He was not, the Toros were. This was therefore a false statement provided to the Director.*
>
> *2) On 10 February 2009 the transfer of lease 059 from Mr Kiri to Medici, dated 30 December 2008, was registered. Here the Director was at fault because there was no consent, as required by section 36, from the lessor namely the Toros.*
>
> *3) There was arguably a further error by the Director, or at least one compounding the other, in that he treated the consent of the Minister as valid when the register clearly showed that after 4 December 2006 he was not the lessor. That consent should have been rejected as should the application for registration of the transfer.*
>
> *4) On 10 February 2009, the surrender of the lease 059 was registered. The surrender itself was dated 21 November 2008 and signed by Medici as lessee and Minister Worwor as lessor at a time when Medici was not (yet) even the lessee, though it was registered as such on 10 February 2009. Further, Mr Worwor was not the lessor, the Toros were. At fault here is the Department for accepting and registering the surrender without section 49 (1)(b) being satisfied i.e. the instrument of surrender was not executed by the lessee and the (true) lessor. Also at fault was the Minister for signing the surrender of lease on 21 November 2008 when the lease was not his to surrender.*
>
> *5) There was also a consent to this surrender and to subdivision into 28 plots and the execution of new leases in replacement signed by John Morsen Willie, the Minister*

of Lands. The date of that is a little unclear (10 June 2007?) but in any event this was another false declaration by a Minister of Lands because it says he is registered as lessor of leasehold title 059 when he was not, the Toros were. Accordingly the Minister was here at fault for consenting to the surrender of a lease which was not his and to subdivision of land which was not his. The Director is at fault for accepting and acting on a consent given by somebody who was not the registered lessor.

6) *Of course, on a lease being surrendered, the ownership of the underlying land does not change. It still belonged to the Toros. Accordingly when the 28 new titles were issued they all ought to have been signed by the Toros as lessors. Instead, eight were signed as lessor by the Minister and the other twenty by Kalchili Kiri. Neither of these people were the lessor, the Toros were. Apart from Mr Kiri being at fault, the Minister is at fault for signing eight new titles in respect of land he did not own and the Department is at fault for registering 28 new titles without any involvement of the true lessor, again in breach of section 36.*

7) *There were then transfers by Medici of 14 of its leases, 13 to Zheng Yu Peng and the other to Operation Education Vanuatu Ltd. There were consents to eight of these transfers by the Minister of Lands (Steven Kalsakau in every case, except one from Maxime Carlot Korman). At fault here are these Ministers for consenting to transfers of leases of which they were not the lessor and again the Department for acting on consents not given by the true lessor, in breach of section 36."*

25. In respect of the damages claimed for the conduct of the various Ministers of Lands and the Director for Lands and his staff, the Republic in its defence dated 27 November 2014 pleads that when the transfer of the 059 lease from

Mr Kiri to Medici was registered the Republic *"was of the view that the land subject to lease title 12/0633/059 is not within the portion of Laviskoni land declared by the Ifira Lands Tribunal to family Toro."*

26. It further pleads that the Minister gave consent based on information provided that the 059 land was not within the part of the Laviskoni land declared to Family Toro and that the Director registered the transfer on the basis of this information as well. It repeats these points in respect of the subsequent registration mistakes in connection with the surrender of lease 059 and the issue and transfers of the new leases following the subdivision. It expressly pleads that "the surrender and transfer of lease title 12/0633/059 were approved and registered in good faith based on the information provided."

27. In the closing submissions filed on behalf of the Republic, this point is expanded to assert (though this was not expressly pleaded nor is there any sort of counterclaim) that the registration on 4 December 2006 was the first mistake in a series of mistakes and that the Minister should have remained as registered lessor throughout.

28. Hypocritically then, the Republic accepts that both the Minister and the Director made various mistakes which should not have occurred because the claimants were the registered lessor at all material times, but it says that the Republic should have no liability for those mistakes because there was an earlier one in registering the claimants as lessors in the first place, something the Director could under section 99 have remedied at any time after 4 December 2006, but did not.

29. With respect, the submissions on behalf of the Republic in this respect are not only fallacious but concerning. As the Court of Appeal has said on a number of occasions, albeit in the context of concern about the protection of a lessee's registered interest, "the Register is everything". The Republic of course has been a party in each of these cases. See for example: *Ratua Development Ltd v Ndai* [2007] VUCA 23, *Huang Xiao Ling v Leong* [2013] VUCA 15.

30. If anybody should know that it is essential that the Register is correct, and its integrity respected, it is the Director of Lands, his staff and the Minister for Lands. The public is deemed to know it and these officials should be in no doubt about it.

31. It is not an issue in the present proceeding whether or not the claimants should have been registered as lessors on 4 December 2006. Unless it was changed by the Court or the Director under the Act, the Register said they were the lessor and their position was indefeasible. All that mattered is that they were so registered.

32. That registration was in effect a declaration to the world at large, and certainly to all staff of the Director of Lands and any Minister of Lands, that any dealings with leasehold title 059 had to be done with the consent of the claimants. It was also a form of comfort to them that there could be no dealings on their title without reference to them, as assured by section 36.

33. The position taken by the Republic is all the more curious because the alleged doubt about the entitlement of the claimants to be the registered lessor was raised - well before 4 December 2006- by way of the letter from the Tribunal

dated 24 January 2006. That letter expressly stated that leasehold title 059, among others, was not part of the land of which the claimants were declared custom owners by the Ifira Village Land Tribunal in 2005. Yet despite knowing of that assertion the Director registered the claimants as lessors in place of the Minister of Lands on 4 December 2006. Whether that was done after any consideration of whether it should be done, and of whether the letter should give rise to an investigation is not clear; the Republic called no evidence about that. For present purposes it is irrelevant because once the claimants were registered as lessors then that meant they had to be treated as the lessor for all dealings under the Act unless and until that status changed as a result of Court order under section 100 or the Director taking action himself under section 99.

34. Soon after 4 December 2006 there was the letter of 8 February 2007 from Mr Daniel requesting that the Director cancel the registration of the claimants as lessors. Apparently the Director did not respond.

35. In answer to a question from me, Mr Pierre agreed that while the lessor had not been formally changed from the claimants (back) to the Minister, the claimants had at least by early 2009 in effect been sidelined and many documents were registered without reference to them as registered lessors. He agreed that in effect the Director had treated the December 2006 registration as erroneous without ever telling the claimants or giving them an opportunity to be heard and without undertaking the clear statutory process available under Section 99 to deal with this kind of situation.

36. Section 99 (1) of the Act says:

"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 as entitled under this Act or as to some respect to 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, that rectify the register."

37. Having received the tribunal decision of 30 November 2005 and the letter of 24 January 2006 from the Secretary of the Ifira Council of Chiefs, the Director ought to have instituted a process under section 99 in which all interested parties were heard and an informed decision made. Instead what happened is that the Director and several Minister of Lands treated the register as if it was wrong without providing the claimants an opportunity to be heard, or even telling them.

38. In my view, the several unlawful acts of the Director and the Minister(s) of Lands were serious and unacceptable. Their failure to respect their own Register brings the entire land registration system into disrepute. If the Register is ignored or undermined by the Director and the Minister based on a mere letter written to the Director, then how can anyone rely on it?

39. At no stage, not even when this proceeding was issued and served on the Republic, has any attempt been made to challenge the correctness of the registration of the claimants as lessors on 4 December 2006 - until the

submissions were made on 4 March 2016 contending that that registration was a mistake. There is no pleading that the registration on 4 December 2006 was in error, it is simply (rather vaguely) pleaded that there was information which led the Minister of Lands and the Director to act as they did. There is no counterclaim seeking an order cancelling that registration or a declaration that it ought not to have occurred.

40. I note too that the only sworn statements from the Republic amount to what might be described as technical evidence as to the relevant dealings on the titles. There has been no sworn statement in which it is asserted that the reason for all of these mistakes was a belief on the part of the Director that they were justified because of doubt over the registration of the claimants as lessor back on 4 December 2006. There is no sworn statement from any of the Ministers of Lands, or any member of Department of Lands staff or the Director himself to the effect that the views which are pleaded as having being held were actually held. Nor is there any sworn statement asserting that the unlawful conduct was done in good faith. That is pleaded but it is not supported by any evidence at all that things were done in good faith.

41. In the course of cross-examination Mr Pierre (quite properly) said he could not be sure what was in the mind of those who carried out the dealings because he was not personally involved but he accepted that all of the mistakes enumerated earlier in this judgment were oversights that should not have occurred. He said the staff just acted on the information they had. When I asked him to comment on the suggestion that his staff had not acted in good faith he (understandably) said it was a bit difficult for him to answer because he did not know what was in their minds.

42. In summary the Republic pleads that the impugned transactions were done in good faith but has adduced no evidence whatsoever to support that assertion.

43. Section 9 of the Act on which the Republic relies, at least so far as it is sued in respect of the Director's actions, provides:

> *"The Director shall not, nor shall any other officer of the Land Records office, be liable to any action or proceedings for or in respect of any act or matter done or omitted to be done in good faith in the exercise or intended exercise of his powers under this act or any order made there under."*

44. The first point to be made, and one noted by Justice Tuohy in *Inter-Pacific Investments Ltd v. Sulis* [2007] VUSC 6 (at paragraph 35), is that there is no reason why the Director should not be personally liable, and his employer the Republic vicariously liable, for negligence in the exercise of his statutory functions. The possibility of personal liability is indeed impliedly recognised by section 9 of the Act. There can be no serious suggestion that the Director and the Minister of Lands did not each owe a duty of care to the claimants, the registered lessor, and that as outlined above they each acted on several occasions in serious breach of such duty, thereby causing actual or potential loss to the claimants.

45. The effect of section 9 is that the Director and his staff are protected from such prima facie liability as the section itself contemplates if the impugned exercise of statutory power was done in good faith. Its wording clearly implies that the onus is on the Director to establish such good faith in order to

escape the liability which would otherwise apply. It is an affirmative defence which needs to be both asserted and established.

46. There is no evidence placed before the Court that there was such good faith in respect of any, let alone all, of these dealings. There is no evidence at all as to what was the thinking or intention of relevant staff and Ministers at the time of each of these transactions. The Director said he was not in a position to speak on behalf of the staff involved and no evidence was called from any Minister.

47. I therefore conclude that I have no evidential basis on which I can consider whether or not section 9 might have applied in this case to relieve the Republic of responsibility for the actions of the Director and his staff. I therefore dismiss the pleaded defence under that section.

48. In passing I note that in the course of preparing this judgment I was unable to find any case authority on the meaning of " in good faith" in Section 9 of the Act. Because of my above finding there has been no need to look further into it. In general terms it seems to me the defence could be established by the Director if he provided evidence of an honest belief on the part of the employee carrying out a transaction that it was an appropriate one and/or if there was an absence of intent to defraud or to seek unconscionable advantage. I leave open the question whether such serious and serial breaches as occurred here may constitute such a gross failure to carry out statutory duties as to amount to a lack of good faith. In general my understanding is that some improper motive or element of bad faith would need to be present before an official, even if grossly negligent, would be deprived of a good faith

defence. See for example: *Central Estates (Belgravia) Ltd v Woolgar* [1972] 1 QB 48 and *Medforth v Blake* [2000] Ch 86.

49. Section 24 of the Act was also pleaded as a defence. That provides:

> *"Whereby this Act any person is exonerated from enquiring as to any matter of fact relating to a registered interest, or to a power of dealing therewith, or is protected from the effect of notice of any such matter or fact, then, in registering any instrument relating to that interest, the Director shall not be concerned to make any enquiry or search in relation to that interest which such person need not have made nor shall the Director be affected by any notice with which such person need not have been affected."*

50. Self-evidently that provision has no application to the circumstances of this case and the Republic has made no submission explaining how it applies. Here the document to which the Director and his staff failed to have regard was the one they registered on 4 December 2006. The case has nothing to do with any background enquiries.

51. I therefore conclude that the Republic is liable for breach of its duty of care to the claimants as registered lessor, both in respect of the unlawful conduct of the Director and his staff and the various Ministers of Lands.

52. I note that even if I had found that the Director was protected from liability by Section 9 and the Republic accordingly was not liable for his actions or those of his staff, I would have nevertheless have found the Republic liable for the

actions of the various Ministers of Lands, for which it is also responsible. The various steps taken unlawfully by the various Ministers of Lands were essential to each of the mistaken (if not fraudulent) dealings which occurred. Had the Director and Minister been sued separately I would have found them jointly and severally liable for all proved losses. Accordingly, even if the Republic is not liable for the Director's conduct, it is still liable for any losses the claimants can establish as having flowed from the unlawful dealings on the register.

What sum should be awarded for damages?

53. The claimants seek damages against the second defendant in the sum of Vt 46 million. This is in two parts. The Vt 1 million claim derives from the sum paid by Medici to Mr Kiri when it acquired the 059 lease from him on 10 February 2009. The other Vt 45 million relates to the sum that was paid by Zheng Yu Peng for the 13 titles he acquired from Medici.

54. As is often the case in civil litigation, counsel spent the majority of their time and effort addressing liability issues and not enough addressing quantum in the event that liability was established. The submissions made by Mrs Nari in support are very brief and there is no attempt to isolate the nature of the claim for damages and the appropriate measure of damages. As she put it in paragraph 31 of her reply submissions:

> *"It is only fair and just that the Republic pay damages in the amount of Vt 46 million. The amounts are monies unlawfully taken by the first and third defendants."*

55. Later at paragraph 34 she says: "*The Minister of Lands, Director of Lands and his officers have acted unlawfully to assist the first and third defendant unjustly (sic) enrich themselves with Vt 46 million without the consent of the claimant.*"

56. As best I can ascertain it from these submissions, the claimants contend that even though they are not seeking damages from the first and third defendants who apparently ended up benefiting from these transactions, they seek compensation from the second defendant for allowing the first and third defendants so to benefit, measured in the sums by which they appear to have benefited. That is not a tenable basis for an award of damages against the Republic; this can only be determined by assessing what losses have been caused to the claimants by the breaches of duty for which the Republic is responsible.

57. For the Republic, in its closing submissions of 4 March 2016, it is submitted that because none of the money claimed was paid to the second defendant it should not be held accountable for it. It submits that the only entitlement the claimants may have is to the money which was paid into the Custom Owner's Trust Account on the registration of lease 059 on 15 May 2000. However, harking back to one of its fundamental submissions about liability, the Republic says that the claimants could only access such monies if they can prove they are custom owners of the land where lease 059 was located, and it submits they are not able to do so.

58. Despite the inadequacy of the submissions, I consider I have sufficient evidence to determine the claims for damages.

59. The starting point is to identify the nature of the cause of action under which liability has been established against the Republic. I would categorise this as a simple claim in negligence, albeit with aspects of breach of statutory duty involved. The Minister(s) of Lands owed a duty of care to the true and registered lessor, the claimants, not to purport to act as if he was the true lessor. He clearly breached that duty on a number of occasions each of which involved making a false declaration to the Director.

60. The Director of Lands and his staff owed a duty of care, reinforced by section 36, to the true and registered lessor, the claimants, only to deal with title 059 and the replacement 28 titles in accordance with their statutory obligations and by treating them at all times as being the true and registered lessors. That duty was grossly and repeatedly breached by the Director and his staff.

61. The measure of damages for these kinds of tortious breaches, as famously stated by Lord Blackburn in *Livingstone v. Rawyards Coal Co.* (1880) 5 App Cas 25 at 39 is:

> *" .... that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."*

62. The starting point then is to identify the nature of the loss which has been suffered by the claimants as a result of the negligence of the various Ministers of Lands and the Director and his staff. In my view, there are two aspects:

a) the claimants have been deprived off the right to consent or refuse to consent to the transfer of the lease 059 from Mr Kiri to Medici and to the surrender of that lease in February 2009; and

b) the above having occurred without reference to them, the claimants have then been deprived of the opportunity, at least between February 2009 and 18 November 2013 when Spear J issued his interim judgment, to be, and to have the benefits of being, the lessor of the 28 new titles.

63. What then is the monetary loss which the claimants have suffered as a result of the conduct of the parties for whom the Republic is responsible? What is the sum of money which ought to be paid to them to put them back in the position, as best money now can do it, that they would have been in had the Director and Ministers acted lawfully?

64. I agree with counsel for the Republic that it is not sufficient to look at what was paid on the transfer of leases from one lessee to the other. This is a claim by a lessor for loss caused through the negligence of those for whom the Republic is responsible. It cannot be right simply to treat the benefits apparently obtained by two other (lessee) parties as the measure of what the claimants have lost through the actions of the Republic.

65. As to the Vt 1 million claim, the position at that stage (10 February 2009) was that by virtue of the registration on 4 December 2006 the claimants had taken over as lessor of leasehold title 059 from the Minister of Lands. Mr Kiri who had become the lessee in 2000 remained as lessee. As at 4 December 2006, and at all material times until lease 059 was surrendered, the

claimants were stuck with the terms of that 50-year lease which the Minister had entered on their behalf six years earlier. It seems to me they cannot prove they suffered any loss in respect of the transfer of that lease from Mr Kiri to Medici in February 2009. Even if they had consented to the transfer, the Vt 1 million would not have come to them as lessor as it was a payment made by the new lessee to the former lessee for the benefit of the balance of the lease.

66. The claimant's real complaint about the 059 lease, as Mrs Nari put it in her submissions, was that the Republic *"is responsible for allowing the late Mr Kiri to obtain title 059 in 2000 without paying any premium and then paying a very small land rent of Vt 6,400 for land which is worth more than Vt 100 million."* The problem with that contention is that this claim does not concern the circumstances of that transaction in 2000. There is no application to cancel the registration of that lease, and that is hardly surprising because the claimants ended up as lessor. What is challenged in this proceeding is (only) the conduct of the Director and the Minister(s) in relation to the registration of the transactions from February 2009 onwards.

67. On this basis, I do not consider the claimants have suffered a loss in relation to the transfer of lease 059 from Mr Kiri to Medici. If they have, there is insufficient evidence to quantify it and it is certainly not to be assessed as Vt1m based on the transfer from one lessee to another.

68. The position is however different in respect of the claim for Vt 45 million, which relates to the surrender of leasehold title 059 and the transfer of the 13 leasehold titles from Medici to Zheng Yu Peng.

69. If the claimants had been the lessor after the surrender of the lease 059, as they ought to have been, then they would have had unencumbered ownership of the whole of the 059 land. They would no longer have been saddled with Mr Kiri's lease. They would have been free to decide what to do with the land. Following this judgment they will still be free to deal with that part of the land contained in the 15 titles still held by Medici and The Operation Education Vanuatu Ltd, as their leases are being cancelled. However, because of Zheng Yu Peng's leases remain, the claimants are not, in respect of the land in those 13 titles able to be put back in the position they should have been in. What is the sum they should be paid for this loss?

70. The claimants have limited their claim for damages to the loss of premium they would have obtained if they, rather than Medici, had sold those titles to Zheng Yu Peng. As to rental, arguably they have in the end not suffered a loss, except in respect of rental between 2009 and November 2013, in respect of the other 15 titles. I also understand they may be able to obtain some outstanding rental from Zheng Yu Peng for the pre-18 November 2013 period but there was no evidence about this. As to rental, it could indeed be said the claimants are better off as to all 28 titles as a result of the Republic wrongly allowing the surrender of lease 059 because they are no longer stuck with the very small rental which Mr Kiri was paying.

71. The 28 new leases issued by the Minister of Lands (as to 8) and Mr Kiri (as to 20) involved the payment of no premium by the lessee Medici to the lessor. The first paragraph of each lease, in which the amount received by the lessor from the lessee is usually recorded, was in each case crossed out.

72. In principle, the measure of damages to which the claimants are entitled is a reasonable sum for compensation for there having been no premium paid for those 13 titles. As to this, there are two forms of unchallenged evidence as to what is a reasonable payment to the lessor would have been.

73. First, when the claimants were in 2015 endeavouring to assess whether the Vt 45 million paid by Zheng Yu Peng for the 13 titles was a reasonable market price they obtained a valuation from Linda M Olul, a registered valuer. She valued these 13 titles, which contain an area of 13,178 m^2, at Vt 50,800,000. The values of the individual titles range from Vt 3.8 million to Vt 4.1 million.

74. It was on this basis that the claimants accepted that the Vt 45 million paid by Zheng Yu Peng was within range of a reasonable market price at the time when those titles were purchased in August 2011. They accepted that the amount paid would not have put Zheng Yu Peng on notice as to the legitimacy of the title of the lessee, Medici.

75. There is then the evidence that Zheng Yu Peng did pay that Vt 45 million for the 13 lots. That is evidence of a market price, as at August 2011, when the titles were purchased. Although it relates to a transaction between lessors effectively Medici was acting as lessor in selling the leases for which it had paid nothing.

76. In this proceeding the claimants seek damages for the lower of the two values.

77. I am satisfied in all the circumstances that Vt 45 million is a fair and reasonable sum, established by unchallenged evidence, to compensate the

claimants for the loss of opportunity to sell those 13 titles to Zheng Yu Peng, or to another purchaser on the open market, after the surrender of the lease in February 2009. There could be some argument about a market price in 2009 as opposed to 2011, but the Republic has called no evidence or raised an issue about this, as it denied that damages along these lines should be awarded at all. In any event I note there is no claim for interest by the claimants so the Republic will still be paying rather less than it might have been.

78. For these reasons I dismiss the claim for Vt 1 million damages but uphold that for Vt 45 million damages. I accordingly award Vt45 million in damages to the claimants against the second defendant.

79. At paragraph 14 (b) of his judgment of 18 November 2013, Justice Spear made an order preventing the Director registering any dealing with the 28 leases without further order of the Court or the prior written consent of the claimants. The 15 leases held by Medici and The Operation Education Vanuatu Committee (Inc.) are being cancelled so that order will no longer have any effect in relation to them. By contrast, Zheng Yu Peng should now be free to deal with his 13 titles in accordance with his rights as a lessee and section 36 will, especially I hope after this judgment, protect the claimants from any dealings without reference to them as registered lessor. I will therefore rescind Justice Spear's order at paragraph 14(b), that order to take effect once Order 1 below has been implemented by the Director.

Orders

80. I make the following orders:

1) Pursuant to section 100 (1) of the Land Leases Act [Cap. 163] I order the rectification of the Land Leases Register by directing

that the registration of the following 15 leases be cancelled on the ground that I am satisfied these were obtained or made by mistake, if not fraud: namely those in favour of Medici Investment Limited in respect of leasehold titles 12/0633/869, 12/0633/870, 12/0633/871, 12/0633/872, 12/0633/873, 12/0633/874, 12/0633/875, 12/0633/876, 12/0633/877, 12/0633/878, 12/0633/879, 12/0633/880, 12/0633/881 and 12/0633/882 and that in favour of Operation Education Vanuatu Committee in respect of leasehold title 12/0633/883.

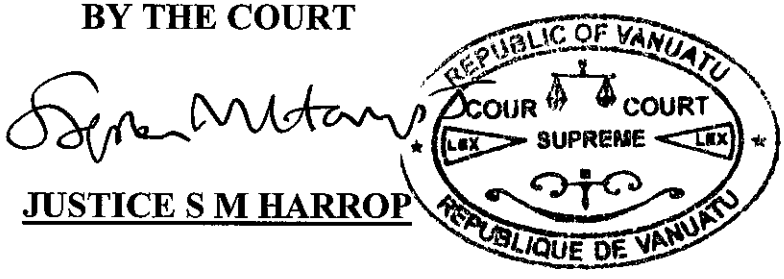
2) The second defendant is to pay damages to the claimants in the sum of Vt 45 million within 28 days of the date of this judgment.

3) The claimants are entitled to their costs against the second defendant on a standard basis which are to be taxed if they cannot be agreed.

4) With effect after the implementation of Order 1 above, I rescind the order made by Justice Spear in paragraph 14(b) of his judgment of 18 November 2013 (preventing the Director from permitting dealing with any of the 28 leases without further order of the Court or the prior written consent of the claimants).

Dated at Port Vila this 15th day of March 2016

BY THE COURT



JUSTICE S M HARROP