IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 18/1935 CoA/CIVA

BETWEEN: MICHEL MONVOISIN and LUDOVIC BOLLIET
First Appellants

AND: KALORIB POILAPA
Second Appellant

AND: KALKOT MORMOR and RICHARD MATANIK
First Respondents

AND: KALCHIRAU THERESA ANATU
Second Respondent

AND: THE GOVERNMENT OF VANUATU
Third Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice John William Hansen
Hon. Justice Oliver A. Saksak
Hon. Justice Daniel V. Fatiaki
Hon. Justice Gus Andrée Wiltens
Hon. Justice Felix Stephen

Counsel: *John Malcolm and So'oletaua Motuliki for the First Appellants*
Jerry Boe for the Second Appellant
Garry Blake for the First Respondents
Brian Livo for the Second Respondent
Lennon Huri for the Third Respondent

Date of Hearing: *15th February 2019*

Date of Judgment: *22nd February 2019*

JUDGMENT

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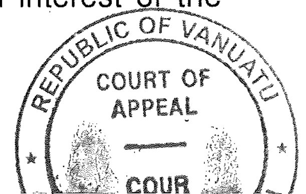
1. The appellant appeals against orders of the Supreme Court which directed the rectification pursuant to Section 100 of the Land Leases Act [CAP. 163] of the land register by removing the registration of leases held by them. The Supreme Court held that the registration of the leasehold interest of the first appellant in lease title No. 12/0543/032 (the 032 lease) and the leasehold interest of the

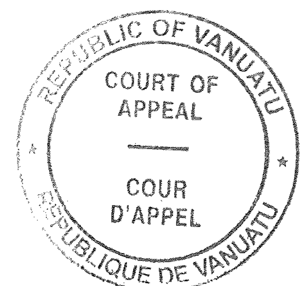


second appellant in lease title No. 12/0542/001 (the 001 lease) had been obtained by fraud and/or mistake and should be set aside.

2. The proceedings in the Supreme Court had been brought by the first and second respondents. The background events leading up to the commencement of the proceedings can be shortly stated. Since 2010 the first respondents were seeking to establish a land use project which would involve the grant of leases over the area of land that later became the subject of the 001 and 032 leases to protect and retain that land for the future use by the communities of Lelepa and Mangaliliu. Between 2010 and 2012 they held numerous meetings with officials from the Lands Department. On 18th June 2012 senior officers of the Lands Department attended a meeting of people from the communities to discuss the project, and on 9th July 2012 the first respondents submitted their applications for lease over the land to the Land Management Planning Committee for consideration.

3. Without any notice to the first respondents, and without the knowledge of the senior officers of the Lands Department who had been at the community meeting, on 23rd August 2012 the then Principal Registration Officer at the Lands Department registered lease 032 which had been signed between the Minister of Lands and Kalorib Poilapa (the second appellant) on 27th July 2012. On 29th August 2012 lease 001 which had also been signed between the Minister of Lands and Kalorib Poilapa on 27th July 2012 was registered. Both leases covered large tracts of land.

4. The Minister of Lands was the lessor named in both leases pursuant to s.8(2)(b) of the Land Reform Act [CAP. 123] which empowers the minister to lease land where custom ownership is disputed. It is common ground that custom ownership was in dispute here. One of the disputing parties was Mr Anatu (the second claimant in the Supreme Court and now the second respondent). He had been the successful claimant for custom ownership in a decision of the Efate Island Court delivered in May 2010, but that decision was then appealed to the Supreme Court, and the appeal remained to be determined.



5. On 20th December 2012 a transfer of lease 032 was registered from Kalorib Poilapa to the first appellants. The evidence shows that Mr Monvoisin was representing the first appellants in the dealings which surrounded this transfer.

6. When the first respondents became aware that the leases had been granted they commenced the Supreme Court proceedings and obtained orders restraining the registered lessees from further dealing with or developing the leases pending trial.

Pleadings in the Supreme Court

7. The proceedings were brought against the "*The Government of Vanuatu*", in reality the Republic as the entity responsible for the actions of the Minister of Lands and the Lands Department, and against the two lessees. The first respondents sought orders cancelling the registration of both the 001 and 032 leases. Mr Anatu sought only the cancellation of the 032 lease. Both alleged that the registration of the leases had been obtained by mistake or fraud.

8. Allegations pleaded by the first respondents included that the Minister had failed to consult with disputing custom owners who did not approve of the grant of the leases, had failed to take into account the interest of the first respondents, and failed to follow fair and proper processes and procedures for the registration of the leases. These failures caused the leases to be registered by mistake. Against the first appellants, Messrs. Monvoisin and Bolliet, it was alleged that the transfer of lease 032 was obtained with their knowledge of fraud or mistake because they had knowingly defrauded the government of fees in respect of stamp duty and registration fees on the transfer by understating the consideration for the transfer. They paid stamp duties and registration fees on a consideration of VT2 million when the actual consideration was VT20 million.

9. Allegations by Mr Anatu in his claim included that lease 032 was registered by mistake because the Lands Department did not check that all requirements for registration had been complied with, and because the Minister and Department of Lands knew there was a dispute over custom ownership. One of the requirements that was not complied with was alleged to be that no negotiator

certificates had been issued by the Minister to commence negotiations for the grant of the leases.

10. The Republic in its defence admitted that the Minister had acted on behalf of the custom owners under s.8 of the Land Reform Act. The Republic frankly admitted that the applications for the registrations of the leases did not go through the Department of Lands, instead Kalorib Poilapa went directly to the then Minister of Lands for ministerial consent. The defence admitted that the Minister did not consult with the disputing custom owners, and further admitted that there was no check-list and that the leases did not pass through the Executions' officer of the Department of Lands.

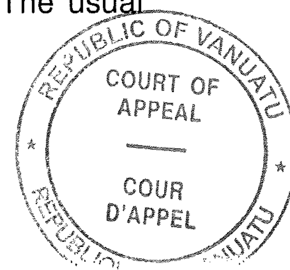
11. Upon the grant of a lease fees are payable by the lessor including a lease execution fee, advanced land rent, a registration fee, and premium for the grant of the lease. The Republic's defence said that these fees (which normally should have been paid by Kalorib Poilapa to obtain registration of the original grant of both leases) were paid in the case of lease 032 by Mr Monvoisin at the time of the transfer to the appellants, and that there was no record or payment of any fees relating to the registration of lease 001.

12. The defence of Kalorib Poilapa essentially denied the allegations of mistake made in the statement of claim, and pleaded that as the claimants were not custom owners of the land they had no standing to bring the proceedings.

13. The appellants pleaded that they were bona fide purchasers of the 032 lease for valuable consideration, and by counterclaim they sought restraining orders against the first respondents from interfering with their enjoyment of the lease.

Decision in the Supreme Court

14. The court held that Mr Anatu had a sufficient interest to bring proceedings, and then addressed issues canvassed at trial. The court accepted the evidence of the officers from the Department of Lands and found that the usual and proper administrative procedures and processes of the department were not followed for the registration of both 001 and 032 leases to Kalorib Poilapa. The usual



check-list requirements were not checked and the Lands Department records indicated that no certificates of registered negotiator had been issued.

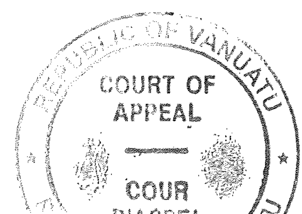
15. Whilst s.8 of the Land Reform Act empowers the minister to grant the leases, the identity of the disputing custom owners was known but they were not consulted.

16. The court made specific findings about the inadequacy of the premiums that were set for the grant of the leases. The premium stated in lease 001 which covered some 1805 hectares was VT2 million, and the premium stated in the lease 032 which covered 485 hectares was VT500,000. Evidence from an officer of the Valuer General's Office was that a realistic estimate of the premium for the 001 lease would be VT171,400,000 and for the 032 lease would be VT80,200,000. On this evidence the government was defrauded of proper stamp duty and registration fees that would have been payable on the correct premiums, and the custom owners were defrauded as a grossly inadequate premium would be received into the Custom Owners Account to be paid by the government once the custom ownership dispute is resolved. Upon these findings the court held that registration of the leases following their initial grant by the Minister was obtained by fraud and/or mistake. No analysis was undertaken to show the causal relationship between these findings and the obtaining of registration.

17. The court held that the transfer of the 032 lease to the appellants was not a bona fide transaction. Firstly, the government had been defrauded of registration and stamp duty fees because of the understatement of the consideration. Secondly, the appellants had perpetuated or contributed to the fraud by paying the fees outstanding on the original grant of the 032 lease to Kalorib Poilapa, and then paying the balance of the actual consideration of VT20 million to his credit at the Bred Bank. As they had knowledge of these frauds, and also had knowledge that there was a dispute over custom ownership of the land they were not bona fide purchasers.

Grounds of appeal

18. The first appellants raise only three grounds of appeal each directed to overturning the finding that they were not bona fide purchasers for value. They



accept the Supreme Court's finding that the original grant of the 032 lease was obtained by fraud and mistake, but say that under s.100(2) of the Land Leases Act they had no knowledge of the irregularities associated with the registration of the original grant in favour of Kalorib Poilapa, and did not cause any fraud or mistake that led to the registration of the transfer from him.

19. The three grounds of appeal are:

    (1) That by reason of a delay of some two and half years between the conclusion of the trial and the delivery of the judgment, erroneous findings of fact were made which justify overturning the decision;

    (2) There was no fraud leading to the registration of the transfer arising from the misstated consideration at VT2 million instead of VT20 million;

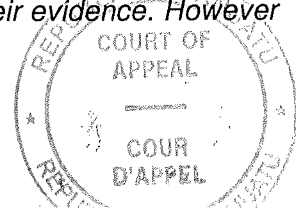
    (3) The finding that Mr Monvoisin was warned that there was a customary ownership dispute about the 032 leasehold land was erroneous.

20. Kalorib Poilapa in his appeal in which he seeks to defend the grant of the 001 lease to him says that the power which the Minister exercised under s.8 to grant lease 001 was, in effect, an absolute power which enables him to do as he sees fit, and it was not open to others to challenge how the powers were exercised. The grounds of appeal do not challenge the finding that the first respondents had standing to bring the Supreme Court proceedings.

Discussion – the First Appellants' appeal

21. A delay of two and half years between trial and decision is regrettable, but it does not necessarily follow that the decision ultimately reached was wrong and should be set aside. The approach which an appellate court should take when delay is raised as a ground of appeal was considered by this court in Wong Jok Keong v Hue [2017] VUCA 33; Civil Appeal Case No. 1045 of 2017. The court found helpful guidance in the following passage from the decision of the Court of Appeal in Bond v Dunster Properties Ltd. [2011] All ER (D) 248:

As in any appeal on fact, the court has to ask whether the judge was plainly wrong. This high test takes account of the fact that trial judges normally have a special advantage in fact-finding, derived from their having seen the witnesses give their evidence. However

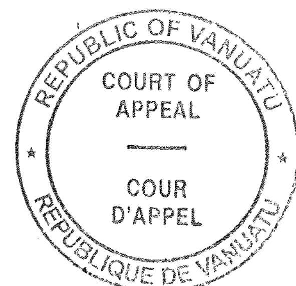


there is an additional test in the case of a seriously delayed judgment. If the review court finds that the judge's recollection of the evidence is at fault on any material point, then (unless the error could not be due to the delay in the delivery of judgment) it will order a retrial if, having regard to the diminished importance in those circumstances of the special advantage of the trial judge in the interpretation of evidence, it cannot be satisfied that the judge came to the right conclusion. This is the keystone of the additional standard of review on appeal against findings of fact in this situation. To go further would be likely to be unfair to the winning party. That party might have been the winning party even if judgment had not been delayed.

22. We were also referred to the decision of the New South Wales Court of Appeal in <u>Monie v Commonwealth of Australia</u> [2005] NSWCA 25: (2005) 63 NSWLR 729 at 743 – 744:

It must, however, be emphasized that delay between taking evidence and the delivery of judgment does not, in itself, justify upholding an appeal against the judgment given. Error must still be established on the part of the trial judge warranting either a reversal of the judgment or the grant of a new trial. Delay may assist an appellant in establishing such error because, as the approach identified by the full federal court demonstrates, the inference will more readily be drawn that a trial judge's failure to deal in a significantly delayed judgment with particular matters on which the appellant relied in contradiction of the findings made in that judgment resulted from those matters being overlooked by the judge – either because of the time which has passed or because of the pressure on the judge in the end to complete the judgment. In Boodhoo v Attorney General of Trinidad and Tobago [2004] UKPC 17: [2004] 1 WLR1689 at [11], the Privy Council acknowledged that the delay in giving the decision may adversely affect its quality to such an extent that it cannot be allowed to stand. That is what must be shown in order to demonstrate error resulting from delay which was warrants either a reversal of a new trial.

23. Before an appellate court will interfere with the decision of a trial judge on the ground of delay it must be satisfied that the judge was plainly wrong. To so satisfy the appellate court the appellant must first identify findings of fact that may be suspected because the passage of time <u>and</u> could have led the judge's recollection of the evidence or the course of the trial to be at fault; <u>and</u> must then demonstrate how those findings of fact, if wrong, so undermine the reasoning leading to the ultimate decision, that the decision should be set aside. Once the impugned finding or findings of fact are identified the appellate court will need to explore whether they were contested facts in issue at trial, what other evidence there was about those facts, and how far the finding could have been influenced by faulty recollection due to delay.

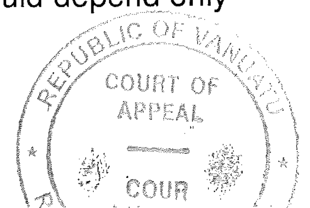


24. The first appellants' grounds of appeal and written submissions do not demonstrate any particular finding of fact that is said to be wrong by reason of delay. Rather a general complaint is made that after two and a half years "*it would not be humanly possible to remember the manner in which evidence is given*" and that "*justice must not only be done but be seen to be done*".

25. In oral submissions counsel identified several findings that were said to be erroneous. Those which were pressed as being of substance were three.

26. First, the Judge found that Mr Monvoison knew there was a dispute as to custom ownership for the 032 lease. It was contended that this finding, based on the evidence of Mr Anatu and his father Kalori Korryaiu, failed to address the evidence of Mr Monvoison who denied being aware of the dispute. It is correct that the Judge does not refer to Mr Monvoison's denial, but the denial was made in a sworn statement by Mr Monvoison which was specifically addressed to this topic. The Judge therefore had the denial before him in the papers. The evidence of denial was not simply something said orally that may not have been noted or otherwise remembered. Where there is written evidence such as a sworn statement, there is difficulty in showing that delay plays any part in the finding. A Judge is not obliged to recite evidence for and against each contested fact and to specifically record reasons for the preference of one over the other version. A finding which reflects one version will by inference imply that the contrary one has been rejected, and if there is a rational basis arising from the evidence in its entirety for its rejection, no error will be demonstrated. Here the finding was entirely predictable. The dispute over this land had been in the Land Tribunals for years and it is unlikely that Mr Monvoison was unaware of this. Moreover, the fact that the Minister had granted the initial lease, rather than custom owners, should have put him on notice that there was a dispute.

27. The second finding attacked was that there was fraud based on the understatement of the consideration in the transfer. It is contended that the Judge over-looked the evidence from Mr Monvoison that as soon as he learned of the underpayment of fees and stamp duty, he paid what should have been paid in the first place. Again this evidence is contained in a sworn statement forming part of the written evidence, and not something that would depend only



on the recollection of the Judge. In his sworn statement made in May 2015, Mr Monvoison said:-

"There was a problem with stamp duties, which I have fixed. The problem was, our agent tried to reduce stamp duties stipulating 2 sale price of VT2 million.
That was incorrect. The sale price was VT20 million and we have now paid the full stamp duty on that price.

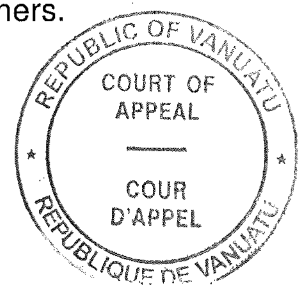
The actions of our agent do not detract from the fact that:-

1) We were a bona fide purchaser;
2) We had no knowledge of any other claim;
3) We paid a fair price for the land.

The issue of the stamp duty is a side issue, now of no relevance BUT, being used to confuse and detract from the reality of the bone fides of this sale."

28. We are told from the bar table that no evidence was produced at trial to establish the reimbursement of under paid fees, but even if the situation is as Mr Monvoison said, the fact remains that the transfer was registered on the footing that it was properly recording a legitimate transfer on the terms stated in the transfer document. This information was at the time of registration false, and the transfer was registered in the mistaken belief that the stated consideration was correct. The evidence of Mr Monvoison does not alter the position at all. The registration occurred because of the fraud and the mistake.

29. The third finding that is attacked because of delay concerns the valuation evidence referred to by the Judge from the Valuer General's Department. The complaint is that the Judge did not refer to a valuation prepared by Jeremy Dick for the Bred Bank in relation to Mr Monvoison's application for a loan to fund the purchase of the 032 lease. That valuation assessed a market value of the 032 leasehold land at VT39 million (in contrast to the Valuer General's premium estimate of VT80,200,000). Again, this is really a complaint that the written evidence was not expressly set out and reasons given for accepting that which the judge relied upon, rather than an alleged error based on delay. Again, the opposing evidence, even if it were to be accepted in preference to the other evidence would not alter the result. Either way the stated premium was an extreme undervalue to the great disadvantage of the true custom owners.



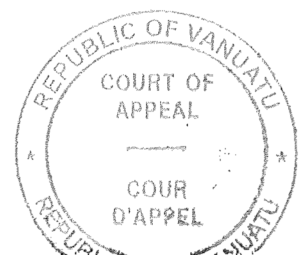
30. There is no substance in the first ground of appeal based on delay.

31. The second ground of appeal concerned the underpayment of stamp duty and registration fees. The appellants contend that there was no fraud because the error was corrected sometime after registration. The sworn evidence of Mr Monvoison and his attitude to this event has already been set out. The later payment, if it were made, would reimburse the government, but the fraud had already been committed and put into effect. There is no error in the finding about the fraud made by trial Judge.

32. This Court raised an issue that was not canvassed at trial which arises from the evidence about the misstatement of the consideration, especially the Minister's consent which was essential for the registration of the transfer of the 032 lease.

33. The document that was taken to the Minister for his consent to the transfer was a typewritten document that stated the consideration for the transfer to be VT20,000,000. That document now shows an alteration to the stated consideration. The figure of 20,000,000 has been struck out in pen and the figure 2,000,000 written in. A small indecipherable mark has been placed in the margin to give the appearance of an initial to the alteration. The transfer itself that was submitted for assessment of stamp duty and the registration twice shows in type face the consideration to be VT2,000,000.

34. The inevitable inference from these documents and Mr Monvoisin's evidence is that his agent (Franco Zuchetto) altered the Consent after it was signed by the Minister so that the consideration stated in the Consent matched the stated consideration on which the stamp duty and registration fees were assessed and paid. The coincidence of figures was necessary to obtain registration. The alteration of the Consent after it had been signed by the minister was a material alteration to the document which, according to Mr Monvoisin, was made by his agent. Even if there were doubt about who made the material alteration, it was later acted upon by Mr Monvoisin's agent who sought to obtain for him an advantage from the alteration. Either way a material alteration to a document of this kind renders the document void see Chitty on Contracts, Vol, para 25 – 020



(2004 Edition) and Halsbury's Law of England, 4th Edition Reissue, Vol 13, paras L and 81.

35. Simply stated, the Consent ceased to have legal effect upon the alteration being made. In consequence there was no Ministerial consent, and on that ground the registration was mistakenly made. That in our opinion is the short and complete answer to the appellants' case. There was no consent and without the Minister's consent there could be no transfer. No question of the appellants being bona fide purchasers for value can arise. There simply was no transaction capable of being registered.

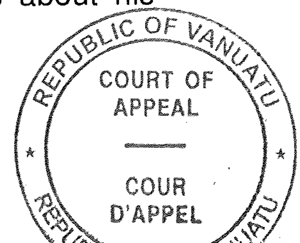
36. There was no need for the trial judge to go down the path of reasoning he followed which assumed that the registration of a real transaction has occurred, but which for the reasons he gave should be set aside.

37. Had the Minister's consent not been rendered void, we consider the conclusion of the judge that the registration occurred as a result of mistake and fraud relating to the understatement of the consideration was correct in any event.

38. The third ground of appeal concerns the finding that Mr Monvoisin was warned that there was a custom ownership dispute, a finding which he challenges. This finding has already been discussed under the first ground of appeal. Whilst we think the finding was inevitable, we have difficulty understanding how that knowledge was relevant to the question whether Mr Monvoisin was a bona fide purchaser for value within the concepts of s.100(2). However there was ample other evidence to support the finding that he was not a bona fide purchaser, and for the reasons just given there simply was no consent to the transfer and the first appellants' appeal must fail on that ground.

Discussion – The Second Appellants' appeal

39. Kalorib Poilapa's short point on appeal is that the Minister's power under s.8 of the Land Reform Act was plainly enlivened by the dispute over the custom ownership. His power under that section is unfettered so that he may decide as he wishes, and the various complaints made by the respondents about his exercise of power are beside the point.



40. That submission totally misunderstands the nature of the Minister's power under s.8, and disregards earlier decisions of this court.

41. According to its terms, s.8 gives the Minister the general management and control over all land where there is a dispute as to custom ownership of land not occupied by an alienator: s.8(1)(b). That is the situation here. Subsection 8(2) then addresses the scope and purpose of the Minister's power. In particular by s.8(2)(b) he has power to grant leases "*in the interests of and on behalf of custom owners*". Under s.8(2)(c) he has power to "*take all necessary measures to conserve and protect land on behalf of the custom owners*".

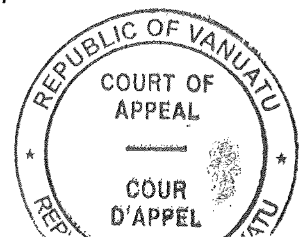
42. In Ifira Trustees Limited v Family Kalsakau and others [2006] VUCA 23 Civil Appeal Case 5 of 2006 this court rejected the very argument which the second appellant now advances. The court said:

> "*When Parliament grants a power to make decisions, the decision maker must undertake the task conscientiously and independently weighing all matters which are relevant and ignoring those which are irrelevant and the decision maker must faithfully apply fair and proper processes and procedures.*
>
> *Section 8, as an example, is not a licence for a Minister to make any decision that he likes about the care and control of disputed land pending the resolution of that dispute. A Minister exercising this power can only reach a proper and lawful conclusion after he has weighed and assessed all matters which are relevant*".

43. The earlier decision of this court Roqara v Takau [2005] VUCA 5; Civil Appeal Case 25 of 2004 is an example of a situation where a matter relevant to the grant of the lease was not taken into account. The Minister was not informed by the Department of Lands about an Island Court order intended to preserve the subject matter of the dispute pending a decision, therefore the decision was made without taking into account a fact which the court held to be very relevant.

44. In Solomon v Turquoise Limited [2007] VUSC 9; Civil Case 163 of 2006 Tuohy J. in relation to s.8 said:

> "*What it does mean is that when exercising those powers, the minister must consult the disputing owners and must carefully consider their abuse and the reasons for them before acting. This is part of the minister's duty to follow a fair and proper process and to act only after he has weighed and assessed all relevant matters*".



The decision in that matter was upheld by this Court in Turquoise Limited v Kalsuak and others [2008] VUCA 22; Civil Appeal Case No. 21 of 2008. The Minister's failure to consult with one of the disputing custom owners and to have regard to his wishes was a mistaken exercise of the minister's power which led to the grant of the lease and its registration.

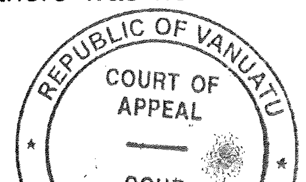
45. In its decision, the Court of Appeal considered argument on the Minister's behalf that the power to order rectification for mistake under s.100 should be limited to the type of mistakes and slips that could be remedied by the director under s.99(1). The court said:

> *"We are unable to accept that s.99(1) imposes any limitation on the otherwise broad scope of "mistake". Section 99(1) empowers the Director to take steps to rectify the register where the register "does not truly declare the actual interest to which any person is entitled under this Act or is in some respect erroneous or imperfect". This is a very wide power. If the Minister makes an error in the exercise of power such that the Minister's decision should be set aside on administrative law principles, and if the product of that decision remained on the register, the register would not truly declare the interest of the registered proprietor, and should be erroneous. In our view, the wide scope of the power in s.99(1) supports an interpretation of s.100(1) which includes within "mistake" an improper exercise of power of the Minister under s.8".*

46. There will be an improper exercise of ministerial power where the minister's decision can be set aside on administrative law grounds, for example where the minister fails to take into account matters that are relevant to his decision or takes into account irrelevant matters.

47. In this case the uncontested position is that the Minister did not consult with the disputing custom owners, and therefore failed to take into account their wishes. The Minister failed to take into account that the normal checks conducted by the Department of Lands had not occurred. He plainly failed to consider the adequacy of the premium stated in the two leases which were to the extreme disadvantage of the true custom owners. These matters justified setting aside the Minister's decision to grant the leases. Registration of the lease was therefore obtained in the mistaken belief that the Minister's decision was made according to law.

48. Further there is the admission of the Republic that the normal processes and procedures of the Lands Department were not followed in that there was no



check-list for the leases, and the leases did not pass through the execution's officer of the department as leases would normally do before registration. The registration of the leases without the processes and procedures being followed was a further mistake that led to their registration.

49. The conclusion of the Supreme Court that registration of lease 001 should be cancelled and the land lease register rectified accordingly was clearly correct.

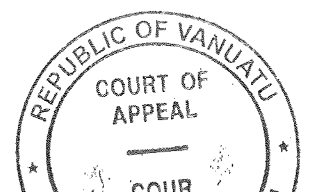
50. The appeal by Poilapa must also be dismissed.

Application by Sandrino Traverso to be joined to the appeal and to adduce new evidence

51. When the appeal was called counsel for Mr Traverso (Mr D. Thornburgh) applied to have him joined as a party to the appeal as he claimed an interest in its outcome, and upon being joined to call new evidence. After hearing argument, and considering sworn statements filed in support, the court refused the application and said its reasons for doing so would follow.

52. Mr Traverso says that in about 2009 Kalorib Poilapa approached him about a proposed sale of land which included the land within lease 001. At the time he was led to believe there was a lease over the land, lease 12/0541/015. Agreement to purchase the lease was made and Mr Traverso advanced monies on account to Kalorib Poilapa. The transaction turned out to be "*lies*". In an effort to redeem the situation the parties agreed that Mr Traverso would continue assisting Kalorib Poilapa financially in obtaining the grant of the 001 and 032 leases. However that agreement broke down when the 032 lease was transferred to Messrs. Monvoisin and Bolliet. Mr Traverso then issued supreme court proceedings against Kalorib Poilapa claiming repayment of VT14,728,691 plus interests. Later he obtained a default judgment for the amount claimed and successfully resisted an application to set the judgment aside.

53. In November 2013 he obtained an enforcement warrant to recover the judgment sum then standing at VT18,438,942, including interests and costs. The warrant directed the sheriff to seize and sell at public auction the 001 lease "or any other property attached or belonging to the enforcement debtor" to satisfy the warrant.



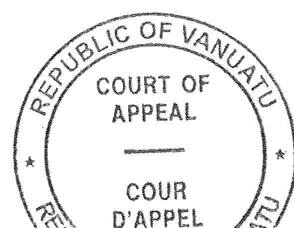
By 1st September 2014 the warrant had not been executed. Mr Traverso then obtained an order from the Supreme Court extending the life of the warrant, but the same order stayed the warrant pending determination of the Supreme Court proceedings the subject of this appeal. Mr Traverso claims that the warrant gives him an equitable interest in the leasehold interest of Kalorib Poilapa, and he should therefore be a party to these proceedings.

54. The new evidence Mr Traverso could give is that he was told by the Lands Office that at the time a check-list was not required, and that he had in his possession two negotiator certificates in respect of leases 001 and 032 which would challenge the judge's finding that no negotiator certificates had been granted by the minister. Mr Traverso sought to be heard about this evidence, and his meetings with relevant stakeholders so as to protect his interest in the lease 001.

55. This court identified three matters that Mr Traverso needed to address:

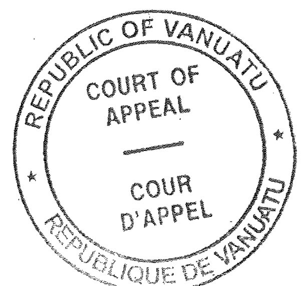
    (1) Whether he had an interest in the 001 lease sufficient to give him standing;
    (2) The explanation for the delay in seeking to be joined;
    (3) The probative value of the so called new evidence.

56. On the first matter, counsel conceded that there is no statutory provision in Vanuatu that creates in favour of a judgment creditor an interest in the property of a debtor against whom an enforcement warrant is issued, but he argued that this particular warrant gave some form of equitable charge over lease 001. In dismissing Mr Traverso's application the court said that the claimed equitable interest was doubtful. On further consideration we think the submission is without merit. Whilst this enforcement warrant specified lease 001 as property of the debtor to be sold by the sheriff, the warrant extends generally to all the property of the debtor. The notion that in the absence of a statutory provision to such effect, an enforcement warrant before execution constitutes a general charge over the debtor's property cannot be correct. The debtor remains free to do as he wishes with his property until execution is effected by the sheriff. In this case no step had been taken to note the warrant on the leasehold title, by caution or otherwise. We are satisfied that Mr Traverso had no interest that could justify his joinder as a party.



57. On the question of delay Mr Traverso said that until he read the judgment under appeal he understood from discussions with Mr Monvoisin that the litigation concerned only the 032 lease. When he read the Supreme Court judgment he realized the 001 lease was under threat. He then asked Mr Monvoisin to have his lawyer apply to have him joined. It was not until shortly before the appeal was listed that he realized that this was not happening, and made his own application. We consider that it is unlikely that Mr Traverso did not realize the litigation involved the conduct of the Minister in granting both the leases, but if he did not know, he certainly had reason to check what the litigation was about. We find the explanation for delay unconvincing.

58. As to the "*new*" evidence, none of it is new. It was there all the time, and if Mr Traverso had made sensible enquiries about the litigation he could have offered his evidence to other parties to use as they saw fit. Indeed it was said from the bar table that the negotiator certificates had been shown to one of the parties but which one we were not told. Apart from the evidence not being new, we consider it could have no bearing on the outcome of the trial. In so far Mr Traverso had conversation with officers of the Lands Department that was hearsay and inadmissible evidence. So too his evidence about his discussions with "relevant stakeholders" was likely to be inadmissible for the same reason. As to the negotiator certificates they would have been pointless evidence. They were meaningless documents on their face. They purported to authorize Kalorib Poilapa to negotiate for land with the custom owner Poilapa Kalorib. He was not the custom owner and it is meaningless for the Minister to authorize him to negotiate with himself. Moreover the reference in the judgment to there being no record of the issue of negotiator certificates on the Lands Department file was not relevant to the outcome of the proceedings. Under s.6 of the Land Reform Act a negotiator certificate is only required when an alienator or other person wishes to enter into negotiations "with any custom owner concerning land". The transactions here were not with custom owners. The grant of the leases was made directly by the minister under s.8. This court recognized in Roqara v Takau [2005] VUCA 5 that where the minister acts under s.8, a negotiator certificate is not required. The court said:



As the land was the subject of disputed custom ownership, under s. 8 of the Land Reform Act [CAP. 123] such certificate were not a prescribed pre-condition to the grant of leases by the Minister under s. 8 of the Land Reform Act [CAP. 123]. However the Ministry and Department of Lands had adopted the practice of issuing Certificates of Registered Negotiator to applicants who sought the lease of land which was the subject of disputed ownership. This was done as the Department required the Claimants for custom ownership to be consulted and their consent sought by the applicant for a lease: see s.6 of the Land Reform Act.

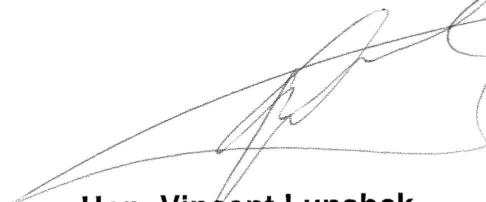
59. The evidence which Mr Traverso wanted to introduce would have no influence on the outcome of the trial. The only possible use it could have had would be in the cross examination of the Lands Department officers. Thus for it to have any purpose at all would require a complete retrial of the proceedings. It is far too late for that to happen. The public interest in bringing finality to disputes, especially long running ones where the livelihoods of many people are affected, overrides last minute personal issues of the kind belatedly raised by Mr Traverso, even if they could be shown to have some legal merits.

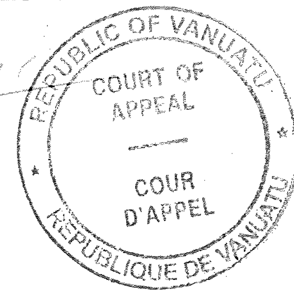
60. For these reasons the applications by Mr Traverso were dismissed, and for the reasons earlier given the appeals against the decision and orders of the Supreme Court given on 6th July 2018 are also dismissed.

61. The appellants must pay the respondents' costs of the appeal.

DATED at Port Vila, this 22nd February, 2019.

BY THE COURT





Hon. Vincent Lunabek
Chief Justice.