

IN THE COURT OF APPEAL  
OF THE REPUBLIC OF VANUATU  
(Appellate jurisdiction)

CIVIL APPEAL  
CASE NO. 19/2961 COA/CIVA

BETWEEN: CHEN JINQIU  
Appellant

AND: LY NU LOUNG  
First Respondent

AND: MILLIE OGDEN, FELIX LOUNG AND VINCENT  
LOUNG  
Second Respondents

AND: THE GOVERNMENT OF THE REPUBLIC OF  
VANUATU  
Third Respondent

**Coram:** Hon. Chief Justice Vincent Lunabek  
Hon. Justice John Hansen  
Hon. Justice Richard White  
Hon. Justice Oliver A. Saksak  
Hon. Justice Gus Andrée Wiltens  
Hon. Justice Dudley Aru  
Hon. Justice Viran Molisa Trief

**Counsel:** Robert Sugden for Appellant  
Nigel Morrison for First and Second Respondents  
Lennon Huri for Third Respondent  
Avock Godden for Jean Marc Pierre

**Date of Hearing:** 12<sup>th</sup> and 14<sup>th</sup> February 2020

**Date of Judgment:** 20<sup>th</sup> February 2020

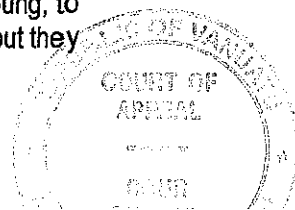
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## REASONS FOR JUDGMENT

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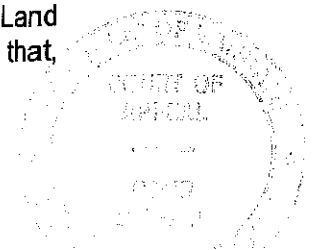
### Introduction

1. This is an appeal from a judgment of the Supreme Court ordering the rectification of the Land Leases Register and the payment of damages to be assessed. The appeal is brought by Chen Jinqiu, who was the first defendant at trial.
2. The background to the appeal is somewhat tortuous. The first respondent to the appeal, Ly Nu Loung, to whom we will refer as "the wife", is married to Loung Fong, to whom we will refer as "the husband", but they



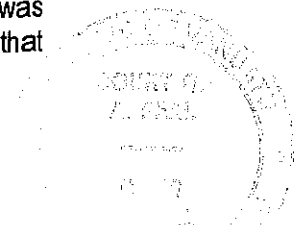
have been estranged for many years. They have three children, Millie Ogden, Felix Loung and Vincent Loung.

3. In 1982, the husband and the wife, using marital funds, purchased the leasehold title 03/0183/038 in Luganville, Santo (Lease 038), and registered it in their joint names. On 2 February 1987, the wife provided the husband with a power of attorney (the POA) in order to facilitate the administration of the couple's business interests in Luganville during her absences overseas. Eleven years later, on 27 April 1998, the husband used the POA to effect a surrender of Lease 038 and the creation of two derivative leases in his own name as sole proprietor, being Lease 03/0183/070 (Lease 070) and Lease 03/0183/071 (Lease 071). The primary judge had not "the slightest doubt" that the husband's use of the POA for this purpose constituted a fraud on his wife, at [24].
4. Between July and November 2001, the husband sold Lease 070 and Lease 071 to Gum So Leung but, following the commencement of proceedings by the wife, this sale was reversed and the purchase price refunded. Some of the moneys used to refund Gum So Leung were provided by the wife and the children. On 21 August 2001, the wife lodged cautions with the Director of Lands, under Part 14 of the *Land Leases Act*, on each title forbidding the registration of any interest affecting her interest.
5. The proceedings commenced by the wife in 2001 were settled prior to judgment. As part of the settlement, the husband executed transfers of both Leases 070 and 071 in favour of the wife and the three children. The husband was to stamp and register the documents so as to give effect to the transfers. However, he did not do so and Leases 070 and 071 remained registered in his name.
6. In February 2002, the Director cancelled the two cautions over Lease 070 and Lease 071. The primary judge said that the Director had done so "ostensibly because the parties had settled".
7. A little over 8 years later, the wife became aware that the husband was still the registered proprietor and, in July 2010, she lodged fresh cautions over both Leases. Those cautions were registered on 24 August 2010.
8. On the hearing of the appeal, counsel for Chen Jinqi submitted that the caution on Lease 071 had been lodged but not registered until 2014. That submission cannot be accepted because a copy of the Register, scanned on 26 August 2010, shows that the caution had been registered on 24 August 2010. Counsel for Chen Jinqi referred the Court to another copy of the title said to have been obtained in 2014 which does not show the caution as having been registered. However, the copy of the title scanned on 26 August 2010 was adduced into the evidence at trial by Chen Jinqi himself and it can be taken that he thereby impliedly represented to the Court that it was reliable. An independent matter indicating that the caution had been registered is the fact that, on 13 October 2014 the Director purported to give notice under s.96(1)(c) of the *Land Leases Act* of his intention to remove the caution. It would not have been necessary for him to do so had the caution not been registered.
9. The caution over Lease 071 remained in place until 15 April 2015 when it was removed by the Director. He did so because the Department had received a request, it seems from Geoffrey Gee and Partners (GGP), acting on behalf of Bred Bank, for the registration of a transfer of the lease from the husband to Chen Jinqi. Bred Bank was lending money to Chen Jinqi and wished its mortgage to be registered. The transfer was intended to give effect to a contract made between the husband and Chen Jinqi in December 2013 whereby the husband agreed to sell Lease 071 to Chen Jinqi for VT45 million, payable in instalments.
10. The notice sent by the Director on 13 October 2014 in purported compliance with s. 96(1)(c) of the *Land Leases Act* required the wife either to withdraw her caution or to substantiate her claim and indicated that,



if she did not do so, or at least provide a certified copy of pending court proceedings, the caution would be removed from the Land Lease Register.

11. Unfortunately, the Director sent the notice to the address of the wife shown on the caution, namely, PO Box 78, Asia Motel, Luganville, Santo in the Republic of Vanuatu. However, the wife had, in accordance with s.93(3) of the Land Leases Act indicated in the caution, in capitalised and emphasised font, her appointment of Ridgway Blake and their office as the place at which notices and proceedings relating to the Caution should be addressed or served. The Director did not send any notice to that address. The consequence was that the notice did not come to the attention of the wife or her solicitors, and the wife did not take action to resist the removal of the caution.
12. Following the submission to him of a "Consent Checklist" (an internal Department of Lands document), the Minister had, on 26 August 2014, given his consent under section 36 of the Land Leases Act for the transfer of Lease 071 to Chen Jinqiu. The judge received evidence indicating that there were irregularities in the manner in which the Checklist was provided to the Minister as well as in its content.
13. On 27 March 2015, Chen Jinqiu met the wife and her daughter Millie Ogden. The wife and Millie told Chen Jinqiu of the caution on the title to Lease 071. Thus, Chen Jinqiu had notice of the caution from at least that time, but the Judge had evidence that he had been informed about its existence even earlier.
14. On 13 April 2015, Chen Jinqiu and Marco Herrominly met the Minister personally and, amongst other things, sought the removal of the wife's caution over Lease 071. The registration of the transfer of Lease 071 to Chen Jinqiu occurred two days later. The wife's caution was removed by the Director at the same time, presumably so as to allow registration of the transfer to proceed.
15. The inference that a causal relationship existed between these events is strong.
16. The wife had caused a further caution to be lodged on Lease 071, on 12 February 2015, but this was not registered until 27 April 2015, as the Director took the view that the transfer requested by GGP, which had been lodged earlier, took priority.
17. The primary judge accepted that the true consideration paid by Chen Jinqiu for the transfer of Lease 071 was VT 45,000,000. However, the consideration shown on the transfer was VT 30,000,000 and the *ad valorem* stamp duty payable under the *Stamp Duties Act* was calculated by reference to this figure.
18. The circumstances just described have given rise to considerable litigation, including an unsuccessful appeal by Chen Jinqiu to this Court: *Chen Jinqiu v Ly Nu Loung* [2019] VUCA 13 and an unsuccessful appeal by the husband: *Loung Fong v Chen Jinqiu* [2016] VUCA 39. For the purposes of this decision, it is not necessary to describe all the litigation. It is, however, pertinent to note that the Court of Appeal in *Chen Jinqiu v Ly Nu Loung* [2019] VUCA 13 described an action commenced by Chen Jinqiu on 2 March 2017 as a "blatant abuse of the Court's processes", at [64], and upheld the striking out of that action.
19. The judgment under consideration on this appeal concerned two actions. The subject of both actions was the alleged wrongful registration of the transfer in favour of Chen Jinqiu.
20. In the first, Civil Case No.142/2015, the wife was the first claimant and the three children were, collectively, the second claimant. The husband was the first defendant and Jean Marc Pierre was the second defendant. The latter was the Director of Lands in the Vanuatu Lands Department at relevant times. Chen Jinqiu was not a defendant to this action. The principal relief sought by the claimants was damages. They alleged that



the husband and Mr Pierre had, in collusion with Chen Jinqui, engaged in deliberate and fraudulent conduct in relation to the registration of the transfer directed at depriving them of their rights and interests in Lease 071. Both defendants denied these allegations.

21. In the second action, Civil Case No. 1335 of 2015, the wife was the first claimant and, following their joinder on the first day of trial, the three children were (again collectively) the second claimant. There were three defendants: Chen Jinqui was the first; the Government of the Republic of Vanuatu was the second; and Jean Marc Pierre was the third. In this action, the principal relief sought by the wife and children was rectification of the Land Leases Register pursuant to s 100 of the Land Leases Act and damages assessed against all defendants, jointly and severally. They repeated the substance of many of the allegations made in Action 142/2015 and alleged that Chen Jinqui had procured the registration of the transfer by "omission, fraud or mistake". The allegations against Mr Pierre were similar to those made in Action 142/2015. The Republic was said to be liable by reason of the conduct of its employee, Mr Pierre.
22. An order for the consolidation of both actions was made pursuant to CPR 3.4, but the terms of the order were not before this Court.
23. On or about 19 August 2016, the wife and the children reached a settlement with the husband concerning the claims against him in Action 142/2015 (the 2016 settlement). Consent orders were made. This was after the wife and the children had commenced Action 1335/2016. By the consent orders, the husband was to transfer to the wife and children Lease 070 and Lease 071 as well as the business of the Asia Motel. The claimants then discontinued their claims against the husband in Action 142/2015. The husband has never been a party to Action 1335/2016.
24. The trial of the consolidated actions commenced on 7 March 2017 and concluded on 17 March 2017.

### **The power to direct rectification**

25. Section 100 of the Land Leases Act provides:

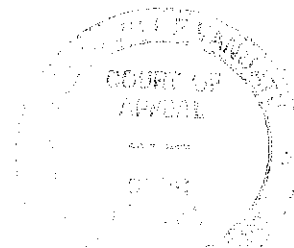
**100.** (1) Subject to subsection (2) the Court may order rectification of the register by directing that any registration be cancelled or amended where it is so empowered by this Act or where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.

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

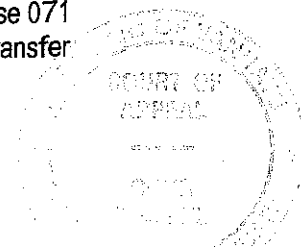
26. As is apparent, s.100 empowers the Supreme Court to order rectification of the Register by directing that any registration be cancelled or amended if it is satisfied that any registration has been obtained, made or omitted by fraud or mistake. However, the Court may not exercise this power so as to affect the title of a purchaser for value unless that purchaser caused the omission, fraud or mistake, substantially contributed to it, or had knowledge of the omission, fraud or mistake relied upon for the rectification which is sought. We note that the effect of s.100 was discussed by this Court in *Nafalak Teufi v Kalsakau* [2005] VUCA 15.

### **The findings of the Primary Judge**

27. The Primary Judge found, in summary, that:



- a) the husband's use of the POA in 1998 to surrender Lease 038 and to have the derivative Leases 070 and 071 issued in his sole name was an abuse of the POA, and a fraud on his wife, at paragraphs 24 - 31;
- b) the husband's surrender of Lease 038 was unlawful, as was his obtaining of the two derivative leases, Lease 070 and Lease 071, at paragraph 31;
- c) as part of the settlement of the litigation in 2001, the husband had executed transfers of Leases 070 and 071 to the wife and the children, but they had never been registered. The cautions lodged by the wife in 2001 were cancelled by the Director of Lands in February 2002, but the wife had lodged fresh cautions which were registered on 24 August 2010, at paragraph 22;
- (d) Mr Pierre, the Director, had not complied with s.97(3) of the Land Lease Act before removing the wife's 2010 caution over Lease 071 from the Register because he had not sent the notice of his intention to do so to the address of Ridgway Blake, which the wife had nominated in the caution as her address for service. In making this finding, the Primary Judge made adverse findings about the credibility of the evidence given by Mr Pierre and his witness Mr Willie concerning the circumstances in which the wife's 2010 caution was removed, at paragraphs 43 - 45;
- (e) the removal of the wife's 2010 caution was a causative "mistake" for the purposes of s.100(1) because, without its removal, the transfer of Lease 071 to Chen Jinqui would not have occurred, at paragraph 46;
- (f) the Consent Checklist on which the Minister relied in giving the consent to the registration of the transfer required by s. 36 of the Land Leases Act contained "glaring mistakes" which, if they had been disclosed, would have led the Minister to decline his consent. Hence, these mistakes were causative of the registration of the transfer, at paragraphs 53 - 54;
- (g) the understatement of the true consideration for the transfer was not a genuine mistake. It deprived the transfer of status as an instrument or disposition in accordance with the Land Leases Act. The Judge referred in this respect to s.76 (3) of the Land Leases Act which requires instruments to contain a "true" statement of the amount of the purchase price and to s.22 (1) of the Act which, amongst other things, proscribes the transfer of a lease except in accordance with the Land Leases Act, at paragraphs 58 - 68;
- (h) the three mistakes (the removal of the wife's 2010 Caution, the errors in the Consent Checklist and the understatement of the true price) enlivened the Court's rectification power under s 100 (1), at paragraph 69;
- (i) neither Mr Pierre nor the Government of the Republic was protected from liability by s. 9 or s. 24 of the Land Leases Act, because it could not be said that Mr Pierre or other Department of Lands employees had acted in "good faith", at paragraph 73;
- (j) it could not be held that Chen Jinqui had knowledge of the husband's fraud on his wife in 1998 in surrendering Lease 038 and obtaining the derivative Leases 070 and 071 in his own name, at paragraph 75;
- (k) however, Chen Jinqui had actively contributed to the obtaining of the unlawful transfer of Lease 071 because, despite being aware that the stated purchase price was untrue, he had signed the transfer.

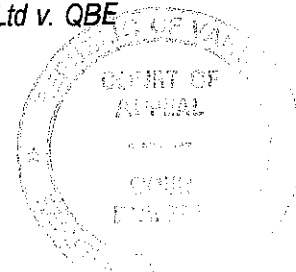


form. The Judge also referred to other actions which the claimants had submitted indicated Chen Jinqi's participation in obtaining the registration of the transfer, at paragraphs 82-83. Although the Judge did not make specific findings concerning them, it seems that he accepted that the matters supported his conclusion that Chen Jinqi had been "complicit in the impugned registration". The Judge made express findings that there had been a "fraud on the Government coffers".

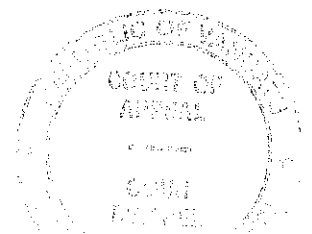
- (l) the claim of the wife and children was not defeated by laches, at paragraphs 84 - 87;
  - (m) it was not necessary for the wife, as a condition of the rectification, to repay the VT45 million purchase price, at paragraphs 77 - 79;
  - (n) the Register could be rectified without restoring the fraudulent husband as a registered proprietor, at paragraph 80;
28. Having made these findings, the Judge then ordered that the Register be rectified by:
- (i) cancelling Chen Jinqi's registration as sole proprietor of Lease 071;
  - (ii) cancelling the registration of the mortgage in favour of Bred Bank granted by Chen Jinqi over Lease 071;
  - (iii) registering the wife and the three children as proprietor in common with equal individual shares.
29. It is pertinent in relation to the second of these orders to note that the loan secured by the mortgage had been repaid in full before the making of the order, so that Bred Bank was not prejudiced by it.
30. The Judge concluded his judgment by awarding the wife against Chen Jinqi, the Republic and Mr Pierre jointly and severally damages to be assessed at a separate hearing.

#### **The parties appealing**

31. As already indicated, the appeal is brought by Chen Jinqi. No other party filed an appeal.
32. However, on Friday 7<sup>th</sup> February 2020, that is, the Friday before the commencement of the February session of the Court of Appeal, Mr Pierre filed an application for leave to appeal out of time. His draft notice of appeal provided with the application contained 9 grounds.
33. The Court heard submissions on Mr Pierre's application on 12<sup>th</sup> February 2020. The application was supported by Mr Sugden, appearing on behalf of Chen Jinqi, but opposed by Mr Morrison, appearing for the wife and the children. The Republic of Vanuatu took a neutral position. At the conclusion of the hearing on 12<sup>th</sup> February, the Court announced its decision refusing the grant of leave to Mr Pierre and said that it would provide its reasons as part of this judgment. Those reasons follow.
34. The principal matters to which the Court has regard in considering whether to exercise the discretion to grant an extension of time in which to commence an appeal include the length of the extension required, the reason for the failure to commence the appeal within time, the prospects of success of the appellant on the appeal, and the degree of prejudice to the respondent if the extension is granted: *Laho Ltd v. QBE Insurance (Vanuatu) LTD* [2003] VUCA 26.



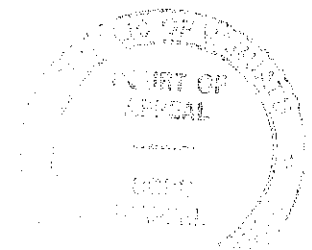
35. In the present case, the delay is substantial as, at the date Mr Pierre's application was filed, four months had elapsed since the delivery of judgment on 4 October 2019. Relative to the 30 day period fixed by r.20 of the Court of Appeal Rules 1973 for the commencement of such appeals, this is a significant period. Contrary to the submissions of counsel for Mr Pierre, the period of delay cannot reasonably be described as "short".
36. Mr Pierre did not provide a personal affidavit in explanation of the delay. Instead, he relied on the affidavit of his counsel, Mr Godden. The explanation was to the effect that Mr Godden had had difficulty in contacting Mr Pierre after the delivery of judgment and in providing him with a copy of the judgment, that Mr Pierre was away from Port Vila participating in a Land Tribunal Hearing, and that the period of the delay had included a period during which the Court was in recess and Mr Godden on holidays.
37. Regrettably, Mr Godden's affidavit was expressed in very general terms. He did not provide any particulars of when the attempts had been made to contact Mr Pierre, when Mr Pierre had received a copy of the judgment, when Mr Pierre had first given instructions in relation to an appeal and the action, if any, taken after those instructions were received. An email from Mr Pierre attached to Mr Godden's affidavit indicated that he (Mr Pierre) may have been intending to appeal at 27 December 2019, but no action was taken thereafter until 7 February 2020. Mr Godden's affidavit did not indicate any steps taken to mitigate potential prejudice to the respondents by the delayed commencement of the appeal, for example, by putting the respondents on notice of the foreshadowed application. On the contrary, Mr Morrison said (without contradiction) that the first notice which he had received of Mr Pierre's proposed appeal was at the call over on 7<sup>th</sup> February 2020. In all these circumstances, the evidence put forward by way of explanation for the delay is unsatisfactory.
38. It is difficult for the Court at this stage to assess Mr Pierre's prospects of success on the appeal. Mr Godden addressed this topic only in one very short paragraph in his supporting affidavit. He did not provide an outline of the submissions which he would make on the appeal if the extension of time is granted. Had he done so, the Court would have been assisted in assessing the potential merit of the grounds in the draft notice of appeal.
39. It is of course a matter of concern that a litigant may suffer real prejudice by the refusal of the grant of an extension of time. Mr Godden identified the prejudice in Mr Pierre's case as being that, if he is not permitted to appeal, the Judge's order for the claimant's damages to be assessed will, at least against him, stand. We accept that an inability to challenge the order may be a real form of prejudice. However, the extent of that prejudice is reduced because Mr Morrison accepted that, if a particular challenge by Chen Jinqi on his appeal against the damages order succeeded, it would also be appropriate for the order concerning Mr Pierre to be set aside.
40. The Court was concerned about the potential prejudice to the respondents if Mr Pierre was permitted, at this very late stage, to commence an appeal. In particular, the Court was concerned that it may lead to the necessity for the hearing of the appeal to be adjourned to the May session. However, Mr Morrison accepted, quite fairly, that if the extension of time was granted, he should be capable of being ready to deal with the appeal at its scheduled listing time of 2 pm on Friday 14<sup>th</sup> February 2020.
41. It has to be emphasized that limitation periods such as that contained in rule 20 serve a valuable purpose in the administration of justice. Amongst other things they facilitate the provision of procedural fairness and allow both the other parties to the litigation and the Court to prepare adequately for a hearing.



42. In the present case, the matters which inclined the Court against the grant of extension of time included the period of the extension sought, the inadequacy of the explanation provided in support, the absence of material by which the Court could assess the potential merit of Mr Pierre's proposed grounds of appeal, and the limited nature of the prejudice to Mr Pierre if the extension is not granted.
43. These are the reasons for the ruling on 12<sup>th</sup> February 2020.
44. Mr Pierre was not otherwise made a party to the appeal and he did not seek to be heard on the appeal.
45. The Republic of Vanuatu did not appeal against the Judge's orders. Its written submissions supported the submissions by Chen Jinqiu, at least to the extent that they concerned the conduct of employees in the Department of Lands. We will take that into account in the determination of the matters raised by Chen Jinqiu's appeal.

#### **The notice of appeal**

46. Chen Jinqiu's notice of appeal contains 25 grounds. Several of these contain multiple subparagraphs alleging further errors. The effect is that the notice of appeal alleges more than 40 separate errors. It is improbable that a single judgment would contain this number of errors. The inclusion of so many errors in a notice of appeal is often taken as indicating that the author of the notice did not have confidence in the merit of any of them. For this and other reasons, many counsel consider it prudent to exercise discrimination when preparing the grounds in a notice of appeal.
47. The lack of close crystallization in Chen Jinqiu's notice of appeal of the issues to be decided on the appeal was not made good in the submissions filed on his behalf on 30 January 2020. Counsel accepted that this document did not identify succinctly for the Court the particular complaints which Chen Jinqiu wished to advance on the appeal. Counsel was then permitted to file and serve a further submission, which he did on 10 February 2020. Rather than confine the matters, these submissions seemed to raise further grounds of complaint, without any attempt to link them to the grounds in the notice of appeal.
48. It was also apparent that some of the further submissions raised issues which had not been argued before the Judge. The respondents' written submissions provided in advance of the hearing identified several matters in this category. Despite having this notice, counsel did not seek leave to argue those matters. It should be clearly understood that a litigant is not entitled as of right to argue on appeal matters not raised at trial. A party wishing to do so should seek the Court's leave. Whether leave will be granted depends on a range of factors of the kind discussed in *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337 and *Pittalis v Grant* [1989] QB 605. Given that counsel did not seek leave on this appeal, there are some matters which it is not necessary for this Court to address.
49. At the commencement of the appeal, counsel for Chen Jinqiu said that he pursued all grounds. This was so despite several not being supported by any submissions.
50. In order to address the matters raised by Chen Jinqiu, we will, so far as is practicable, attempt to group the complaints raised by the notice of appeal. We will address the grounds in the sequence which seems to us most appropriate.





### **The heading to the primary judgment**

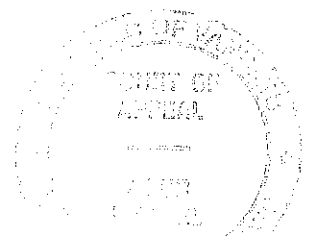
51. Counsel's first submission concerned the "entitling" of the primary judgment. He submitted that there was no proceeding before the Court in which the parties are listed in the manner shown on the judgment, namely, with the wife as first claimant, the children as second claimant, Chen Jinqiu as first defendant, the Government of the Republic of Vanuatu as second defendant, Jean Marc Pierre as third defendant, and Bred Bank as an "interested party".
52. Counsel is correct insofar as there had not been a single action commenced in the Supreme Court with the parties so described. However, the Judges' description of the parties reflects the order that the two actions (142/2015 and 1335/2016) be consolidated and follows the form of the claimant's consolidated pleading which the Judge had ordered them to file on 7 March 2017. Moreover, as counsel acknowledged, nothing turns on the way the Judge identified the parties in the judgment.
53. However, as a matter of form, it is appropriate that the orders for rectification and for damages to be assessed be made in the appropriate action. We will refer to this again later in these reasons.

### **Grounds 4 and 5 - The Court's power to make the rectification orders**

54. Counsel submitted, on two bases, that the orders made by the Primary Judge had been beyond the Court's power.

#### **"Cancel" or "amend"**

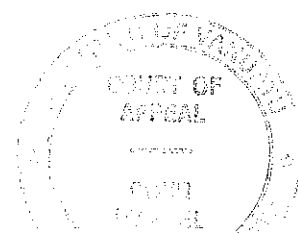
55. First, counsel submitted that s.100 of the Land Leases Act authorizes the Court to order rectification of the register by its cancellation *or* amendment, but not both. Accordingly, by ordering both the cancellation of the registration of Chen Jinqiu as sole proprietor and of Bred Bank as mortgagee *and* the registration of the wife and the children as proprietors, the primary Judge had exceeded his authority. This submission, if accepted and the appeal otherwise dismissed, would mean that the husband would, on the cancellation of Chen Jinqiu's registration, be restored as the registered proprietor.
56. Counsel's initial submission on these grounds overlooked s.2 of the Interpretation Act, which provides that words and expressions defined in the Schedule to that Act have the meanings attributed to them. The Schedule specifies that the term "amend" includes "repeal, revoke, rescind, cancel, replace, add to or vary and the doing of any two or more of such things simultaneously in the same written law". This extended meaning of the term "amend" is inapplicable if there is something in the subject or context of an Act which is "inconsistent with" a provision in the Interpretation Act: s.2(b) of the Interpretation Act.
57. Counsel for Chen Jinqiu seemed to accept that, if the extended definition is applicable in the case of s.100, it would defeat his submission. He submitted, however, that three matters indicated that the extended meaning of "amend" could not be applied in the case of s.100.
58. First, the expression of the terms "cancelled" and "amended" in s.100 (1) as alternatives suggested that the Court could do one or other of the two alternatives, but not both. Secondly, if "amend" includes "cancel", the inclusion of the word "cancel" was unnecessary. As the Court should strive to give effect to each word in s.100, this suggested that the term "amended" should not have the extended meaning. Thirdly, s.100 authorizes an order that a *registration* be cancelled or amended. This should be understood as referring to the process of registration, that is, the transfer itself, and not its effect.



59. As to the last of these matters, section 1 in the Land Leases Act provides that the term "to register" means "to make an entry in the Land Leases Register under this Act and "registered", "unregistered" and "registration" shall be construed accordingly". In our view, the reference in this definition to the making of an entry is important. It indicates that the power to order cancellation or amendment of a registration is a power to order that an *entry* in the Register be cancelled or amended. That is to say, it is not confined to the process of registration or to the transfer itself.
60. We see no reason to give s.100 the narrow and rather rigid construction for which counsel contended. In particular, we do not regard the application of the extended meaning of "amend" as being "inconsistent with" the terms or context of s.100. On the contrary, the two terms are complementary. They indicate that the Court may simply cancel a registration (with no associated orders) or make an order requiring more than one action of the specified kind in relation to a registration. This includes ordering the cancellation of a registration together with consequential orders identifying the person or persons who are to replace the person whose registration has been cancelled. Understood in this way, the Court's power to direct that a registration be cancelled or amended does not create the form of binary choice for which counsel contended.
61. In summary, we accept that the extended meaning of the term "amend" was applicable in the present case and indicates that the Judge's orders were authorized.
62. It is immaterial that the primary judge did not refer expressly to the extended meaning of "amend" in the Interpretation Act. The important matter is that the orders he made were authorized, even if the Judge did not explain the particular source of his authority.
63. We add that, contrary to the assumption implicit in counsel's submission, acceptance of the narrow and rigid view of s.100 (1) for which he contended would not necessarily have the consequence that the judge's orders were unauthorized. That is because the ordinary meaning of the word amend is capable of encompassing the replacement of one name with another, and that is in substance what the Judge did.

***Did the husband have to be a party?***

64. Counsel submitted that it was open to the Primary Judge to make an order deleting the husband's name from the Register following cancellation of Chen Jinqi's transfer only in proceedings under s. 100 (1) to which the husband was a defendant or, at least in which the husband was a party. The implicit submission seemed to be that that had not been so in the present case.
65. This submission cannot be accepted. Section 100 does not contain any limitation of the kind for which counsel submitted and it would not be appropriate for this Court to read into it a limitation which Parliament has not chosen to impose. That is especially so as the limitation for which counsel contended could be a cause of considerable inconvenience and unnecessary expense.
66. Of course, the Court would be concerned not to exercise the power in s. 100 in a way which was adverse to a person's interest without giving that person the opportunity to be heard. That will usually require that the person be a party to the proceedings. That consideration is not pertinent in this case as the husband was a defendant to one of the two consolidated actions and can be taken to have been aware of the relief by way of rectification of the register sought by the claimants. We also note in this respect the uncontested suggestion in the submissions that the husband had been present in the courtroom for at least part of the trial.

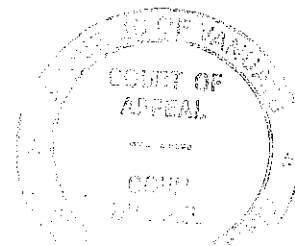


### **Ground 3 – Asserted error of law in making the rectification orders**

67. By ground 3, Chen Jinqui contended that the Judge had erred in law in ordering the cancellation of the registration of his transfer and in ordering that the wife and the children replace him on the Register as registered proprietors.
68. In addition to the challenge to the Court's power just addressed, counsel submitted that the rectification orders made in this case, if permitted to stand, would "drive a truck through" the principle of indefeasibility on which the registration system in the Land Leases Act, and s.23 in particular, is based. Putting to one side counsel's hyperbole, we still do not regard this as a persuasive submission. It is inherent in an order for rectification, in particular, an order for cancellation of a registration, that there will be some infringement on the principle of indefeasibility. That means that the certainty which registration is intended to provide is qualified. In a given case, that may be an important consideration bearing on the Court's exercise of the discretion whether to order rectification. But the Parliament is to be taken to have known that rectification may have this effect on the indefeasibility principle and nevertheless must have intended that the power to order rectification may be exercised in an appropriate case.

### **Grounds 1, 2 and 7(ii) - The effect of the 2016 Settlement**

69. Three of Chen Jinqui's grounds concerned the effect of the 2016 Settlement. First, he contended that, following the 2016 settlement (which, it will be recalled concerned the claim made against the husband in Action 142/2015), the Judge should have struck out Action 1335/2016.
70. Chen Jinqui contended, secondly, that the Judge should have held that, by entering into the 2016 settlement, the wife had *elected* not to pursue her claim with respect to Lease 071. That election, so it was said, was irrevocable, with the consequence that, after the 2016 Settlement, the wife had lacked standing to pursue the remedy of rectification.
71. Thirdly, counsel contended that the "only possible right" which the wife could claim in respect of Lease 071 was to be made a joint tenant with her husband. The finding in paragraph 75 of the judgment that Chen had no knowledge of the husband's fraudulent use of the POA in 1998, together with the wife's acceptance of an interest in 070 "in place of her claim in respect of 071" meant that an order of rectification could not be made.
72. These submissions face a number of insuperable difficulties:
- a) the submissions overlooked altogether the settlement of the 2001 action by which the husband agreed to transfer to the wife and the children his interest in leases 070 and 071. That settlement, and the action taken to implement it meant that, on the cancellation of the transfer from the husband to Chen Jinqui, the wife and children were entitled to be registered as proprietors;
  - b) counsel did not point to any principle or rational basis by which the settlement of the claim against the husband made it appropriate for the Court to strike out claims against different parties, including a claim for a form of statutory relief, in an action to which the husband was not a party;
  - c) contrary to Chen Jinqui's submission, the settlement of a claim against one wrong-doer not, in the absence of statutory intervention, preclude the pursuit of relief against another wrongdoer, at least in the circumstances of the kind in question in this case;



- d) the doctrine of election in the law involves a choice between two alternative and inconsistent courses, such that a person cannot, having chosen one, later seek to invoke the second: *Lissenden v. CAV Bosch Ltd* 1940 AC 412 at 428-30, 436. That doctrine has no application presently as there was no inconsistency between the settlement of the claim against the husband and the continued pursuit of relief against Chen Jinqi, especially given that the principal relief sought against him was rectification of the Register. For the reasons which will become apparent, it was certainly not "against all conscience" for the wife to do so;
- e) Had Chen Jinqi sought the husband's continued involvement in the proceedings so that he could obtain relief by way of contribution or other relief from him, he should not have discontinued his counterclaim in Action 1335/2016, which included a claim against the husband.

73. Accordingly, these grounds of appeal fail.

#### **Ground 6 - The use of the 1998 fraud**

74. Chen Jinqi contended in Ground 6 that it had been wrong of the Judge to treat the husband's fraud in 1998 as part of the fraud which could be relied upon by the claimants in their claim against him. Counsel referred in this respect to paragraph 34 of the Judge's reasons:

[34] It is clear that this Court has a discretion ("**may**") to order rectification of the register by directing that any registration be cancelled or amended in two (2) situations:

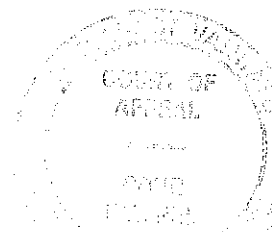
- (a) Where "*it is so empowered by this Act*"; and
- (b) Where "*it is satisfied that any registration has been obtained, made or omitted by fraud or mistake*".

Notably in this latter instance the identity of the offending or mistaken party or person is not mentioned so long as the registration occurred as a result of fraud or a mistake that is sufficient. In the present case, the Claimants say that Chen Jinqi's registration of lease "071" by the Director of Lands was "*obtained and made*" by fraud and mistake.

75. This ground appears to be based on a misunderstanding of the Judge's reasons. The Judge did not in paragraph 34 purport to rely on the husband's 1998 fraud in relation to the claim for rectification. All the Judge said in paragraph 34 was that s.100 did not make the identity of "the offending or mistaken party or person" an integer of the exercise of the Court's power. And, as earlier noted, the three matters on which the Judge relied did not include the husband's fraud in 1998.

#### **Grounds 7(i) and 10(iv)-(vi) - Relief in favour of the children**

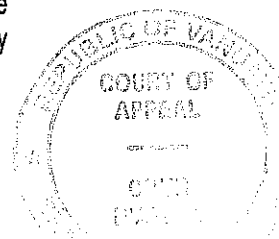
- 76. Chen Jinqi submitted that the primary judge had erred by making orders in favour of the children, because they had not brought any claim in Action 1335/2016 (in which the claim for rectification was made) and because the evidence did not disclose a basis for a lawful claim by them to be registered as proprietors of Lease 071.
- 77. This submission cannot be accepted. First, the children were joined as the second claimant in Action 1335/2016 on the first day of trial, as both the Judge's notes and the filed Amended Supreme Court Claim indicate.



78. Secondly, there was evidence supporting the Judge's finding that the husband had in 2001 executed transfers of Lease 070 and Lease 071 to the wife and children and that these transfers had been submitted to the Department of Lands for registration. Further, as already noted, the wife and children had provided some of the funds used to refund Gum So Leung, thereby providing consideration. Although the notice of appeal contained a bare assertion that the Judge had erred in his findings concerning the transfer to the wife and children in 2001 (Ground 10 (iv)-(vi)), counsel made no reference to the evidence received at trial on this topic, let alone a submission to the effect that the Judge had erred in his assessment of that evidence.

**Ground 8 -The "ruling" by the Court of Appeal in 2016 and Chen Jinqui's "contractual right"**

79. By ground 8, counsel contended that the primary judge had been wrong in "holding" that Chen Jinqui's "contractual rights", together with a "ruling" of the Court of Appeal in *Luong Fong v Chen Jinqui* [2016] VUCA 39, did not prevent him making the rectification orders.
80. The "contractual rights" to which counsel referred were those arising from the contract entered into by Chen Jinqui and the husband in settlement of proceedings commenced by Chen Jinqui on 18 April 2015. In those proceedings, Chen Jinqui had sought an order for possession of the premises on Lease 071 and for payment of mesne profits from 21 February 2015 until possession was obtained. The husband had counter claimed seeking rectification of the Register to restore him as the lessee or, alternatively, for payment of the balance of the purchase price. On 11 March 2016, the trial judge made orders giving effect to the settlement between Chen Jinqui and the husband to the effect that the former was entitled to possession and dismissing the husband's counterclaim.
81. Counsel for Chen Jinqui submitted that the husband had consented to the judgment as trustee for himself and the wife and, accordingly, that the judgment bound the wife in respect of any further rectification action against Chen Jinqui.
82. This ground faces the immediate difficulty that the Judge did not make the "holding" which Chen Jinqui seeks to impugn. Counsel's submission did not identify such a finding in the Judge's reasons. Moreover, the written submissions by counsel at trial did not contain an express submission to the effect now made. Counsel did not seek leave to advance on appeal an argument which he had not advanced at trial.
83. However, leaving those issues to one side, it is apparent that the ground cannot succeed. There is simply no evidence supporting the conclusion that the husband conducted the defence and brought the counterclaim in the action giving rise to the consent judgment as trustee for himself and the wife. On the contrary, it is apparent that the husband, having perpetrated a serious fraud on the wife and the children, and perhaps on Chen Jinqui as well, was pursuing the claim in his own interest. The reasons of the Court of Appeal in 2016 VUCA 39 reflect that understanding of the capacity in which the husband was acting. The suggestion that the husband, as a fraudster, was acting in the interests of his wife and children is fanciful.
84. Whether, had the husband succeeded in the action, the Court would have declared that he held Lease 071 and any associated benefits as a constructive trustee for the present respondents does not alter that position. A trust cannot be invented now, simply because it suits Chen Jinqui's present interest in the litigation.
85. The "ruling" of the Court of Appeal to which counsel referred is not a ruling at all. It was no more than the observation that the payment to the husband of the full purchase price (which had occurred before the entry



of the consent judgment) made it unlikely that he would have succeeded in having the sale agreement set aside and the register rectified so as to record him as the lessee.

86. Ground 8 fails.

**Ground 11 and 12 - Knowledge of the wife's 2010 caution**

87. By ground 11, counsel contended that the Judge did not have any evidence to support the finding that the wife's 2010 caution had been registered on 24 August 2010. By ground 12 he contended that the Judge had erred in finding that Chen Jinqui was "deemed to have had notice" of the 2010 caution.
88. Plainly, these grounds cannot succeed. The primary Judge did have evidence, being the copy of the Register adduced into evidence by Chen Jinqui himself. It showed that the caution had been registered on 24 August 2010. It remained so registered until 15 April 2015. By reason of s.18 of the Land Leases Act, Chen Jinqui was deemed to have had notice of the caution.

**Grounds 13, 14 and 15 - The findings concerning the surrender of Lease 038 and the issue of the derivative titles**

89. These grounds sought to impugn the Judge's finding that the husband's use of the POA to surrender Lease 038 and to obtain the two derivative Leases was a fraudulent use of the POA. The Judge should have found, it was submitted, that the husband was permitted to use the POA for any purpose unless the wife had imposed a restriction on its use. He submitted that there was no evidence of such a restriction.
90. Contrary to counsel's submission, the POA did contain such a restriction, being that to which the primary judge referred in his reasons. That was to use the POA in relation to the wife's interest as part-owner of Lease 038. The POA expressed in that way did not authorise the husband to extinguish the wife's interest in Lease 038, at least while acting independently of the wife.
91. However, in our view, Chen Jinqui's focus on these matters is a distraction from the real fraud perpetrated by the husband, namely, purporting in 2013 and 2014 to transfer both the legal and equitable interest in Lease 071 to Chen Jinqui when, by reason of his agreement in 2001 and the execution of the transfers to give effect to it, the beneficial interest in Lease 071 was owned by the wife and children. This was so, even if until the time of registration, the husband continued to hold the legal interest. The husband was not entitled to deal with the legal interest in a way which defeated the beneficial interest of the wife and children. Nevertheless, he did so in order to obtain the payment for himself of the Vt 45 million purchase price which Chen had agreed to pay.
92. As the Judge noted, at [75], "fraud in the abuse of the POA may be left to one side."
93. Accordingly, it is not necessary to address these grounds further.

**Grounds 16 and 17 - The application for Ministerial Consent**

94. In paragraph 82 (7) of the reasons, the primary judge recorded that GGP had submitted the Application for Ministerial Consent as "agent" for Bred Bank and Chen Jinqui. The Judge also recorded that the application had answered in the negative the question "is the land subject to litigation dispute". He held that this answer was incorrect because the search of the Register obtained by GGP on 8 July 2014 revealed the existence

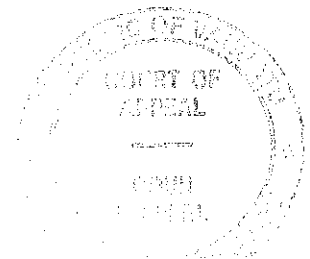


of two uncanceled cautions on the Register in favour of the wife and the husband, and they were indicative of disputation.

95. By grounds 16 and 17, Chen Jinqui contended that the Judge had been incorrect in holding that GGP had been acting as his agent in submitting the application for Ministerial consent and also incorrect in finding that the application for the consent contained the identified incorrect statement.
96. It seemed to be common ground that GGP's retainer was with Bred Bank and not with Chen. However, that does not preclude the possibility that GGP did act as Chen Jinqui's agent for the limited purpose of submitting the application for Ministerial Consent. That is especially so as Bred Bank and Chen Jinqui had a common interest in obtaining that consent. Counsel's submission did not address that possibility. In that circumstance, we are not satisfied that error has been shown in the Judge's conclusion.
97. Further, we are not satisfied that the Judge's conclusion that the negative answer to the question of whether the title was affected by any dispute was incorrect has been shown to be wrong. Counsel's submission on this topic seemed to be based again on the mistaken notion that the wife's 2010 caution had not been registered at that time.
98. It is true that Ms Smith from GGP deposed that a search of the Register received by GGP on 24 June 2014 did not show the registration of the 2010 caution. However, Ms Smith deposed expressly that a second title search received on 8 July 2014 recorded the registration of two cautions in 2010 (one by the wife and one by the husband). The inconsistency between these two copies of the Register was not explained in the evidence. The most obvious explanation is that the first copy provided to GGP had been made before 24 August 2010 (in fact before 2007) and so did not contain the registration occurring after that date. In any event, we consider that the Judge was right to find that the negative answer to the question of whether the land was "subject to litigation/dispute" was incorrect.
99. These grounds fail.

#### **Grounds 9, 18 and 20 – Laches**

100. In ground 9, Chen Jinqui contended that the primary judge should have found that the wife was estopped by laches from denying the "validity" of his contract with the husband and the power of the husband to transfer good title to lease 071 to him. In ground 18, he complained about particular factual findings which the Judge had made concerning aspects of his defence of laches. In ground 20, Chen Jinqui contended that the primary judge had erred in concluding that he had suffered no detriment for the purpose of establishing a defence of laches.
101. The substantive matters pleaded by Chen Jinqui in his filed defence in Action No. 1335/2016 which were said to constitute laches by the wife were:
  - a) her awareness by August 2001 that her husband had used the POA to surrender Lease 038 and to obtain the two derivative Leases 070 and 071 and, further, that the husband was then in the process of selling the two Leases to Gum So Leung, (Defence paragraphs 46-47);
  - b) her failure to take steps or, at least effective steps, to make sure that the caution she had lodged in July 2010 in respect of Lease 071 was registered, [Defence paragraph 51];



- c) her failure to take any, or any effective, steps to make sure that she received notice of an intention to remove the caution until after 24 June 2014, which was well after Chen Jinqui had entered into the contract with the husband on 5 December 2013, [Defence paragraph 51];
- d) allowing the husband to retain the POA for 26 years despite knowing for 12 of those years that he had attempted at least once to dispose of all of her interest without her knowledge, [Defence paragraph 51].

102. Chen Jinqui also pleaded that the wife's failure to stop the husband from dealing with her interest was a product of laches, with the effect, that she was estopped from denying that the husband had had her authority to transfer the whole of her interest in Lease 071 to him.

103. The matters to which counsel for Chen Jinqui referred in his submissions at trial in relation to the defence of laches extended beyond the matters pleaded in the defence. The Judge summarised those matters as including:-

- a) the "delay" of 18 years between the grant of the POA and the commencement of Action 1335/2016 against Chen Jinqui;
- b) the unrestricted nature of the POA and the commencement of "aborted proceedings" against the husband which were not finalised satisfactorily;
- c) the omission of the wife and children to take any action between 2001 and 2010 to ensure that the transfers to them of Leases 070 and 071 were registered;
- d) the omission of the wife after lodging the 2010 caution to take any Court action to enforce the registration of the transfer;
- e) allowing the circumstance to exist in which Chen Jinqui could enter into a contract with the husband and pay a substantial part of the purchase price before her caution on Lease 071 was registered;
- f) the failure, despite advice to the contrary, to seek an injunction to restrain the registration of the transfer to Chen Jinqui before 15 April 2015;
- g) the failure, despite learning of the registration of the transfer shortly after 15 April 2015 to take any action in relation to that registration until commencing Action 1335/2016 on 21 April 2016;
- h) the fact that Chen Jinqui had paid substantial funds to the husband before the registration of the wife's June 2010 caution and further, had expended money on the property after obtaining registration of the transfer;

104. In his reasons, the primary judge summarized the matters upon which each party relied in relation to the defence of laches and concluded:-

[87]Having carefully considered the competing submissions, I am satisfied that the defence of Laches fails.

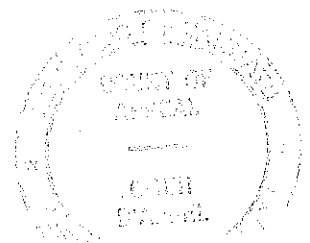
105. On the appeal, counsel for Chen Jinqui relied on the submissions which he had made at trial and said that the Judge had erred in not accepting them. Counsel also submitted that the Judge's failure to have regard, or proper regard, to the matters relied upon for the defence of laches could be inferred from the Judge's





failure to refer to the evidence on which he had relied in the final submissions to support the defence of laches.

106. It would have been preferable for the primary judge to have made specific findings regarding the particular matters to which each party referred in relation to the submissions of Laches. However, the reasons should be heard in their entire context and it is apparent that the Judge had, earlier in his reasons, made findings about several of the matters on which counsel had relied.
107. However, Chen Jinqi's invocation of the defence of laches faces an even more fundamental difficulty, namely, that it was not available at all. Laches is an equitable defence to an action in equity: *Lester v Woodgate* [2010] EWCA Civ 199 at [21]-[22]. But the claimants were not making claims in equity. They were pursuing the statutory remedy of rectification of the Register (not the equitable remedy of rectification) and their monetary claims were for common law damages (not equitable compensation). The time limitation periods fixed by the Limitation Act were applicable to those claims.
108. For this reason alone, Chen Jinqi's defence of laches had to fail.
109. However, even if the defence was available, we are not satisfied that any error in the primary judge's rejection of it has been shown. First, the Judge did not overlook the matters on which Chen Jinqi relied for prejudice: the Judge referred to them specifically.
110. Secondly, several of the submissions which were made on Chen Jinqi's behalf were misconceived. For example, contrary to his submission, the wife had revoked the POA in 2001 (Judgment [22]). The Judge accepted the evidence to that effect.
111. Again, contrary to counsel's submission, the wife did, on becoming aware that the transfers of Leases 070 and 071 had not been registered, lodge cautions. As already noted, the evidence adduced by Chen Jinqi himself showed that the caution on Lease 071 was registered on 24 August 2010. Further, Chen Jinqi can be taken to have had constructive knowledge of the cautions at the time he entered into the contract with the husband in December 2013: see s.18 of the Land Lease Act. Counsel acknowledged that Chen Jinqi had not made any search of the Register before entering into the contract and before making substantial payments to the husband pursuant to it. In those circumstances, there cannot have been actual reliance by Chen Jinqi on the entries, or absence of entries, on the Register concerning Lease 071.
112. It is possible that the wife and the children could have taken more action than they did to protect their interest in Lease 071 after becoming aware of Chen's purchase. However the omission to take every possible action which a party could does not, of itself, support a defence of laches. We note that the Judge also had evidence that Ridgway Blake, the solicitors for Millie Ogden, had written to Mr Pierre on 8 April 2015 reminding him, as was the fact, that the wife's caution remained in place and that Ridgway Blake had not received the 30 day notice required by s.96(c) and 97(3) of the Land Leases Act. It would be difficult to hold that a party had been guilty of unconscionable delay in circumstances in which they had relied on a public official complying with his or her obligations at law.
113. For these reasons, we consider that grounds 9, 18 and 20 fail.
114. We add one final comment. In the submissions on appeal, the respondents sought to rely on unrelated conduct of Chen Jinqi which has occurred since the judgment delivery. That submission was misconceived.



### **Ground 19 – The complaint of alleged collusion**

115. Chen Jinqui contended that the Judge had erred by failing to consider particular evidence given by Millie Ogden which, he submitted, “supported the proposition that [the husband] was colluding with his wife and children against [Chen Jinqui], in the various proceedings.”
116. In the context of this case, an allegation of collusion of this kind is a serious allegation, and one which should have been pleaded: CPR r.4.7. Chen Jinqui’s defence contained no such plea. Nor did his written submissions at the conclusion of the trial contain such a contention.
117. Counsel did not seek leave to advance this new matter on appeal. If counsel wished to pursue the contention, he should have sought such leave. Had such an application been made, it would almost certainly have been refused, given that the respondents were denied the opportunity to lead evidence concerning it at trial.
118. Accordingly, ground 19 is dismissed.

### **Grounds 21, 22 and 23**

119. Ground 21 is an unparticularised allegation that the Judge erred in holding that the registration of the transfer should be cancelled on the basis of mistake. Ground 22 contends that the Judge should have found that the s.100 (2) defence did not avail Chen Jinqui only in relation to the understatement of the true purchase price. Ground 23 contends that the Judge erred by ordering the cancellation of the registration instead of ordering that the transfer be amended by inserting the true purchase price and then suspending its registration until the correct amount of stamp duty had been paid.
120. As already noted, the Judge was satisfied that three matters constituted a “mistake” resulting in the registration of the husband’s transfer to Chen Jinqui: the removal of the wife’s 2010 caution from the Register without the s.96 (1) (c) notice having been given to the wife at the address she had nominated for that purpose, the errors in the Consent Checklist, and the understatement in the transfer of the true purchase price. Although the Judge regarded that understatement and the consequent effect on the stamp duty liability as constituting a fraud on the revenue of which Chen Jinqui was aware, he nevertheless, rather charitably, described it as a “mistake” to which Chen Jinqui had substantially contributed.
121. We will consider separately the matters to which counsel referred.

#### ***The failure to give notice at the nominated address***

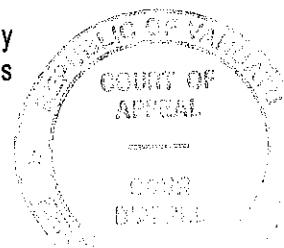
122. Counsel submitted that there had been no breach by the Director of the notice provision in s.96 (1)(c). In support of this submission, he referred to s.93 (3) of the Land Leases Act which provides:-

#### **93. Lodging of cautions**

.....

(3) Every caution shall specify an address in Vanuatu of the cautioner and the cautioner may at any time prior to the receipt by the Director of an application for the removal of the caution under section 97, by notice in writing to the Director, appoint an address in Vanuatu in lieu of the address specified in the caution, whereat notices relating to the caution or proceedings in respect thereof may be served on the cautioner.

123. Counsel emphasized the words “may be served” in the last line of this provision. He submitted that they were permissive in nature, meaning that, while it was open to the Director to send a notice to the address

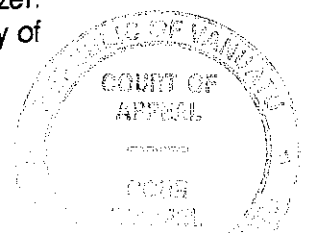


nominated for service, it was also open to the Director to send the notice to the first address specified in accordance with the opening words of subs. 3.

124. We do not accept that submission. The scheme of Part 14 of the Land Leases Act concerning cautions has certainty as an essential requirement. This is an important element in maintaining the integrity of the Register. Part of this scheme is certainty in the address to which s.96(3)(c) notices are to be sent. Part 14 achieves this by providing for a single address at which notices may be served and, further, by requiring that such notices be served in the manner specified in s.108. Although the cautioner must specify his or her address in Vanuatu, the cautioner may by notice in writing to the Director appoint an alternative address "in lieu of" of his or her address as the at which notices may be served. The words "in lieu of" indicate that the nominated alternative address *takes the place* of the personal address of the cautioner as the place at which notices are to be served. The certainty required by the scheme of Part 14 would be lost if it was open to the Director to choose the address at which he or she should serve notices.
125. Next, counsel submitted that Millie Ogden had become aware by informal means of Chen Jinqui's proposed purchase of Lease 071 more than 30 days before the registration of the transfer on 15 April 2015. Thus it was submitted that the Director's failure to send a notice in accordance with s.96 (1)(c) had not had any causative effect.
126. In our view, this submission also misunderstands the scheme created by s.96. That scheme provides for the cautioner to have 30 days in which to take action to defend the caution. That 30 days commences to run only on the giving of the s.96(1)(c) notice to the cautioner at the address identified in s.93(3) and in the form and manner required by s.108. If the notice is not given at a nominated address, the time does not commence to run. That has the effect that the caution does not lapse.
127. In the present case, the failure by the Director to give notice at the address nominated by the wife meant that the 30 day period required before the caution could lapse did not ever commence to run. Despite that, the Director regarded the wife's caution as having lapsed and proceeded to register the transfer. In these circumstances, it is plain that the failure to give the requisite notice at the nominated address was causative. The primary Judge was correct to so conclude.

#### ***The mistakes in the Consent Checklist***

128. The Judge identified three mistakes in the Consent Checklist:-
- It related to two lease titles, Lease 071 and an unrelated Lease 094.
  - The entry in the "valuation unit" contained details relating to lease 094 and did not mention the figure of Vt 30 million for the transfer of Lease 071.
  - The question "is the lease encumbered with a mortgage, caution or other restriction?" had been answered in the negative even though the wife's caution had been registered on 24 August 2010.
129. Chen Jinqui did not submit that those conclusions of the Judge were incorrect. Instead, he contended that there was no evidence that these mistakes had been "operative" or to indicate that, but for the mistakes, the Minister would not have given his consent. He noted in this respect that no evidence had been led from the Minister at the trial and, further, that there was no evidence that the errors in the Checklist had not been disclosed to the Minister subsequently.
130. Contrary to counsel's submission, the Judge did have evidence concerning these matters from a Mr Solzer. He had been employed as officer and advisor to a previous Land Minister and had the responsibility of



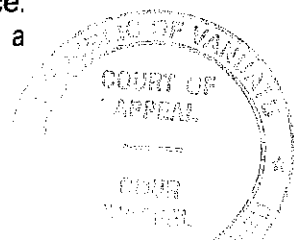
preparing the internal paper work regarding land transfers for the Minister's consent. He was thereby familiar with the Departmental processes. Amongst other things, Mr Solzer said that "it goes without saying [that] a Consent Checklist and a Minister's consent should never be generated or occur when a registered caution exists over a property". Mr Solzer noted two other features of the Consent Checklist which were unusual:-

- The Consent Checklist had been prepared in the Department's Port Vila Office rather than in the Santo Office, at which checklists for the transfer of Santo properties were usually prepared;
- Most Consent Checklists may take weeks or months to complete even when there are no legal issues, whereas the Consent Checklist in the present case had been completed in one day. Mr Solzer described this as "unbelievable".

131. Quite apart from this evidence, counsel's submission ignored the very purpose of a Consent Checklist, namely, to provide satisfaction to the Minister that all is in order before he or she provides the consent.

#### ***The understatement of the purchase price***

132. Counsel for Chen Jinqi attempted to give a benign explanation for the understatement of the purchase price in the transfer, describing it as a "mistake". However, as already noted, the Judge rejected the contention that this was an innocent mistake. He found that Chen Jinqi had known that the stated purchase price was untrue and that the submission of the transfer constituted a fraud on the revenue. Apart from repeating submissions which the trial judge had rejected, counsel did not identify any error in the Judge's conclusion on this topic.
133. Counsel also repeated his trial submission that, instead of making the rectification orders, the Judge should only have made orders which would have involved Chen Jinqi paying the stamp duty which had been avoided. In respect of this submission, we make the same observation as did the Court of Appeal in *Monvoisin v Mormor* [2019] VUCA 6 at [31] that "the later payment, if it were made, would reimburse the Government, but the fraud had already been committed and put into effect."
134. The fraud in this case was serious, as the true price was understated by one third. By submitting the transfer with the understatement of the price, Chen Jinqi committed the offences established by s.11 of the Stamp Duties Act and s.109 (2)(a) of the Land Leases Act. The seriousness of these offences is indicated by the fact that each may attract a significant sentence of imprisonment, as well as a fine. Those who are minded to defraud the revenue in this way should know that they face the risk that a registration obtained by their deception may be cancelled.
135. We accept that Chen Jinqi was not responsible for the other mistakes in the Consent Checklist and that he was not responsible for the Director's failure to give the s.96(1)(c) notice at the correct address. But there is no error in the finding by the primary judge that his knowledge of, and involvement in, the understatement of the purchase price in the transfer substantially contributed to "the mistake" which caused the registration of the transfer.
136. It is convenient at this point to refer to a submission of the Republic. Although the Republic did not appeal against the Judge's orders, it did refer to paragraph 67 of the judgment in which the Judge found that the mistaken belief by officers in the Lands Department that the purchase price stated in the transfer was correct had been, in part, causative of the registration of the transfer. Counsel submitted that the evidence had not justified a conclusion that the officers had been aware, at the time, of the understatement in price. We accept that submission. On our understanding of the reasons, the Judge was stating only that, as a



matter of objective fact, the officers had been mistaken about the true price. The Judge accepted that that mistake was innocent. He was not finding that the officers had proceeded at the time with knowledge of the understatement.

#### **Ground 10 – Miscellaneous factual findings**

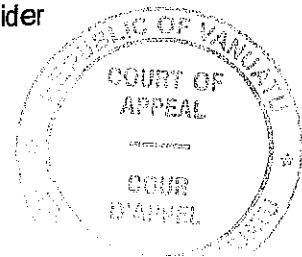
137. In ground 10, Chen Jinqi contended that the primary Judge had made no less than 13 errors in his factual findings. We have already addressed some of these alleged errors.
138. We consider it unnecessary to address the reminder. That is because counsel did not indicate how the alleged errors were material to the Judge's reasoning nor indicate how his decision would, or may, have been different had the alleged errors not been made. We also take into account that several of the errors are expressed at a level of unhelpful generality and superficiality. For example, the first two errors alleged in ground 10 are that the primary Judge had erred by finding that "the first respondent did or did not consent to various things" and that "the first respondent knew or did not know various matters". Grounds of this kind are not proper grounds of appeal and do not warrant consideration by this Court.
139. Counsel also made some submissions which seemed unrelated to any ground of appeal and, which were said by counsel for the respondents, without contradiction, not to have been raised at first instance. This being so, we have not felt it necessary to address matters of this kind in this reasons.

#### **Family assets and unjust enrichment**

140. A considerable part of Chen Jinqi's submissions on the appeal were to the effect that Leases 070 and 071 were "family assets" of the husband wife and children, with the consequence that the order for the wife and children to be registered as proprietors while the husband retained the Vt 45 million paid by Chen Jinqi meant that "the matrimonial assets" had been unjustly enriched. Counsel for the respondents submitted that this claim had not been made at trial and that Chen Jinqi should not be permitted to raise it for the first time on appeal. However, it is apparent from the trial submissions that Chen Jinqi did make a submission to this effect, although it appears not to have been developed in any detail. Chen Jinqi is also correct in his submission that the primary Judge did not deal with the contention.
141. However, we consider Chen Jinqi's invocation of a concept of "matrimonial assets" or "family assets" in the present context is unrealistic. When unjust enrichment is raised, an initial question is whether the putative recipient has been enriched. If so, the enquiry proceeds to the justice or otherwise of the enrichment. In this case, on the facts found by the Judge, the wife and children have been victims of a serious fraud by the husband. Instead of being enriched, the wife and children have been deprived of an asset to which they were entitled. They have not, and will not, derive any benefit at all from the payment which Chen made to the husband, the great majority of which occurred before Chen Jinqi was even registered on the Lease. We note again that the husband and wife had long been estranged.
142. In short, the submission that the wife and children had been unjustly enriched is untenable.

#### **Delay in judgment delivery**

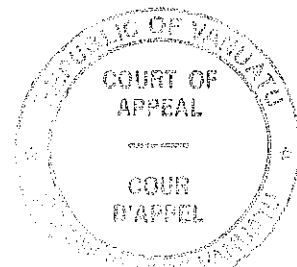
143. Counsel for Chen Jinqi also sought to impugn the judgment by reference to the time which elapsed between the reservation of judgment (17 March 2017) and its delivery (4 October 2019). However, the notice of appeal did not contain any ground concerning the delay. It is therefore unnecessary to consider



this submission, although we do draw attention to the reasons on this topic in *Monvoison v Mormor* [2019] VUCA 6 at [21]-[23].

#### **Grounds 24 and 25 – The order for damages to be assessed**

144. By these grounds, Chen Jinqui contended that there was no basis upon which the primary Judge could or should have made the order for damages to be assessed. In particular, he contended that the claimants had not proven any loss caused by his conduct, other than the incurring of legal costs.
145. An initial submission by counsel was that the trial had involved a hearing of *all* pleaded issues, including the allegations of loss and damage. The consequence, so it was submitted, was that it had been inappropriate for the Judge to have allowed the claimants a further opportunity to present evidence concerning loss.
146. It was common ground that no pre-trial order had been made to the effect that the issues in the action concerning liability and the issues concerning damages should be heard and determined separately. When that is to occur, it is generally appropriate that a specific order be made so that the parties know with certainty whether the trial is to involve all issues or is to proceed in parts and will, accordingly, know the evidence and submissions to be presented in each stage of the trial.
147. However, counsel for the respondents contended, and counsel for Chen Jinqui did not dispute, that it is not uncommon for trials to proceed on the assumed basis that the issues of liability and damages will be heard and determined separately. The trial in the present case appears to have proceeded on that assumed basis. That seems to be confirmed by the fact that no party presented at trial evidence concerning the damages issues and the parties' submissions did not address the issue of damages. In these circumstances, it should not be held that the Judge erred for this reason alone in making the order for damages to be assessed.
148. However, the basis upon which the Judge made the order against Chen Jinqui for damages to be assessed is more problematic. The Judge did not identify the cause, or causes, of action which he found established and in respect of which damages should be assessed. Nor did the Judge identify the particular loss or losses of the claimants for which damages should be assessed.
149. Counsel for the respondents submitted that the Judge's reasons should be taken as indicating that damages should be assessed against Chen Jinqui because of his fraud and his breach of duty. However, the fraud by Chen Jinqui found by the Judge was a fraud on the revenue, and not a fraud on the respondents. Furthermore, it is difficult to see that Chen Jinqui could have owed a duty of care to the respondents. Counsel did not articulate any basis upon which the existence of such a duty could be found. Having entered into the contract with the husband in December 2013 without actual knowledge of the interest of the respondents in Lease 071, and having made payments in accordance with the purchase, Chen Jinqui was in the position of competing with the respondents to have his interest in the land recognised. It is not easy to see that a person in that position could owe a duty of care to his or her competitor.
150. In these circumstances, we consider that this aspect of grounds 24 and 25 should be upheld, with the consequence that the order for damages to be assessed in so far as it concerns Chen Jinqui should be set aside.



151. Counsel for the respondents had accepted that, if Chen Jinqi's contention that the trial had been a trial of all issues succeeded, then the order for damages to be assessed made against Mr Pierre and the Republic should also be set aside. However, as that contention has not succeeded, and there is no appeal by Mr Pierre and the Republic, the order for damages to be assessed against those parties remains in place.

### **Summary of findings**

152. For the reasons given above, we consider that Chen Jinqi's appeal succeeds only with respect to the order for damages to be assessed. That part of the primary Judge's order is set aside and the appeal is otherwise dismissed.

153. The rectification orders should be regarded as made in Action 1335/2016, as should the order against the Republic for damages to be assessed. The orders to that effect against Mr Pierre are made in both actions.

154. This means that the damages are now to be assessed on the respondents' claims against Mr Pierre and the Republic.

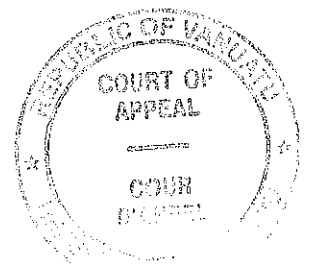
155. However, we wish to make the following comment. It is highly desirable that this long running saga be brought to an end in the near future and we encourage the parties to engage in sensible discussions with a view to reaching a settlement. On our present understanding the damages to which the respondents may be entitled against Mr Pierre and the Republic may not be large. For example, proper consideration of the issue of causation, including remoteness and reasonable foreseeability, may mean that any losses resulting from the physical work carried out by Chen Jinqi on Lease 071 may not be recoverable against Mr Pierre and the Republic. Further, regard may have to be had to the position which would have pertained had the transfer to Chen Jinqi not been registered on 15 April 2015. Given the history, it may well have been the case that a considerable further period of time would have elapsed before the respondents could have obtained registration of transfers in to their own names. No doubt there are other issues. In our view, if matters of this kind are considered sensibly, settlement of the outstanding damages claims should be achieved in the near future.

### **Costs**

156. In his notice of appeal, Chen Jinqi sought an order that he have his costs both at the trial and in the appeal. In their submissions, the wife and the children sought an order that they have the costs of the appeal, as they have already obtained an order that they be paid their costs of the trial.

157. In our view, the limited success which Chen Jinqi has obtained on the appeal does not warrant any interference with the Judge's order concerning the trial costs. With respect to the appeal, the wife and the children succeeded almost entirely on the multiple grounds of appeal advanced by Chen Jinqi. This makes it appropriate that he pay all their costs of the appeal (but excluding the costs of Mr Pierre's application for leave to commence an appeal out of time). The position may have been different had Chen Jinqi been more discriminating in selecting the grounds for appeal and in selecting the grounds to be pursued at the hearing.

158. Were it not for the fact that the Republic supported Chen Jinqi's appeal, an order that he pay its costs may have been appropriate. However, given its support for the position of Chen Jinqi, we consider that the appropriate order is that the Republic bear its own costs of the appeal.




## **ORDERS**

We make the following orders:-

- (1) the appeal against the order that Chen Jinqi pay the wife and the children damages to be assessed is allowed and that order is set aside.
- (2) the Judge's rectification orders are to be understood as made in Action 1335/2016.
- (3) the orders for damages to be assessed against Mr Pierre are to be understood as made in Action 142/2015 and in Action 1335/2016.
- (4) the order for damages to be assessed against the Republic is to be understood as made in Action 1335/2016.
- (5) otherwise the appeal is dismissed.
- (6) Chen Jinqi is to pay the costs of the wife and the children on the appeal (other than with respect to Mr Pierre's failed application) to be taxed in default of agreement.
- (7) there be no order with respect to the costs of the Republic.

**DATED at Port Vila this 20<sup>th</sup> day of February 2020.**

**BY THE COURT**

  
.....  
**Hon Vincent Lunabek**  
**Chief Justice**

