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

Civil Case No. 29 of 2010

IN THE MATTER OF: **The Estate of MICHAEL VARISIPITI (deceased)**

BETWEEN: **JULIANE VARISIPITI**
Claimant/Administratrix

AND: **THE REPUBLIC OF VANUATU**
First Defendant

AND: **NOEL VARI**
Second Defendant

Coram: ***Justice D. V. Fatiaki***

Counsels: *Mr. Silas C. Hakwa for the Claimant*
Mr. Sammy Aron for the First Defendant
Mr. Edward Nalyal for the Second Defendant

Date of Judgment: *22 March 2017*

JUDGMENT

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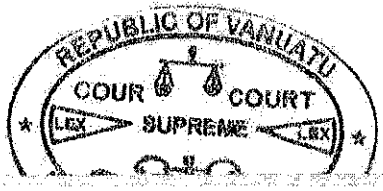
1. On 8 April 2015 this Court issued an interlocutory Ruling answering the question: "*Whether the asserted Agreement for Lease survived the death of the lessee Michael Varisipiti?*" in the claimant's favour. The case was part-heard at the time.

2. In its Ruling this Court considered the provisions of Section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 (UK) and said (at para. 21):

> "*The 'cause of action' in the present case is based on breach of an Agreement to Lease as well as, a statutory 'cause of action' namely, causing or obtaining the registration of a lease by mistake. In my view there can be no serious argument that neither 'cause of action' is caught by the proviso and accordingly, I find that they both survive the demise of Michael Varisipiti for the benefit of his estate*".

3. As to the first "*cause of action*" that is predicated upon the vicarious actions of the first defendant ("*the Republic*") in leasing the land the subject matter of the Agreement for Lease to the second defendant after the named "*lessee*" under the Agreement had passed away and before the lessee's widow had obtained authority to administer the "*lessee's*" estate, thereby putting it beyond its power to perform and complete the Agreement. The latter "*cause of action*" invokes the provisions of Section 100 of the Land Leases Act and seeks the rectification of



the second defendant's lease and/or substitution of the claimant's name as lessee.

4. On 15 April 2016 an application for leave to appeal the Ruling by the second defendant was refused by the Court of Appeal [**see:** Vari v. Varisipiti [2016] VUCA 5]. An application for summary judgment was also pending at the time.

5. On 30 October 2016 the second defendant filed a Memorandum seeking the vacation of the summary judgment hearing and the continuation of the trial proper as there were still "*triable issues*" remaining in the case. The application was not opposed and was granted.

6. On 14 December 2016 at a chamber hearing, counsel for the Republic conceded the claim and agreed to the cancellation of the second defendant's lease Title No. **04/2943/020** and the registration of a lease over the same title in the claimant's favour "*as trustee*". The continuation of the trial was fixed for 2 February 2017.

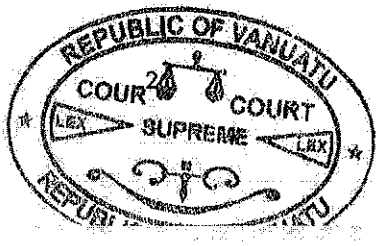
7. On 02 February 2017 the second defendant sought leave to file what is described as a "*cross claim*" against the Republic on the basis that "*... the second defendant will suffer loss and damage as a result of the mistake of the first defendant, if the court rules, the said lease be rectified*". The application was opposed due to its lateness and the trial continued to a conclusion. At the time I said that I would rule on the application in the judgment. This I now do.

8. Rule 4.11 of the Civil Procedure Rules allows a party to amend its case with leave of the court at any stage of a proceeding. Rule 4.8 allows a defendant in a proceeding "*to make a claim against the claimant (a counterclaim)*" instead of bringing a separate proceeding by including details of the counterclaim in the defence. Rule 4.9 allows a defendant to make a counterclaim against a person other than the claimant:

> "*If*
> *(i) the claimant is also a party to the counterclaim*" or
>
> *(ii) the relief against the other person is related to or connected with the original subject matter of the proceeding*"

Sub-rule (2) requires a claim under Rule 4.9 to be served "*on the other party within the time allowed for service under Rule 4.13(1)*" and subrule (3) says: "*the other person becomes a party to the proceeding on being served with the defence and counterclaim*".

9. From the foregoing it is clear that the second defendant's so-called "*cross claim*" is not a "*counterclaim*" within the contemplation of Rule 4.8 in so far as the cross-claim is, by counsel's own admission, not "*made against the claimant*".



10. In my view the second defendant's "*cross claim*" against the Republic is not a claim recognized in the Rules nor is it a proper "*counterclaim*". I am fortified by the clear wording and intention of Rule 4.9 which not only envisages that the claimant will be "*a party to* (the defendant's) *counterclaim*" but also, the "*other person* (against whom the claim is made) *becomes a party*" on being served with the counterclaim. In this case the "*other person*" in the "*cross claim*" is the Republic which has been "*a party*" in the proceedings since its inception.

11. The pleaded "*cross claim*" which only sues the Republic is in the following relevant terms:

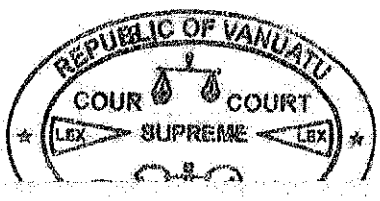
> "*5. As a result of the* (Republic's) *mistake the second defendant's lease title 04/2943/020 is at risk of being rectified by the court.*
>
> *6. The second defendant claims under Sections 101 and 102 of the Land Leases Act* (the Act) *an indemnity from the* (Republic) *on the basis the second defendant was, at all material times, a bona fide purchaser and/or reliant on the* (Republic's) *advice to acquire said lease.*
>
> *7. The second defendant will suffer loss and damage as a result of the mistake of the* (Republic) *if the court rules, the said lease be rectified*".

12. In my view the dual expressions: "*... at risk of being rectified*" and "*... will suffer loss and damage ... if the Court rules the said lease be rectified*" clearly demonstrates that the so-called "*cross-claim*" is based on the uncertain future event of the claimant succeeding in her claim for rectification and the second defendant being unsuccessful in his defence.

13. That "*future event*" is, at the time of the filing of the "*cross-claim*", a mere discretionary possibility and does not provide the second defendant with a "*cause of action*" or a proper basis for his "*cross-claim*". In my view, the "*counterclaim*" envisaged by Rules 4.8 and 4.9 is one that subsists notwithstanding the original claim and is capable of being pursued independently of it whatever may be the outcome of the original claim. In other words a counterclaim that depends for its existence on the success of the original claim is not a valid "*counterclaim*" within the contemplation of the Rules [***see also:*** Rule 9.9(4)(b)].

14. Furthermore in the pleaded "*cross-claim*" the second defendant cannot be said to have sustained or suffered any loss or damages and, in the absence of the same, no cause of action arises. Even a claim for indemnity under Section 101 requires the claimant to be "*suffering damages*" (present active tense) by reason of any rectification that has occurred. I note in para. 5 of the cross-claim the second defendant appears to accept a "*mistake*" was made by the Republic concerning his lease title 04/2943/020.

15. If I am wrong in so construing Rule 4.9, I would nevertheless exercise my discretion under Rule 4.11 and refuse the second defendant leave to file and serve the "*cross claim*" on the basis of the clear prejudice that the claimant and



the first defendant would suffer in being served at the very last minute without prior notice or warning at the continuation of a part-heard trial where the claimant had already testified in the case and the second defendant had had several years in which to file and serve his "*cross claim*" and also, 3 months prior notice of the trial continuation date (***see also:*** Rules 5.5 and 5.7).

16. Returning to the claim proper and in the interest of brevity I adopt the chronology outlined in the court's earlier Ruling on the preliminary issue with the following additions for completeness:

- 15 March 1994 – the Principal Lands Officer wrote to Mr. Loloso Livo, caretaker of Niafu Plantation (who later became a jointly registered lessee of Lease Title No. 04/2943/020). The recipient was clearly informed after drawing his attention to Sections 8 (1) and (2) of the Land Reform Act:

  "*Long saed igat administresen procija. So Rural Land Developmen Comiti iappruvum applikesen blong Varisibiti Michael mo Minista ibin issuim wan "Certifiket of Registered Negotiator" we iconferem approval blong R. L. D. C. so Varisibiti igat rait folem evri paoa we Minista igivim long em blong mekem negociasen*"

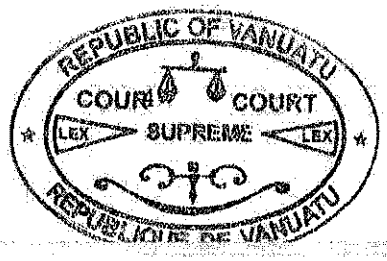
  And later:

  "*Blong follem procija we Law iappruvum, ofis blong Rural Land isave priperem lis blong Varisibiti wetaot consent blong ol custom ona we oli dispiutim land*".

  "*Naoia we Varisibiti Michael iteck ova lo Plantesen Naevo Title 610, mi laekem talem se nao you finis olsem Maneja. So you mas aot long Plantesen long gud hard mo gud tingting*";

- Oct. 2006 and Oct./Dec. 2007 – counsel for the claimant wrote to the Director of Lands and the Minister of Lands and the second defendant advising them of the claimant's interest in Lease Title No. 04/2943/020 and her application to administer her late husband Michael Varisipiti's estate which included Agricultural Lease title 04/2943/020. The letters consistently warned and requested the recipients not to process or approve the transfer or registration of a lease in favour of anyone else other than the claimant. Unfortunately counsel's letters were not responded to nor did they achieve the desired result.

17. The evidence for the claimant comprised several sworn statements of which statements dated 23 March 2007; 26 October 2007; 02 November 2007 and 18 January 2008 were filed in Probate Case No. 07 of 2007 and an additional sworn statement dated 26 April 2011 which was filed in the present case. All sworn statements and several annexures are bound together and marked "***Exhibit P(1)***". The claimant also called Robinson Toka as a witness and he produced his sworn statement "***Exhibit P(2)***". Both the claimant and her witness were cross-examined.



18. The second defendant produced two (2) personal sworn statements – "***Exhibit D(1) and D(2)***" and the sworn statements of two of his sisters Hannah Bogiri; Veruja Kalpat and a former wife of the deceased Manina Packete "**Exhibit D(3), (4)** and **(5)**" respectively. Only the second defendant was cross-examined.

19. The first defendant produced a sworn statement of Jean Marc Pierre the Director of Lands – "***Exhibit D(6)***" who was not cross-examined.

20. With those introductory remarks it is now possible to return to the claim in the present case wherein the claimant invokes the provisions of Section 100 of the Land Leases Act. In particular, the claim identifies the following "*mistakes*":

    (1) The land comprised in Lease Title No. 04/2943/020 is the subject matter of a valid and subsisting Agreement for Lease which continues to have full effect notwithstanding the death of Michael Varisipiti;

    (2) The grant to the second defendant of a Certificate of Registered Negotiator when he was not entitled to the same;

21. No authority is cited for this latter "*mistake*" which is based on a misreading of the relevant provisions of the Land Reform Act [CAP. 123]. Section 6 prohibits a person entering into negotiations with any custom owner concerning customary land unless he applies for and receives a Certificate of Registered Negotiator from the Minister. The section does not prevent the issuance of more than one certificate in respect of any customary land nor does non-compliance with the requirements of the section automatically result in an agreement that is illegal, null and void.

22. Undoubtedly it would be more convenient administratively, if only one Certificate of Registered Negotiator was issued at any one time for the same customary land, but, for present purposes, the "*mistake*" (if relevant) is not so much in the existence of more than one certificate but, rather, in the issuance of a certificate where the law and the circumstances did not require it. In brief Section 6 of the Land Reform Act has no application where the land the subject matter of the proposed or completed negotiations is not customary land but is a leasehold title as in the present case. Such a "*mistake*" however, would not be causative of the registration of the second defendant's lease.

23. The same cannot be said of the first "*mistake*" concerning the validity and continuity of the Agreement for Lease which I am satisfied, was operative and causative of the registration of Lease Title No. 04/2943/020 in the second defendant's favour.

24. That fundamental mistake was pervasive not only in the second defendant's thinking and answers in cross-examination but also, in the thinking of the lands

department officials involved in the preparation and registration of the lease in the second defendant's favour.

25. In their defences the first and second defendants both admit the existence of the Agreement for Lease between Michael Varisipiti (deceased) and the Minister of Lands but both deny that the land (in the Agreement for Lease) was part of the estate of the deceased. In particular, the Republic pleads that the "*agreement to lease is a contract in personam between the Minister of Lands and the deceased and does not form part of the estate of the deceased*" and the second defendant says that "*the land the subject of the agreement is not part of the estate of the late Michael Varisipiti*". I disagree.

26. Whilst I accept that an agreement for a lease creates at common law only contractual and not property rights, and for failure by either party to carry out the agreement there is, at common law, a remedy of damages for breach of contract. In equity however, an agreement for a lease has a greater effect than at common law. A court of equity, applying the maxim: "*equity treats as done that which ought to be done*" treats the lessee as having acquired the estate or rights which he ought to have acquired. Thus the lessee under an agreement for lease holds it as if an estate had been granted in the land which he would be entitled to enforce by action for specific performance and not as merely having a right of action for damages.

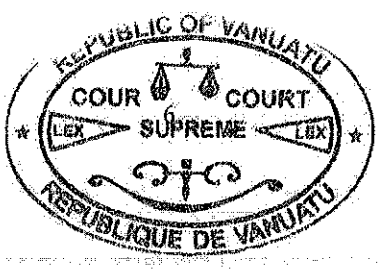
27. The leading case is Walsh v. Lonsdale (1882) 21 Ch D9 where Jessel MR said (at 14):

> "*There is an agreement for a lease under which possession has been given. Now since the Judicature Act 1873 (UK) the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement.* ***There is only one Court, and the equity rules prevail in it. the tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted****, it being a case in which both parties admit that relief is capable of being given by specific performance*" (confirmed in Halsbury's Laws of England (4 edn) Vol 16 para. 1306 ff).
>
> (my highlighting)

28. In short, a court which has powers to hear actions in law and equity will treat the parties to an agreement for a lease as having the rights and obligations which they would have had if one of the parties had pursued the available remedies and obtained the formal lease.

29. In the present case Clause (4) of the Agreement for Lease provides that:

> "*This agreement shall subsist only until an approved survey plan of the leased land has been completed and a formal lease has been executed*".



There is also annexed to the Agreement two schedules of standard terms and conditions applicable to an Agricultural Lease (**Schedule A**) and a special term referring to the cultivation and stocking of "*the demised land*" (**Schedule B**).

30. The wording of the Clause and the **Schedules** is capable of being read as meaning that the Agreement operates as an immediate demise of a legal estate in the land subject to "*completion of an approved survey plan of the leased land*" (not just "*land*") and the "*execution* (not registration) *of a formal lease*". Both of these requirements are necessary formalities to enable a lease to be registered under the Land Leases Act but the actual demise is in my view, made by the Agreement under which exclusive possession was given and taken by the lessee [***see:*** Doe d Phillip and Walters v. Benjamin (1839) 9 Ad & E 64 and 112 ER 1356 (KB)].

31. The second defendant's mistaken thinking is exemplified by his letter to Russel Nari the Director General of Lands dated 10 July 2006 (barely 2 months after Michael Varisipiti died), wherein he writes:

"I am aware that the land is still under the "Agreement to Lease". However, since my brother Michael Vari has passed away ... and as one of his brothers, I am now writing this letter to you to request the following:

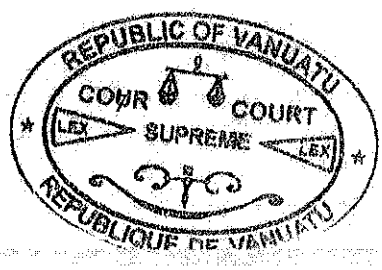
- *That the lessee name be changed from Varisipiti Michael (deceased) to "Vari Family" under the principals Loloo Livo, John Vari and Noel Vari ..."*

And in the final paragraph:

"Sir since this is just an Agreement to Lease (and Not a Registered Lease Proper) and given the current family situation, I believe these changes are possible".

32. I digress to refer to the second defendant's oft-repeated claim to customary ownership of "*Nasulnun*" land within which Niafu plantation and Lease Title No. 04/2943/020 falls. The basis of that claim was quashed in a judgment of this Court in Stephen v. Santo/Malo Joint Area Land Tribunal [2015] VUSC 30 delivered on 6 March 2015. This much was accepted by the second defendant under cross-examination but he maintains that his family is still pursuing the matter under the new Custom Land Management Act. In this latter regard however, attention is drawn to another more recent judgment of this Court in Stephen v. Kwirinavanua [2016] VUSC 44 delivered on 1 April 2016 wherein the claimant was granted a "*certificate of recorded interest*" under Section 19 of the Act over "*Nasulnun*" .

33. The view of the Republic is best exemplified by counsel's concession of the claim and the unusual letter of the Director of Lands to the claimant's counsel dated 10 December 2007 which refers to counsel's letter dated 09 October 2007 (ie. 2 months earlier) and wherein the Director writes:



"Despite your assertions, I understand that the existence of probate case No. 7 of 2007 alone does not prevent the registration of proposed agricultural lease in respect of land lease title 04/2943/020 ("the lease").

In circumstances, I hereby notify you that the lease will be registered ...".

34. Part of the "*assertions*" in counsel's letter of 9 October 2007 includes:

"... there are steps being taken by other persons purporting to obtain a lease over an agricultural property located at South Santo and which property comprises the proposed new lease described as Title No. 04/2943/020. ***This property is the subject of our client's application before the Supreme Court****. We wish to make it quite clear that if there are current attempts to do this, such action is highly improper and contrary to the law".*

And later:

"the reason we write to you in these terms is to ensure that ***nothing is done to the property so as to prejudice the rights and interests of all parties to Probate Case No. 07 of 2007 until such time this case is properly heard and finally determined by the Court****. In this respect we copy this letter to the Director General and the Minister of Lands so that they are fully aware of the current proceedings in Probate Case No. 07 of 2007".*

(my highlighting)

Clearly the Director's above-mentioned letter is disingenuous in its reference to the existence of "*probate case No. 7 of 2007 alone*" (my underlining) and in its convenient avoidance of the claimant's asserted interest in Lease Title No. 04/2943/020.

35. In similar vein is the letter of the Director General ("*DG*") of the Ministry of Lands to Alfred Carlot dated 15 October 2007 wherein he disagreed with the latter's observation "*that the land in question does not belong to the Vari families*" and states at bullet point 4:

"After the death of Mr. Varisipiti, his younger brother by the names of Mr. John Vari, Mr. Noel Vari and one of their uncle applied to lease the area on behalf of the family Vari ***including Mrs. Varisipiti and her children*** *..."*

(my highlighting)

36. In this latter regard the testimony of the second defendant is telling where in answer to the "***Qn:*** *Why not include* (the claimant's) *name in the new lease?*" he answered: "***A:*** *It's not only my name I took it that they were part of the lease*" (whatever that means) and later, in re-examination, the second defendant agreed that the named lessees are the "*heads of the family*" and to the "***Qn:*** *Who represents the claimant and the deceased's children?*" he answered: "***A:*** *It's for the family to decide*". Plainly the highlighted sentence in the DG's letter was a gratuitous addition on the author's part and somewhat removed from the truth.

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37. The Court of Appeal in Kalsakau v. Maiau [2000] VUCA 11 in discussing procedural irregularity as a ground for rectification under Section 100 of the Land Leases Act adopted dicta of Amet J. and Salika J. in Emas State Pty Ltd. v. John Mea (1993) PNGLR 215 as follows:

"Amet J. at 219 said:

"The issue in this case raise for consideration the principle of indefeasibility of title under the Torrens land registration system that hitherto has been applied in this jurisdiction. I do not believe that the system is necessarily appropriate in circumstances such as this, where an individual land owner is deprived of his title to land by irregular procedure on the part of officials and a department of the State, to the advantage of a private corporation. ***I do not accept that quite clear irregularities and breaches of the statutory provision should remain indefeasible. I believe that, although those irregularities and illegalities might not amount strictly to fraud, they should, nevertheless, still be good grounds for invalidating subsequent registration, which should not be allowed to stand****. To not do so would be harsh and oppressive against the innocent individual leaseholder, such as the first respondent."*

(my highlighting)

And at p. 228 Salika J. said:

"I agree, in principle, that where a title has been registered under one's name, it is not capable of being annulled, except where title has been acquired through fraud. I think other exceptions suitable for Papua New Guinea circumstances should be included such as:-

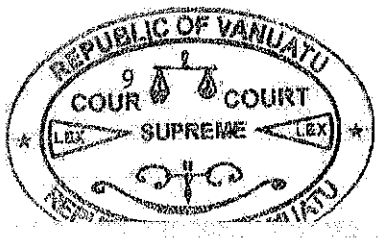
1. *where title has been registered fraudulently*
2. *where title has been registered while a court or tribunal is deliberating on the subject land*
3. *where title has been registered under influence of position of power or money*
4. *where title has been registered under circumstances giving rise to possible breach of principles of natural justice.*

I lay out these conditions because land is a very important commodity in this country..."

38. In the present case the second defendant was fully aware of the existence and pendency of Probate Case No. 07 of 2007, indeed, he was an active participant in opposing the grant of letters of administration to the claimant because in his own words:

"*... properly title No. 04/2943/020 is* ***NOT*** *late Michael Vari's personal property, rather, it is a family property. It must* ***NOT be included*** *as one of late Michael Vari's personal properties*".

Despite that opposition the second defendant continued to surreptitiously pursue a transfer of the said lease title to himself and others while the Court was still considering the claimant's application for letters of administration of her late husband's estate which she claims included Lease Title No. 04/2943/020. Such actions if I may say so, are not dissimilar to circumstances (2) and (4) identified by Salika J. above.



39. I also say "*unusual*" in para. 33 (above) advisedly because 4 months prior to the Director's letter ie. on 30 August 2007, the lease in favour of the second defendant had already been approved and signed by the Minister of Lands and furthermore the lease was registered on 15 November 2007 which is almost 3 weeks before the Director's letter giving the claimant's counsel notice that Lease Title No. 04/2943/020 "... *will be* (**not** has been) *registered*". Is this an instance of the Director of Lands being conveniently unaware of the registration of the second defendant's lease? or is it a case of him deliberately withholding that information from the claimant's counsel along with his response letter until well after the second defendant's lease had been registered?

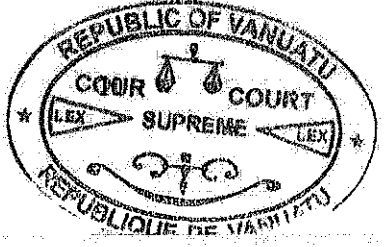
40. There has been no attempt made in counsel's closing submissions or in the Director's sworn statement "*Exhibit D(6)*" to clear up or explain the tardiness of his letter or the false impression given in it that the second defendant's lease had not yet been registered. Given the several warnings in claimant counsel's letter of 9 October 2007 coupled with the fact that the Director had a pivotal/certifying role in the processing and registration of the second defendant's lease, I am left with the distinctly unfavourable impression that the Director's letter was intentionally delayed until after registration of the second defendant's lease was a "*fait accompli*".

41. Likewise no explanation has been given for the glaring difference in the treatment of the claimant's application for a lease which was submitted by Robinson Toka on 1 September 2006 and that of the second defendant which was submitted almost a year later on 12 July 2007.

42. The relevant Lands Department Clearance Checklist Form For Leases has eight (8) separate "*Steps*" commencing with the lodgment of the application for lease or actual lease document in Step 1 and ending at Step 8 with the approval by the Minister of Lands.

43. It is undisputed that the claimant's lease was received on "*1 September 2006*" and was processed through seven (7) steps including the signed verification of the then Solicitor General that the claimant's lease and documents is "*legally in order for Ministerial Approval to be granted*" at Step 6 and the signed endorsement of the Director-General (MoL) at Step 7 that: "*... all documents (are) in order for Ministerial Approval to be granted*" dated "*31 May 2007*" (ie. after 10 months). It is also clear from the relevant Form that the claimant's lease was thereafter deliberately withheld or delayed for no apparent reason(s) for 19 months before it eventually received Ministerial Approval on: "*4 December 2008*" ie. 12 months after the second defendant's lease had been registered.

44. Before leaving the claimant's checklist I note that the year of the Minister's Approval at Step 8 appears to have been altered by persons unknown from "*07*" to "*08*". Likewise with the execution and approval dates on the claimant's lease



document. I also note that Step 3 has been incorrectly repeated and therefore there should be 9 steps and not 8.

45. The claimant's checklist and processing time-line may be compared and contrasted with the second defendant's checklist which reveals that his lease was first received on "*12 July 2007*" (by which time the claimant's lease had passed 7 of the 8 checks required) and all necessary "*steps*" including the Minister's Approval was completed by "*30 August 2007*" ie. within 6 weeks from lodgment to execution and approval of the second defendant's lease. Thereafter it took 2 ½ months to be registered.

46. If I may say so the unexplained difference in treatment between the claimant's lease document (which took over 24 months to process) and the second defendant's lease document (which was processed and registered within 4 months) is so stark that I am driven to the irresistible conclusion that there had to have been a "*mistake*" made in the processing and registration of the second defendant's lease which was improperly and blatantly preferred over that of the claimant.

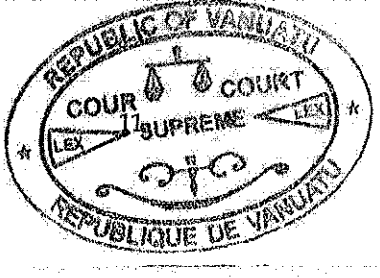
47. As was said by this Court in Etmat Bay Estates Ltd. v. Magna Ltd. [2014] VUSC 79 (at para. 37):

> *"Further, and more importantly, there would have had to have been a fundamental mistake in the registry which led to the registering of the Magna transfer ahead of the Etmat transfer. Whether the mistake was from legal ignorance on the part of the staff conducting the registration, or because of an oversight in not recognising the Etmat transfer, or for some other system failure is not to the point. The registration of the Magna transfer ahead of the Etmat transfer would not have occurred unless there was a "mistake" in the due administration of the registration processes."*

48. In similar veing in Presbyterian Church Trust v. Moore [2013] VUCA 2 under the heading "*Was the registration of PCTA a mistake*" the Court of Appeal said (at para. 13):

> *"Pursuant to section 100 (1) of the land Leases Act, a court may order rectification of the register and order cancellation of a registration if it has been obtained by mistake. We are satisfied that the registration of the lease in favour of PCTA was a mistake. Mrs. Moore was entitled to be registered as the lessee. She had purchased the lease many years before and had presented the lease for registration many years before the PCTA. It was a mistake to register the lease in the name of PCTA when Mrs. Moore was entitled to registration."*

49. Notable by its absence from the second defendant's defence is any reference or reliance on the provisions of Section 100(2) nor is there any averment that the second defendant acquired the lease for valuable consideration albeit that he denies knowledge of any mistake(s) or substantially contributing to any that may have occurred in the registration of Lease Title No. 04/2943/020.



50. Section 100(2) protects "*the title of a proprietor who is in possession …*". In this case the evidence is clear that at no relevant time has the second defendant physically occupied or resided on or exercised any degree of exclusive control over the land the subject of lease title No. 04/2943/020. Indeed the evidence is that at all material times he worked and resided in Port Vila on Efate.

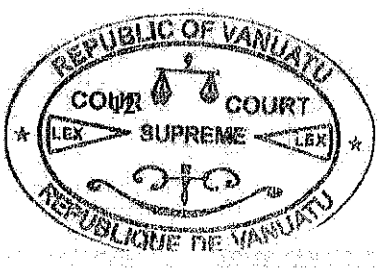
51. Tuohy J. in Solomon v. Turquoise Ltd. [2008] VUSC 64 in rejecting a submission that "*in possession*" included having an immediate right to possession, said [at paras. 67/68]:

> *"The words* ('in possession') *must be read in their statutory framework. Section 100 is an unusual provision to find in a Torrens system such as that constituted in Vanuatu by the Land Leases Act, the central feature of which is indefeasibility of title. It provides a means for a registered title to be defeated retrospectively. It also permits the registered title to be defeated, not just for fraud which is the sole exception in most other systems, but even for mere mistake. In those respects the principle of indefeasibility is not so strongly entrenched in Vanuatu's Torrens system as elsewhere, no doubt as Parliament intended to accommodate Vanuatu's circumstances.*
>
> *Nevertheless the intention of the Land Leases Act is clearly to provide security of title although, because of s.100, that security is by no means absolute.* ***In my view, it is necessary to give the words "in possession" in s.100(2) some practical meaning consistent with providing a level of security, less than absolute, to registered proprietors of leases. That can be done by construing the words "in possession" as meaning in possession, either actual or constructive, of the land. On that basis, a proprietor who, although having the right to possession given him by his lease, is not in possession, actual or constructive, would not have the protection accorded by s.100(2).*** *It is consistent with a provision which allows cancellation of registration titles for mere mistakes of omission in their grant, that a proprietor who is not yet in possession is not protected. Once however the proprietor (for valuable consideration and without knowledge) has come into possession, actual or constructive, the value accorded by Parliament to the security of his title becomes paramount."*
>
> (my highlighting)

(Later endorsed as "*correct*" by the Court of Appeal in Turquoise v. Kalsuak [2008] VUCA 22).

52. In all his sworn statements since 2007 including his application for ministerial consent to lease Title No. 04/2943/020 and in the lease document itself, the second defendant describes himself as being resident in "*Port Vila*" and being employed as a "*Bank Regulator*" with the "*Reserve Bank of Vanuatu Port Vila*". Whatsmore in the impugned lease document the second defendant is (wrongly according to his testimony) described as the "*representative for Loloso Livo and John Vari*". In that capacity therefore the second defendant was not a "*proprietor*" of the lease.

53. Plainly even if the second defendant is a registered joint proprietor of Lease Title No. 04/2943/020 he was never "*in possession*" of the land.



54. Accordingly I am satisfied that as a matter of fact and in law the second defendant is not "*a proprietor who is in possession*" and therefore fails to qualify for protection under section 100(2).

55. In light of the foregoing the claim succeeds and this Court makes the following orders:

(a) A declaration that the Agreement for Lease between Michael Varisipiti and the Minister of Lands dated 14 March 1994 is valid and continued after Michael Varisipiti's death as part of his estate;

(b) An order cancelling the second defendant's lease Title No. 04/2943/020 dated 30th August 2007 with immediate effect;

(c) An order directing the first defendant to register the claimant's lease Title No. 04/2943/020 dated 4th December 2008 with the addition of the words "*as trustee*";

(d) An order awarding costs against the defendants payable in the ratio of 20% by the first defendant and 80% by the second defendant and taxed on a standard basis if not agreed.

DATED at Port Vila, this 22nd day of March, 2017.

BY THE COURT

REPUBLIC OF VANUATU COUR SUPREME COURT LEX REPUBLIQUE DE VANUATU

D. V. FATIAKI
Judge.