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

Civil Case No.142 of 2015
Consolidated with
Civil Case No.1335 of 2016

BETWEEN: LY NU LOUNG
First Claimant

AND: MILLIE OGDEN, FELIX LOUNG and VINCENT LOUNG
Second Claimants

AND: CHEN JINQUI
First Defendant

AND: THE GOVERNMENT OF THE REPUBLIC OF VANUATU
Second Defendant

AND: JEAN MARC PIERRE
Third Defendant

AND: BRED BANK
Interested Party

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

Counsels: *Mr. N. Morrison for the Claimant*
Mr. R. Sugden for Chen Jinqui
Mr. H. Tabi for the State
Mr. A. Godden for JM Pierre
Mr. J. L. Napuati for Luong Fong
Mr. J. Malcolm for Bred Bank

Date of Delivery: *4th October 2019*

REPUBLIC OF VANUATU COUR COURT SUPREME LEX LEX REPUBLIQUE DE VANUATU

JUDGMENT

Introduction & Prior Court Proceedings

1. In order to have a better and clearer understanding and appreciation of this case, it is necessary to briefly retrace the origins of the case and the background of court proceedings that have ensued involving one or other of the parties. The common subject matter of all the proceedings is a piece of valuable commercial land in Luganville town, Santo Island namely **Leasehold Title No. 03/0183/038** ("*038*") which was surrendered and subdivided into two (2) derivative titles issued in its place, namely Lease Title Nos. 03/0183/070 ("***070***") and 03/0183/071 ("***071***"). The case also revolves around the fortunes of the Loung Family and their

estranged parents – Loung Fong (the father/husband) and Ly Nu Luong (the mother/wife).

2. The background of the case is conveniently summarized in the recent judgment of the Court of Appeal in Chen Jinqiu v Ly Nu Loung [2019] VUCA 13 where the Court wrote:

"*Loung Fong and Ly Nu Loung are husband and wife. Millie Ogden is their daughter ... The wife, Mr and Mrs Ogden and two other siblings live in the USA. On the material before the Court the husband and wife have long been estranged. It is also apparent that, sadly, the wife suffers from progressive Parkinson's disease. It appears to us that the role of her daughter Millie Ogden, and her husband, has been no more than attempting to assist their mother and mother-in-law.*

The dispute has its genesis as far back as 1982 when the husband and wife, using marital funds, purchased leasehold title 03/0183/038 in Luganville, Santo. In 1987 the wife gave a general Power of Attorney to the husband. *This was said to be to facilitate administration of the couple's business interests in Luganville during the wife's frequent absences overseas.*

In 1998, using the Power of Attorney, the husband transferred the lease into his sole name. Subsequently, this lease was surrendered and two new leases were issued, 070 and 071. ***The first proceedings filed in relation to these matters was Civil Claim 142 of 2015. It was filed on 7 July 2015. In those proceedings the wife was the first claimant and the three children the second claimants. The husband was the first defendant, and the second defendant the Director of Lands.*** *It is sufficient to say for the purpose of this appeal that allegations of fraud were made by the wife and children against the husband in relation to the transfer of the lease into the sole name of the husband. There are also allegations in relation to the dealings by the husband with one Gum So Leung purporting to sell the 071 lease* (to him). *Various allegations were made against the husband and the Director of Lands, and the claim sought rectification of title and damages.*

(my highlighting)

3. On 19 August 2016 the Luong family members in CC142/2015 settled their differences by entering into Consent Orders requiring the father (Loung Fong) to transfer and register lease title: No. 03/0183/**070** (one of the derivative titles) ("***070***") to his three named children and also the business of the "**Asia Motel**" (free of all accrued liabilities) that was operating out of the lease title.

4. In particular, in relation to the present consolidated proceedings the Court of Appeal said:

"***The original claim in Civil Claim 1335/2016 was filed on 21 April 2016***. *The wife was the claimant, (Chen Jinqui) the first defendant, and the (Luong Fong) the second defendant. It recites the matters between the husband and wife mentioned above. (Additional parties were added in at various stages as the pleadings were amended and a counter claim filed by the appellant.) It goes on to plead that* ***when the wife realised the misuse of the Power of Attorney, she confronted the husband and an agreement was reached in 2001 with the husband which should have led to the transfer of both leases to the names of the claimant and the children. It is alleged that such a settlement was given effect to by the execution of the necessary documents that were presented to the Lands Department.*** *It is also alleged the Minister of Lands consented to the transfer. The husband undertook he would stamp and register the transfer documents.*

It is then alleged that the husband breached this agreement, and the wife became aware of this around 2010. As a consequence she registered cautions over both leases 070 and 071 to protect her unregistered interest. *In the course of 2013 and 2014 the husband and wife entered into voluntary and professionally directed mediation, the outcome being that the husband agreed to reinstate and comply with the settlement set out above.*

It is then pleaded that this was a false submission to the mediator, as at that time the husband was finalising the details of a sale and purchase contract for the 071 lease with the appellant. ***In or about 2013 he entered into an agreement with the appellant which it is alleged provided for the purchase of the 071 lease for VT45 million. It is pleaded that the appellant and the husband fraudulently colluded to deprive the wife and children of the properties. The following terms of the contract are pleaded:***

- ***Upon execution the appellant agreed to deposit VT2 million with the husband***
- ***The balance of VT45 million would be paid over a period of time.***
- ***Title would only be given "when the rest of the payment is finished".***

It is further pleaded that in 2015, by which time the wife was residing in the United States, the husband and the appellant were planning on transferring the 071 lease. In March of that year the wife travelled to Luganville to protect her interest. ***It is alleged she met with (Chen Jinqui) and advised him that his agreement with the husband involved property that the husband had no right to deal with. She also made it plain that her interest was protected by a caution.*** *She also pointed out that by the end of March 2015 he had still to pay off the full contract price, and was, therefore, not entitled to any transfer, even in the terms of the agreement. She pleaded extensive allegations of fraud against the appellant and the Minister of Lands, and sought rectification of title and damages.*

On 1 June 2016 the two cases 142/15 and 1335/2016 were consolidated. Given they relied on the same underlying facts and transactions, that was inevitable. *The wife was granted the right to amend to include the Director of Lands as a party, and timetabling was made for the filing of Amended Claims and Defences.*

On ***21 June 2016*** *the Amended Claim was filed, adding the Director of Lands in both his official and personal capacities. Allegations of fraud and bribery against him were pleaded. Rectification was again sought as the major remedy. On* ***4 August 2016*** *the appellant, represented by Mr Hurley, filed a Defence to the Amended Claim and a Counterclaim. It can be seen, therefore, that there has been a Counterclaim on foot since August 2016. The husband was added as a second Counterclaim defendant.*

The Counterclaim alleges that the full purchase price had been paid to the husband and (Chen Jinqiu) became the registered proprietor of the lease on 15 April 2015. The Counterclaim seeks that if the claimant is successful in that Counterclaim then he will have suffered loss. It is also said that if the defence is unsuccessful, (Chen Jinqiu) would seek an order against the first and second counterclaim defendants, jointly and severally.

Mr Hurley filed a formal Notice of Ceasing to Act on 19 December 2016, and on 3 January 2017 Mr Sugden filed a Notice of Beginning to Act. It appears to be common ground that Mr Sugden was overseas and did not return until 26 January 2017.

...

As noted earlier, the trial date had been set for 7 March. ***On 2 March 2017 Mr Sugden filed a new Civil Claim under number 453/2017. The claimant (Chen Jinqiu) was and the first to sixth defendants were the wife, the daughter Millie Ogden, her husband Thomas, (Loung Fong) the husband, BRED bank and the Republic of Vanuatu.*** *It can be seen that these are all the parties in the consolidated cases, except for Mr Ogden. The claim against the Director of Lands dropped out. We note here that, contrary to Mr Sugden's submission, Millie Ogden was a party to the earlier proceedings because she was named as such in one of the consolidated cases, 142/15.*

We note, with some considerable concern, that neither the other parties nor the Judge were advised of these new proceedings. Service did not occur at that time.
The next day, 3 March, the appellant filed a Notice of Discontinuance of the Counterclaim against the wife, the husband, BRED, and the Government of the Republic of Vanuatu. The trial Judge was of course aware of this, and other counsel were advised before the trial commenced".

(my underlining and highlighting)

5. The effect of the "*discontinuance*" is that Chen Jinqiu's counterclaim may not be revived [***see:*** CPR Rule 9.9(4)(a); Tranchat v Republic of Vanuatu [2012] VUSC 113; Inter – Pacific Investments Ltd v Sulis [2007] VUSC 21 recognising a claimant's "*absolute right to discontinue at any time*" and Hapsai v Albert [2012] VUCA 5 where the Court of Appeal dismissed the appeal because the appellant had filed a notice of discontinuance which "*... brought the proceeding to an end*"]. It also means that in this judgment, it is unnecessary to deal with the claims and issues arising from the counterclaim of Chen Jinqiu in CC1335/2016.

6. For the sake of completeness, mention should be made of two (2) other court proceedings namely, **Civil Case No. 79/2015** between Chen Jinqiu v Luong Fong dit Tchong Huya and Arnold Prasad, Paul Barthelemy and Ruihua Yao (t/a Tapusua Store) where Chen Jinqiu successfully sought vacant possession of Lease Title No. 03/0183/**071** (another derivative title) ("***071***") and mesne profits against the defendants. In that case Loung Fong disputed the claim on the basis that Chen Jinqiu had not paid him the full purchase price of VT45 million for the "***071***" lease. Nevertheless, judgment was given to the claimant.

7. On an appeal by Loung Fong in **Civil Appeal Case No. 922/2016**, the Court of Appeal amended the Supreme Court orders for mesne profits and dismissed the appeal (*see:* **[2016] VUCA 39**). In doing so the Court of Appeal in rejecting as "*unlikely*", an argument that Loung Fong could have been reinstated as the registered lessee of "***071***" said (at para. 39):

"*... as a starting point,* (Loung Fong) *would have to repay the VT45 million to* (Chen Jinqiu) *before he could pursue a claim now for rectification of the Register. He has not offered to do that. He does not suggest the* (Sale and Purchase) *Agreement itself was invalid. There is no reason to think that it was so. The next step, of showing the Agreement should be set aside would seem to be impossible to get over. In short* (Loung Fong) *got what he bargained for*".

8. The other proceeding is: **Civil Case No. 453/2017** between Chen Jinqiu v Ly Nu Loung and Millie and Thomas Ogden and Luong Fong, Bred (Vanuatu) Limited and the Republic of Vanuatu [2018] VUSC 194. It was filed on 2 March 2017 the day before Chen Jinqiu discontinued his counterclaim in CC1335/2016. The

Supreme Court in striking out this latest claim said: "*This proceeding re-agitates more or less the same issues raised in the counterclaim* (in CC1335/2016)".

9. On appeal by Chen Jinqiu in **Civil Appeal Case No. 2690/18**, (op. cit) the Court of Appeal dismissed the appeal and described the latest claim as: "*... a blatant abuse of the court's processes*" and "*... showed that the appellant blatantly and cynically attempted to utilize the CPR to avoid an order of the trial judge*" (***see:*** [2019] VUCA 13 (op. cit). Claimant's counsel was also referred to the Law Council for breach of his professional obligations in improperly manipulating the Civil Procedure Rules. In its judgment the Court of Appeal without deciding the issue said:

"*we are bound to say that there is an alternate argument that if new proceedings are filed before discontinuance and are effectively the same as the earlier proceedings, they amount to a revival*".

Earlier in its judgment the Court of Appeal also rejected as "*... preposterous and without any evidential support*", the suggestion by counsel for Chen Jinqiu that the claimant, her children and her estranged husband (Loung Fong): "*... had colluded together in an attempt to defraud Chen Jinqiu of the VT45 million he had paid* (to Loung Fong)".

10. So much for introductory matters, I turn next to the pleadings in the case of which there have been several amendments and consolidations.

CC142/2015 – Ly Nu Loung and her 3 children v Loung Fong and JM Pierre

- 07 July 2015 - Claim filed;
- 18 Sept. 2015 - Amended Claim filed;
- 27 Oct. 2015 - Application by Chen Jinqiu to join as a party;
- 29 Mar. 2016 - Further amended Claim filed;
- 11 May 2016 - Amended Defence of JM Pierre relying interalia on Sections 9 and 24 of the Land Leases Act. Accepts claimant registered cautions over "*070*" and "*071*" on 24 August 2010;
- 22 Aug. 2016 - Claimant's Defence to Counterclaim of first defendant (Loung Fong);
- 19 Aug. 2016 - Consent Order settling Claim between Claimants and Loung Fong.

CC1335/2016 – Ly Nu Loung v Cheng Jinqiu and Republic of Vanuatu

- 21 Apr. 2016 - Claim filed;
- 25 May 2016 - Application to consolidate CC142/2015 and CC1335/2016;
- 21 Jun. 2016 - Amended Claim filed adding JM Pierre as a defendant;
- 24 Jun. 2016 - Defence of Republic of Vanuatu filed;
- 04 Aug. 2016 - Chen Jinqui's Defence to Amended Claim and Counterclaim filed;
- 13 Aug. 2016 - Defence of JM Pierre to Amended Claim;
- 04 No. 2016 - Loung Fong Defence to Chen Jinqui's Counterclaim;
- 01 Mar. 2017 - Claimant's Reply to Amended Defence of Chen Jinqiu and Defence to Counterclaim;
- 07 Mar. 2017 - Amended Consolidated Claim filed;

11. In the Amended Claim the claimants are seeking rectification of least title No. "*071*" registered in Chen Jinqui's name on the basis of various omissions, fraud

or mistakes that were committed by the defendants and, resulted in the impugned registration. The Claimants also seek damages against the defendants and alternatively, against the Republic of Vanuatu and JM Pierre, damages for negligence in failing to deal properly with the Claimants' various cautions lodged against lease "*071*".

12. In substance, the First Defendant Chen Jinqiu pleads that he is a "*bona fide*" purchaser for value of the "*071*" lease without notice of the registered interest of any person other than the vendor and the First Defendant denies actual or constructive knowledge of any omission, fraud, or mistake and denies causing or contributing to the same (if proven). The First Defendant also counterclaims against the Claimants and Loung Fong jointly and severally for payment of all losses and damages to be assessed including the VT45 million paid to Loung Fong for the purchase of Lease "*071*" under a written contract dated 5 December 2013.

13. The Defence of the Second Defendant **Republic of Vanuatu** includes clear admissions of the joint acquisition of Lease Title 03/0183/038 in July 1982 by the Claimant and Loung Fong; the execution of a "*Power of Attorney*" by the Claimant in favour of Loung Fong in February 1987 over Lease "*038*" registered in April 1998; and the creation of 2 derivative lease titles Nos. "***070***" and "***071***" between the Minister of Lands and Loung Fong only as the sole proprietor/lessee. The Defence also admits the lodging of various cautions against leases "*070*" and "*071*" and their removal by the Director after service of a notification of intention to remove pursuant to Section 97(2) and 97(5) of the Land Leases Act. Finally, the Defence asserts the registration of transfer of lease "*071*" in April 2015 in Chen Jinqui's name was "*done in good faith based on information supplies*" and reliance is placed on Sections 9 and 24 if the Land Leases Act.

14. In similar vein the Third Defendant **JM Pierre** admits most of the historical facts surrounding lease title "*038*" and the derivative lease title Nos. "*070*" and "*071*" and the registration of "*071*" in Chen Jinqui's name "*in good faith and based on information supplied*". He too, relies on Sections 9 and 24 of the Land Leases Act. The Third Defendant also denies any negligence or breach of any duty of care in the removal of the Claimants' caution over lease "*071*".

15. For his part Loung Fong in his defence of Chen Jinqui's counterclaim says he never agreed to any variation or amendment of their Sale and Purchase Agreement and says the purchase price was never paid in full. He also says he never consented to the transfer of ownership of lease "*071*" to Chen Jinqui.

16. For completeness, the Claimants deny Chen Jinqui's counterclaim or having caused him any loss or damage. They deny Loung Fong acted under a Power of Attorney ("*POA*") as trustees for the Claimant and in any event the POA was revoked in 2001. The Claimants deny failing to take reasonable steps and claim instead that proceedings were issued against Loung Fong which were subsequently settled and all necessary documents to implement the settlement was lodged with the Director of Lands for registration after the consent of Minister of Lands was obtained.

The Evidence

17. The witnesses called and cross-examined at the trial in respect of each party were the following:

for Claimants

- Millie Ogden who deposed and produced five (5) sworn statements marked as Exhibits C(1) to C(5);
- Richard Solzer a former officer of the Ministry of Lands who deposed and produced Exhibit C(6); and
- Loung Fong the estranged husband of Ly Nu Loung and father of Millie Ogden who sold lease title "*071*" to the First Defendant Chen Jinqui. He deposed and produced two (2) sworn statements, Exhibits C(7) and C(8).

for First Defendant

- Valiant Leung the husband of Gum So Leung who bought lease title from Loung Fong and later agreed to reverse transaction on being paid all costs and expenses;
- Marco Heromanly a neighbor of Chen Jinqiu who accompanied him to attend a meeting with the Minister of Lands office in Port Vila on 13 April 2013 to discuss the delay of 7 months in registering Chen Jinqui's transfer of lease "*071*";
- Chen Jinqiu who deposed and produced two (2) sworn statements Exhibits FD(1) and FD(2);
- Beverly Jane Smith – a lawyer with Geoffrey Gee who prepared a security instrument to secure the loan of VT30 million from Bred Bank to Chen Jinqui;

for Republic of Vanuatu

- Gordon Willie – Principal Registration Officer in the Lands Department who deposed and produced a sworn statement dated 15 September 2015 – Exhibits 5D(1);

for Jean Marc Pierre

- JM Pierre produced three (3) sworn statements Exhibits TD(1) to TD(3).

18. Given the plethora of pleadings in the two civil cases, it is convenient to refer to the consolidated claim filed in 2017 which reduced the parties to: Ly Nu Loung (First Claimant); Millie Ogden, Felix Loung and Vincent Loung (Second Claimants); and Chen Jinqiu (First Defendant) and Republic of Vanuatu (Second Defendant) sued vicariously as the employer of Jean Marc Pierre (Third Defendant).

19. At the end of the evidence counsels advised the Court that there were no agreed issues other than what is contained in the pleadings. Claimants' counsel suggested two (2) broad "*issues*" which he would provide written submissions on. They were:

(a) Was there any "*mistake*" or "*fraud*" that led to the registration of the "*071*" lease?

(b) What parties are responsible for the mistake, fraud or otherwise?

20. In addition the claimants' written submissions identifies general broad Issues or questions that are said to arise from the Amended Supreme Court Claim filed on 7 March 2017 and the Defences filed to that Amended Claim as follows:

> "*(i) In terms of Section 100(1) of Land Leases Act are there grounds for rectification of "071" lease?*
> *(ii) If the answer to (i) is "yes" then is Chen Jinqiu protected against rectification by Section 100(2)?*
> *(iii) Is the Republic of Vanuatu liable for damages to the Claimants?*
> *(iv) Is Jean Marc Pierre liable personally for damages to the Claimants?*
> *(v) Is Chen Jinqiu protected by the pleaded defences of estoppel by laches?*
> *(vi) Is Chen Jinqiu liable for damages to the Claimants?*"

21. In the absence of agreed issues I consider the preferred approach is to deal with case within Section 100 of the Land Leases Act and the issues arising from subsections (1) and (2) and dealing with counsel's submissions as relevant. Before doing so however it may be noted that most of the historical facts in the case are either undisputed or admitted or have been canvassed and accepted in judgments earlier referred to.

22. I gratefully adopt an amended summary of the Claimants' convenient chronology of relevant dates and events as follows:

- 12 May 1986: The First Claimant Ly Nu Luong and her husband Loung Fong became the registered joint proprietors of Lease Title No. 03/0183/038 ("***Lease 038***");
- 2 Feb. 1987: Ly Nu Loung executed an unrestricted Power of Attorney ("***POA***") in favour of her husband Loung Fong to deal with her interest in lease "*038*";
- 27 April 1987: Loung Fong using the **POA**, successfully registered the "*surrender*" of Lease "*038*" without his wife's knowledge or consent;
- 11 May 1998: Two (2) derivative leases were created as replacements for lease "*038*". They were lease No. 03/0183/070 (**lease "*070*"**) and lease No. 03/0183/071 (**lease "*071*"**) and both derivative leases were registered in the name of Loung Fong as sole proprietor;
- 3 July 1998: **POA** registered;
- July – Nov. 2001: Lease titles "***070***" and "***071***" were sold to **Gum So Leung** (Valiant Leung's wife). The sale was later reversed and the purchase price refunded after the First Claimant had issued court proceedings against her husband and cautioned the titles on 21 August 2001 before any transfers could be registered. The POA was also revoked.

  The Claimants' lawyers also wrote to the Director of Lands on 5 September 2001 formally requesting him to rectify the lease titles

by including the claimants' name in exercise of his powers under **section 99** of the Land Leases Act.

The Claimants' law suit was eventually settled and signed and consented transfers were executed by Loung Fong over lease "***070***" and "***071***" in favour of his wife Ly Nu Loung and their three (3) children Millie, Felix and Vincent Loung. Despite receiving ministerial approval and all necessary processing fees being paid by the intended lessees, the transfers were never registered.

- February 2002: Director of Lands cancelled the Ly Nu Loung's cautions over lease Nos. "***070***" and "***071***" ostensibly because the parties had settled;

- 15 June 2010: A fresh caution is lodged over lease Nos. "***070***" and "***071***" by **Ridgway Blake Lawyers** on behalf of the First Claimant registered on 24 August 2010 ("***the June 2010 Caution***");

- 2013/2014: Former **Senior Magistrate Rita Naviti** was engaged to mediate between Loung Fong and his estranged wife and children in an attempt to get their settlement agreement performed;

- October 2013: **Caillard Kaddour Real Estate** agents listed lease "*071*" for sale on instruction of Loung Fong;

- 5 Dec. 2013: Loung Fong signed a sale and purchase agreement (in Chinese) to sell lease "*071*" to Chen Jinqiu for VT45 million;

- 22 Aug. 2014: Lands Department **Consent Checklist** completed for two (2) unrelated lease titles No. "***071***" and "***094***" with no cautions noted on the Checklist. The Minister of Lands mistakenly signifies his consent to lease "*094*" to be transferred to Chen Jinqui;

- 26 Aug. 2014: Minister signs a consent to transfer lease "*071*" to Chen Jinqiu on the basis of the "*094*" checklist and without sighting a fresh Checklist prepared only for lease "*071*";

- 18 Sept. 2014: Transfer of lease "***071***" records the total purchase price is **VT30 million**;

- 13 Oct. 2014: Director of Lands issues a notice to remove caution to the cautioner Ly Nu Loung addressed to "***PO Box 78, Asia Motel***" in Santo, intentionally ignoring the address appointed in the caution for service of notices;

- 13 April 2015: Chen Jinqiu and Marco Herrominly meet with the Minister of Lands and other Lands Department officers including the Director of Lands, **JM Pierre**;

- 13 April 2015: Chen Jinqiu seeks the removal of the First Claimant's caution to enable the transfer of lease "***071***" to him to be registered;

- 14 April 2015: Transfer of Lease "***071***" to Chen Jinqiu registered;

- 15 April 2015: Land registry removes the June 2010 caution lodged by Ridgway Blake lawyers;

- 27 April 2015: Caution lodged by former Senior Magistrate Rita Naviti on behalf of Ly Nu Loung is registered;

- 11 Dec. 2015: Chen Jinqiu pays Loung Fong VT4 million being the balance of the VT45 million purchase price for lease "*071*";

- 16 Mar. 2016: Chen Jinqiu awarded vacant possession of lease "071" in CC79/2015 (op. cit);

- 21 April 2016: Ly Nu Loung commences Supreme Court proceedings in CC1335/2016 against Chen Jinqiu and the Republic of Vanuatu for rectification of lease "*071*". Later amended to include JM Pierre as the Third Defendant;

23. So much for the brief chronology of largely undisputed facts, I turn next to address the first issue raised by Section 100(1) of the Land Leases Act and encapsulated in the Claimant's closing submissions (*see:* **para. 19** above).

24. Before dealing however with the various "*mistakes*" identified in the Claimants' submissions, let me say at once that there is not the slightest doubt in my mind and I so find, that the actions of Loung Fong in the purported exercise of the **POA** given him by his wife was, an abuse of the **POA** and constituted a "*fraud*" on his wife who was a registered joint proprietor with him of lease "*038*". Loung Fong's actions included surrendering lease "*038*" without his wife's knowledge or consent and thereafter obtaining two (2) derivative leases "*070*" and "*071*" in his own name as sole registered proprietor thereby expunging and denying altogether the continuity of his wife and joint owners' registered interest in the surrendered lease "*038*" and extended to the two (2) leases derived from it.

25. The **POA** expressly authorized Luong Fong to act as his wife by Nu Loung's:

> "***... attorney and generally in relation to my interest in (title No. 03/OI83/038)*** *to do anything and everything that I myself/the said owner of the above title could do and for me and in my name to execute all such instruments and do all such acts, matters and things as may be necessary or expedient* ***for the carrying out of the powers hereby given***".

Using the **POA** Loung Fong surrendered Lease "*038*" and obtained the issuance and registration of two (2) new derivative titles "*070*" and "*071*" in his sole name and omitting any mention of his wife Ly Nu Loung.

26. Under no circumstances can such actions which ultimately and solely benefited the donee of the **POA** to the utter detriment and loss of the donor, be said to be done "***in relation to***" the donor's "***interest***" as part-owner of lease "***038***". Indeed, the effect of what was done, was to completely obliterate and extinguish any "***interest***" that Ly Nu Loung had in lease "***038***". That, was clearly not something that was done, to improve and/or maintain the donor's joint proprietorship in lease "***038***" nor in my view, was it done for "*...* ***carrying out of the powers hereby given***" under the POA.

27. In Reckitt v Barnett, Pembroke and Slater [1929] AC 176, the House of Lords in construing the "*Power of Attorney*" in that case which had been supplemented by a letter that permitted the donee of the Power to draw cheques on the donee's account "*without restriction*":

> "***Held: (1) that the power of attorney, as amplified by the letter, conferred no authority on*** (the donor's attorney) ***to use the*** (donor's) ***money for the purpose of paying his private debts, but the authority to draw cheques was limited to the management of the donor's affair ...***".

28. The House of Lords in Reckitt's case followed an earlier decision of the Privy Council in John and others v Didwell and Company Ltd. [1918] AC 563 (also a "*Power of Attorney*" case) where Viscount Haldane in delivering the judgment of the Court said at p.507:

> "*... when an agent is entrusted by his principal with property to be applied for the purposes of the latter, and to be accounted for on that footing, he is, by virtue of doctrines which apply ... under the law of this and other countries, in a fiduciary position and any third person taking from the agent a transfer of the property with knowledge of a breach of duty committed by him in making the transfer hold what has been transferred to him under a transmitted fiduciary obligation to account for it to the principal. That there is no privity of contract between him and the principal does not make any difference, for the title does not rest on contract. The property belongs to the latter in the contemplation of the Courts which administer equity ...*"

29. Although not directly causative of Chen Jinqui's registration as the lessee of lease "***071***" it was directly causative of the creation and registration of lease "***071***" in the sole name of Loung Fong who is the vendor and transferor of lease "***071***" to Chen Jinqui.

30. A strict reading of Section 49 and applying the limited definitions of a "***lessee***" and "**proprietor**" leads to the conclusion that the "***surrender***" of a lease is only permissible and valid if and only if, it is "*executed by the lessee*" personally as an individual. I say this partly because of the wording of Section 75(2) (a) which by the use of the words "***only***" and "***all***" emphasizes the need for a joint-proprietor to act personally and separately from any other joint proprietor in the disposition (read "*surrender*") of his/her interest.

31. In my view the "***duly authorized attorney***" mentioned in Section 77 (2) (a) means that the "***attorney***" is expressly authorized to do and sign the particular instrument effecting the disposition which, in this case, was the surrender of lease "***038***" and the simultaneous application for the creation of the derivative leases Nos. "***070***" and "***071***" in the attorney's own name as sole registered proprietor. Viewed in that light the "***surrender***" of lease "*038*" was unlawful and this illegality continued with the derivative "*leases*".

32. Section 100 of the Land Leases Act provides:

> ***100. Rectification by the Court***
>
> *(1) Subject to subsection (2) the Court may order rectification of the register by directing that any registration be cancelled or amended where it is so empowered by this Act or*

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

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

33. The Court of Appeal in Naflak Teufi v Kalsakau [2005] VUCA 15 had this to say about the above section:

"*In our view, the meaning of Section 100 of the Land Leases Act CAP 163 is not in doubt. We are satisfied that the object of the Section is to ensure that the land register and the processes leading up to the registration of any instrument or interest is free of any mistakes, fraud or possible fraudulent activities. In other words, its purpose is to secure the integrity of the register and the internal processes culminating in registration. The section, in its terms, is one which empowers the Supreme Court where it is satisfied that any registration has been obtained, made, or omitted by fraud or mistake, to order rectification of the register by directing that any registration may be cancelled or amended. We not without comment, the disjunctive nature of the rectification power.*"

And later the Court of Appeal said:

*"We are satisfied on a consideration of the object and purpose of the section that, at the very least, a person seeking to invoke Section 100 must include a person who has an interest in the register entry sought to be rectified and which it claimed was registered through mistake or fraud. Not only must there be proof of mistake or fraud but also that such mistake or fraud caused the entry to be registered. Furthermore it has to be proved that the mistake or fraud was known to the registered proprietor of the interest sought to be challenged or was of such a nature and quality that it would have been obvious to the registered proprietor had he not shut his eyes to the obvious or, where the registered proprietor himself caused such omission, fraud or mistake or substantially contributed to it by his own act, neglect or default. We use the word "**interest**" in the widest possible sense although accepting it may have in appropriate circumstances be distinguished from a mere busy body."*

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 Jinqui's registration of lease "*071*" by the Director of Lands was "*obtained and made*" by fraud and mistake.

35. Chen Jinqiu for his part, invokes the protective provisions of subsection (2) claiming that he is a "*bona fide purchaser*" in possession of lease "***071***" for valuable consideration without knowledge of any fraud or mistake. He also

denied that he "*caused*" such fraud or mistake or "*substantially contributed*" to it by his act, neglect or default.

36. Returning now to deal the "*mistakes*" identified in the Claimants' submissions. I begin with:

(A) Removal of the Claimants "*June 2010 Caution*".

37. It is common ground that the Claimants' "*June 2010 caution*" was removed on 15 April 2015 after a removal notice was issued by the Director of Lands on 13 October 2014 addressed to the Claimant's postal address at: "***PO Box 78, Asia Motel, Santo***". The particular cautions are dated 15 June 2010 and both were lodged and signed by the claimant's lawyer. Both cautions included a clause for service of notices which reads:

"I/We APPOINT RIDGWAY BLAKE of First Bank Building, Rue Emile Mercet, PORT VILA, Efate in the Republic of Vanuatu as the place at which notices and proceedings relating to this Caution may be addressed to or served upon me/us".

38. Sections 93, 96 and 97 of the Land Leases Act relevantly provide:

"93. Lodging of cautions

(1) Any person who –

(a) claims any interest in land under an unregistered instrument or otherwise;

(b) ... (inapplicable)
(c) ... (inapplicable)
(d) ... (inapplicable)

may lodge with the Director a caution in the prescribed form forbidding the registration of any person as transferee of, or any instrument affecting, that interest, either absolutely or conditionally.

(2) A note of every caution shall be entered on the register and the Director shall take such steps as he thinks fit to bring the caution to the notice of the registered proprietors of interests affected by it.

(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.***

(4) ***Every notice relating to any caution and any proceedings in respect thereof shall be deemed to be duly served if served at the address in Vanuatu specified under subsection (3).***

96. Duration of cautions

(1) Subject to the provisions of this section, a caution, ... shall lapse, as to any interest affected by any transfer or other dealing, except –

(a) ... (inapplicable);

(b) ... (inapplicable);

(c) ... (inapplicable);

upon the expiration of 30 days after notice given by the Director to the cautioner that a transfer or dealing has been lodged for registration, which notice shall be given whenever any transfer or dealing ...

(2) ... (inapplicable);

(3) ... (inapplicable).

97. Application for removal of caution

(1) ... (inapplicable);

(2) Any person adversely affected by any caution may apply to the Director for the removal of the caution.

(3) ***... the Director.....on the application of any interested person, shall, give notice to the cautioner requiring him to withdraw his caution or substantiate his claim, and if the cautioner does not comply with the notice or file with the Director a certified copy of pending court proceedings within 30 days from the date of the notice the Director shall remove the caution from the register.***

(4) A caution which has been removed in pursuance of subsection (2) shall not be renewed by or on behalf of the same person in respect of the same claim.

(5) Any person lodging any caution with the Director or allowing any caution to remain without reasonable cause shall be liable to pay such compensation as the Court thinks just to any person who sustains damage or who has incurred costs or expenses thereby.

(my highlighting)

39. In this regard, **Gordon Willie** deposes that the letter of intention to remove the Claimants' caution was sent to the claimant's address on the Caution and not to the Claimants' lawyer as directed"*... because the Department considered that there was no case in Court to prove the Claimant was legally represented*" (whatever that means). The quoted "*reason*" is an oblique reference to Section 97(3) which is specifically identified and referred to in the Director's letter of intention to remove.

40. At the outset I would point out that Section 97(3) is expressly directed at: "*The Director*" not "*the Department*", and therefore what the Department thinks is irrelevant and a red-herring. Secondly, no-where in Part 14 dealing with **CAUTIONS** and, more specifically, in Section 93(3), is there a requirement that the cautioner must provide evidence of a retainer, or indeed, evidence of a relationship existing between the cautioner and the appointed addressee for receiving notices concerning the caution. But in any event, the Claimants' caution as already noted, was lodged and signed by her lawyer **Nigel Morrison** of the firm of **Ridgway Blake**. Accordingly the deposed "*reason*" for not serving **Ridgway Blake** the cautioner's appointed addressee is wrong and unjustified.

41. Thirdly, if the Director could choose to *whom*? and *where*? he would serve his letter of intention to remove a caution, then there would be no reason to provide for an alternative address other than the cautioner's, for service of notices. Section 93(3) would be rendered nugatory and the words: "... ***in lieu of the address specified in the caution***" would be meaningless;

42. Fourthly, the existence of subsection 93(4) reinforces the option given to the cautioner in subsection (3) to appoint another address for service of notices and also colours the Director's mandatory duty ("*shall*") under Section 97(3) ***viz.*** "... (to) *give notice to the cautioner ...*". In my view the only acceptable service under Section 97(3) is "*personal*" service where the cautioner is an individual.

43. Needless to say Section 97(3) does not expressly exclude the provisions of Section 93(3) or affirmatively state where any notice is to be served, nor does it say "*... at the cautioner's address*". Personal service of the removal notice did not occur in the present case and, in my view, there has been non-compliance with the standatory requirements of Section 97(3). Finally, in light of the terms of **para (f)** Section 108 will not save the situation.

44. Under cross-examination, I was also unimpressed with **Gordon Willie** who was evasive, argumentative, and selective in his answers. He displayed an almost complete lack of understanding of the relevant provisions of the Land Leases Act dealing with the lodgment and removal of cautions and, when questioned about the existence of two 2 lease title numbers "***071***" and "*094*" in the Consent Checklist, he said: *"not in my area of work. Nothing to do with these types of checklists."* Yet, immediately before that answer, when first shown the Checklist he said: *"Familiar with this document. It's used to process documents so Minister can sign consent checklist."*

45. Likewise **Jean Marc Pierre** struck me as evasive, defensive, and insincere in his answers about the claimants' June 2010 caution and its removal, and took to blaming his underlings before he would admit any *"mistakes"* had occurred. To his credit, he did eventually admit "*mistakes*" were made in the service of the notice of removal of the claimant's caution and in the inclusion of lease "***094***" in the Consent Checklist as well as the negative answer "***NO***" to the existence of a "***caution***" in STEP 5 of the checklist.

46. For the foregoing reasons, I reject the defence submissions and hold that the removal of the Claimant's "*June 2010 caution*" was a causative "*mistake*" for the purposes of Section 100(1) in so far as, but for the removal of the caution, the registration of the transfer of lease "***071***" to Chen Junqui would not have occurred.

(B) The Ministerial Consent Checklist

47. Section 36 of the Land Leases Act relevantly provides:

> "*Notwithstanding any provision to the contrary ... any disposition of any land leased under a registered lease ... shall not be registered until the written consent of the lessor to such disposition ... has been produced to the Director*".

48. Clearly the production of a valid written lessor's consent is a condition precedent to the registration of any transfer of a registered lease. In the present case the lessor of lease "***071***" is the *"Minister of Lands*" who signified his consent to the transfer of lease "***071***" from Loung Fong to Chen Jinqiu for VT30 million in a formal document dated 26 August 2014.

49. In order to obtain the Minister's consent a proforma Consent Checklist was raised by the Department of Lands in which, various necessary checks and steps are followed before submitting the same for the Minister's consent.

50. In this regard, the relevant Consent Checklist dated 12 August 2014 records in **STEP 1** beside the item: Title No(s) (2 lease titles): "***08/OI83/071 & 12/0924/094***".The Checklist appears to have been raised for two (2) titles without any justification or reason(s). That should not have occurred and was clearly a "***mistake***" as reinforced in the remaining **STEPS** and checks undertaken on the Checklist.

51. For instance, **STEP 4** which was the step for the *"**Valuation Unit**"* notes the relevant title being considered is: "***12/0924/094***" (**not** 08/0183/071) with a market value of "*VT2,000,000*". Nowhere in this **STEP** is mention made of "*lease title No. 08/OI83/071*" or of the amount of "***VT30 million***" which is recorded on the Transfer of Lease (Form 11) lodged with the Bred Bank Mortgage that accompanied the application for Ministerial consent.

52. Finally, **STEP 5** which is entitled: "***Lease Execution Section***" clearly shows a negative ("***NO***") answer to the question: "***Is the lease encumbered with a mortgage, caution or other restriction?***". The error in this answer would have been clear from an examination of the lease "***071***" file, in that, the Claimants' caution had been registered on lease "***071***" on 24 August 2010 and had not been removed or withdrawn by the 21 August 2014 when the Consent Checklist was being processed.

53. Furthermore, there was no fresh Consent Checklist raised for lease "***071***" as there should have been, nor was one produced in Court and I am driven to the inevitable conclusion that the Minister's Consent to the transfer of lease "***071***" to Chen Jinqiu was granted on the basis of a Checklist that contained glaring "*mistakes*" which if, correctly and properly disclosed, in the Checklist would have led the Minister to decline his consent in so far as **STEP 5** to 8 would all have been answered "***NO***" instead of the selected "***YES***".

54. I am satisfied that this also, was a direct causative "***mistake***" that led to registration of the transfer of lease "***071***" to Chen Jinqiu in so far as the registration was dependent on a valid written consent of the Minister of Lands being first produced to the Director of Lands.

(C) The Incorrect Purchase Price in the Transfer of Lease "*071*"

55. Section 76 (3) of the Land Leases Act expressly and provides:

> *"**Instruments shall contain a true statement of the amount or value of the purchase price** or loan or other consideration (if any), and **an acknowledgment of the receipt of the consideration.**"*

(my highlighting)

56. The relevant instrument namely the Transfer of Lease "**071**" to Chen Jinqiu is dated 15 September 2014 and contains the following relevant Clauses as to value, purchase price, and receipt:

> *"1. The Transferor* (Loung Frong) *has received from the Transferee* (Chen Jinqui) *the sum of THIRTY MILLION VATU (VT30,000,000) being the consideration for this Transfer."*
>
> and
>
> *"5. The value of the interest transferred is hereby declared to be THIRTY MILLION VATU (30,000,000)."*

Confusingly the Transfer purports to have been signed on "*26 June 2014*" which is three (3) months before it was dated. See also the hand cancellation and rewriting of the Transfer's registration date.

57. The claimant's simple submission is that the figure of "***VT30,000,000***" is inconsistent with the purchase price agreed between the transferor (**Loung Fong**) and the transferee (**Chen Jinqui**) in their written Sale and Purchase Agreement of 5 December 2013 wherein Clause 2 reads:

> ***"Both parties have reached an agreement of total transaction of 45 million vatu."***

and therefore, the figure is "*untrue*" and in breach of the mandatory ("***shall***") requirements of Section 76 (3). A further consequence is that the Transfer containing the untrue figure is also non-complaint with Section 22 (1) and therefore is not in a registrable form.

58. The First Defendant's response is that "*... this was a genuine mistake resulting from Chen's lack of knowledge and language difficulties ...*". Also this was "*... not an error causative of an erroneous registration*" and whatsmore the purpose of the requirement under Section 76(3) is *"for the calculation of the ad valorem registration fees pursuant to Section 110 and the Schedule*". Finally counsel submits that the incorrect figure "*... can be ignored by the Director (Schedule Regulation 3(g))*". I disagree.

59. In the first place, the provisions of Section 76(3) are mandatory ("***shall***") and, besides serving as a basis for the calculation of "*ad valorem registration fees*" which shall be paid by the "*transferee*" [***see***: Section 110(1) read with Regulation (3)(a)] where a lease is being transferred as in the present case, the subsection also reinforces the contractual nature of an unregistered instrument [***see:*** Section 22(5)] where consideration has been received by the vendor/transferor.

60. The Schedule Regulations 3(a) and (c) relevantly provides:

> "*(a) ... **the payments of these fess shall be made by the transferee, lessee or mortgagor** ...; and*
>
> *(b) **The fee to be charged for transfers shall be based on the total price expressed in the instrument of transfer** or if no price is stipulated, upon the value of*

the interest transferred at the date of transfer as declared to the Director by the parties to the instrument".

(my highlighting)

61. Nowhere in the above provisions can it be claimed or said that the Director can "*ignore*" an incorrect figure or untrue price or declared value nor does Regulation 3(g) permit the stating of an untrue or incorrect figure in the transfer. More generally as a matter of interpretation under no circumstances can a regulation or subsidiary legislation be construed so as to ignore, evade or override the mandatory requirements of a substantive enactment dealing with the same subject-matter.

62. I accept the claimant's submission that while the Director may have administrative prerogatives for registering instruments and in the assessment of the registration fees payable on an instrument, "(he) *has NO AUTHORITY to waive the Act's statutory requirement that ...* (true) *consideration be disclosed on the relevant transfer instrument*".

63. Secondly, the calculation of the "*ad valorem fees*" is directly related to "*the total price expressed in the instrument of transfer*" such that an untrue or incorrect price will inevitably result in an incorrect fee being calculated and collected for Government. It constitutes a fraud on the Government confers.

64. Thirdly, the entry of an "*untrue*" purchase price also means that the requirement of an "*acknowledgement of receipt of the purchase price*" is similarly tainted by the untruth and itself is also rendered untruthful in so far as the vendor acknowledges receiving a lesser sum than the "*true*" purchase price **ie**. 2/3rds of VT45 million.

65. Fourthly, Defence counsel's submission that the Director may ignore the consideration or value expressed in a transfer of lease itself tantamounts to ignoring the adverb "***true***" in its reference to the statement of the amount of the purchase price. The intentional use of the adjective "***true***" cannot be ignored in considering the purchase price expressed in the transfer and must bear its ordinary, natural meaning of being in accordance with fact or reality, real or actual, accurate or exact and not false or wrong.

66. In my view a transfer of lease which contains an "*untrue*" purchase price is non-compliant with the requirements of Section 76(3) and is therefore not an instrument or disposition "*... in accordance with this Act*" and, unless amended to reflect the true purchase price, the transfer remains "*subject to the provisions*" of Section 76(3) and the proprietor of the registered lease is incapable of transferring it. The transfer with the untrue purchase price and/or value is "*... ineffectual to dispose of the registered lease*" or "*transfer any interest in the lease*" [***see:*** Sections 22(1) and (2) and (60 of the Land Leases Act].

67. In this latter regard the untrue purchase price directly impacts on the registrability of the Transfer of Lease that contains the untruth (and highlights) as well as on the (mistaken) understanding or belief by officers of the Lands Department that the purchase price disclosed in the transfer of lease document based on the sale and purchase agreement between the transferor and transferee is a matter of concern to the contracting parties only and nothing to do with the Department. In

my view such a belief is "***mistaken***" and in part, was causative of the transfer of lease "*071*" to Chen Jinqiu being registered in the present case.

68. As was said by Harrop J. in Lope v Estate of McLean Lopez [2014] VUSC 160 at para. 50:

> *"... the land registry is a very important repository of rights, and of transfers of rights, and it is essential that changes in those rights such as are reflected by a transfer must be properly documented and processed. Informal understandings, no matter how pragmatic, simply will not do".*

69. On this basis also the Court's rectification power under Section 100(1) of the Land Leases Act is enlivened.

70. Having identified and accepted the above three (3) causative "*mistakes*" in the registration of the Transfer of Lease "***071***" to Chen Jinqiu and the role played by the Director and other officers of the Lands Department I reject the defences based on Sections 9 and 24 as pleaded by the Republic of Vanuatu and JM Pierre.

71. I say this on the basis of the following:

- In Toro v Kiri [2016] VUSC 26 Harrop J. in construing Sections 9 and 24 of the Land Leases Act said (as paras. 44 and 45):

  > *"... there is no reason why the Director should not be personally liable, and his employer the Republic vicariously liable, for negligence in the exercise of his statutory functions. The possibility of personal liability is indeed impliedly recognised by section 9 of the Act. There can be no serious suggestion that the Director and the Minister of Lands did not each owe a duty of care to the claimants, ... and that as outlined above they each acted on several occasions in serious breach of such duty, thereby causing actual or potential loss to the claimants.*
  >
  > *The effect of section 9 is that the Director and his staff are protected from such prima facie liability as the section itself contemplates if the impugned exercise of statutory power was done in good faith. Its wording clearly implies that the onus is on the Director to establish such good faith in order to escape the liability which would otherwise apply. It is an affirmative defence which needs to be both asserted and established."*

  And later at para. 48:

  > *"... In general terms it seems to me the defence could be established by the Director if he provided evidence of an honest belief on the part of the employee carrying out a transaction that it was an appropriate one and/or if there was an absence of intent to defraud or to seek unconscionable advantage. I leave open the question whether such serious and serial breaches as occurred here may constitute such a gross failure to carry out statutory duties as to amount to a lack of good faith. ..."*

- The Third Defendant's own acceptance in his letter of 30 August 2001 that the claimant's name "*should also be registered in the two new leases (**070** and **071**) before transferring the same*"; and his further view that the lease titles being registered in Loung Fong's name alone "*as irregular*";

- The letter of the then Attorney-General to JM Pierre dated 22 October 2001 concerning the illegal surrender of lease "*038*" where he writes:

  "*... in our view both Mr Lingi* (a Lands Officer in Department of Lands, Luganville, Santo) *and Mr Loung* (the Claimant's estranged husband) *acted beyond their power*".

  Mrs Loung (the Claimant) *was not informed of the surrender of lease 038 and the creation of 2 new leases "070" and "071" in Loung's own name nor was the claimant informed of the "purported transfer of the said lease to Mr Valliant".*

- Despite the above views expressed by the Attorney-General and the Third Defendant, the derivative leases "*070*" and "071" were never recalled and rectified by adding the claimant's name as a registered joint proprietor of the two leases;

72. In the face of such clearly identified failures, irregularity, and acting beyond powers, the expectation deposed by **Gordon Willie** at para. 10 of his sworn statement for:

"*a joint agreement between (Mr Fong) and the claimant for the purpose of any rectification* (under Section 99) ..."

to have the claimant also registered as proprietor of leases 070 and 071 is with respect, to add insult to injury.

73. Whatsmore the Third Defendant's advice to the claimant to obtain an injunction without first clearly declining to exercise his powers under Sections 96(2) and 99 to rectify, in the face of the clear "*fraud*" and/or "*mistakes*" that had occurred in the registering of the derivative leases "*070*" and "*071*" without including the claimant's name as a joint proprietor, cannot in my view, be said to be advice given in "*good faith*" so as to attract the protection of Section 9 of the Land Leases Act. It was lazy and nothing more than an excuse to pass the buck and was based on an egregious breach of the provisions dealing with the removal of a caution.

74. The next major issue that needs to be addressed is that arising under Section 100(2) namely, did Chen Jinqiu have knowledge of the "*fraud*" or "*mistake*" in consequence of which rectification is sought or did he "*cause*" or "*substantially contribute*" to the mistake or fraud by his act, neglect or default?

75. As to the "*fraud*" in this case namely, the extinguishment of the registered interested of Ly Nu Loung in lease "***038***" by its surrender and the failure to register Ly Nu Loung's interest in the derivature leases Nos. "***070***" and "***071***", that is primarily attributable to the unlawful and fraudulent exercise of the POA granted to Loung Fong by Ly Nu Loung. All this occurred well before Chen Jinqiu first arrived in Vanuatu and was therefore unknown to him and it cannot be said to have been caused or substantially contributed to by any act, neglect or default on his part. Fraudin the abuse of the POA may be left to one-side.

76. Before considering the identified "*mistakes*" and Chen Jinqui's role (if any) in them, it is convenient to address some of defence counsel's submissions.

- **Refunding the VT45 million Purchase Price**

77. In this regard counsel relies on the observations of the Court of Appeal in Loung Fong v Chen Jinqiu [2016] VUCA 39 (op. cit at **para 7** above) and the Claimant's failure to seek the setting aside of the Sale & Purchase agreement selling lease "***071***" to Chen Jinqui. Counsel without addressing the lawfulness of the exercise of the Claimant's **POA** given to Loung Fong, also asserts that the Claimant and Loung Fong "*are still married*" and "*Fong held 071 as trustee for himself and the claimant as joint tenants*". Similarly Fong "***received the VT45 million for himself and the Claimant and it became part of the matrimonial assets***". I disagree with the submissions.

78. Firstly, the Claimant is not a party to the Loung Fong v Chen Jinqiu case or privy to the underlying Sale & Purchase Agreement executed between them. She had no "*locus*" to sue nor is she bound by the Court of Appeal's observations in the case. Secondly, Section 100(1) does not require the setting aside of the contract or repayment of the purchase price by the Claimant in the event lease "***071***" is rectified for "*fraud*" or "*mistake*".

79. Thirdly, there is no evidence sufficient to support the bald assertions that the tainted lease "***071***" and the proceeds of its sale are "*matrimonial property*" held by Loung Fong as "*trustee*" of some nebulous, ill-defined trust.

- **Returning lease "*071*" to Loung Fong**

80. This assertion that rectification of lease "*071*" would restore Loung Fong as proprietor of lease "*071*" is misconceived and wrong. There is no such restriction or fetter on the order that this Court may direct under Section 100(1).

- **Bessie Lope v Estate of McLean Lopez [2014] VUSC 160**

81. Reliance on dicta in the Supreme Court case of Bessie Lope v Ette of McLean Lopez about the failure to state the true or correct consideration as required by Section 76(3), is misplaced as being a non-binding decision of a concurrent court but the facts concerning the stated value are easily distinguished from the present case which involved unrelated, arms-length contracting parties dealing with valuable commercial land.

82. As for the actions of the First Defendant in the mistaken registration of the Transfer of Lease "***071***" to him, the claimant submits the following actions makes him complicit in the impugned registration:

(1) Going and meeting with the Minister of Lands and other Lands Department officials on 13 April 2015 (in the absence of Loung Fong), to query why after 7 months lodgment "*... his lease had not come out*";

(2) Despite his denials, Chen Jinqiu wrote to the Director of Lands on 13 April 2015 requesting the "... (removal) ... *of the cautions delaying the*

registration of the transfer" with the help of a friend (**not** Marco Herrominly) who had attended the meeting with the Minister of Lands);

(3) Knowingly meeting the Minister of Lands in the absence of Loung Fong and sending the letter as above, when he knew full well that he had not paid the full agreed purchase price of VT45 million for the purchase of lease "***071***" and was therefore not entitled to be registered as the proprietor of lease "*071*" (*see:* Clause 8 of the Agreement);

(4) Signing a Transfer of Lease document that contained an "*untrue*" purchase price recorded in it and which he was aware would be submitted by BRED BANK to the Lands Department to be registered and for which he benefited by paying a lesser registration fee then he should have if the true figure had been disclosed;

(5) Again despite his denials, Chen Jinqiu was aware of the First Claimant's "*interest*" in the lease title "*071*" and obtained a significantly discounted purchase price. In the claimant's words: "*Chen Jinqiu used the legal risk* (whatever that means) *to his advantage by negotiating a substantial discount on the purchase price*" *ie. from* an initial asking price of VT58 million, he bought lease "*071*" for VT45 million;

(6) Pursuant to Section 18 of the Land Leases Act, Chen Jinqiu is "*deemed to have had notice of every entry in the register*" relating to lease "*071*" that was subsisting at the time of his acquisition of lease "*071*". This is particularly relevant to his denials of knowing nothing about the claimant's "*June 2010 caution*" lodged by Ridgway Blake;

(7) Geoffrey Gee & Partners ("***GGP***") submitted the Application for Ministerial Consent as "***Agent***" for Bred and Chen Jinqiu in the transfer of lease "*071*" to Chen Jinqui. The Application also incorrectly answers: "***NO***" to the question: "*Is the land subject to litigation/dispute?*" when a search of the relevant title by GGP on 8 July 2014 revealed the existence of two (2) uncancelled cautions on the title in favour of the claimant and Loung Fong which clearly indicated that some fraud had occurred relating to lease "*071*";

(8) In improperly removing the claimant's "*June 2010 Caution*" on lease "*071*" the Department of Lands and the Director of Lands acted as Chen Jinqui's agents. I disagree with this submission.

83. I have carefully considered the various "*matters*" highlighted in the Claimant's submissions and am satisfied that Chen Jinqiu knew of the "*untrue*" purchase price stated in the Transfer of Lease "*071*" document submitted for Ministerial approval and "*substantially contributed*" to the "*mistake*" and its subsequent registration by willfully signing the Transfer of Lease as "*transferee/purchaser*" and neglecting to recall, amend, or correct the Transfer of Lease before it was registered.

LACHES

84. In this regard the First Defendant points to nine "*factors*" including the following:

- Delay of 18 years between grant of unrestricted POA in 1998 and 21 April 2016 when CC1335/16 was filed against the First Defendant;
- The unrestricted nature of the **POA** given to Loung Fong in 1987 and the commencement of aborted proceedings against Loung Fong in **CC120/2001** which were never finalized satisfactorily;
- Between 2001 and 2010 the Claimant's did nothing to get her name registered on "***070***" and "***071***" until caution lodged in June 2010 by Claimant's lawyers but still no court proceedings were instituted;
- On 5 December 2013 First Defendant signed Sale and Purchase Agreement with Loung Fong to purchase lease "***071***" of which Loung Fong was the sole registered proprietor;
- First Defendant had paid a substantial sum to Loung Fong before Claimant's caution was registered and notice sent to Loung Fong about it;
- The Claimants were advised obtain an injunction to stop the registration of First Defendant's Transfer of Lease "*071*" but they did nothing;

and the First Defendant submits that:

> "*these circumstances ... make it unconscionable for the claimant to pursue any claim against Chen on the basis that his sale agreement was invalid for lack of her signature or take any action on that basis so that she is estopped from asserting the Register should be rectified by the removal of the registration of Chen's transfer ...*".

85. The Claimant's response is that laches does not apply because even a long delay does not, by itself, necessarily give rise to laches. For laches to apply there has to be "*unreasonable and prejudicial delay*". Furthermore the defence of laches requires proof of:

(1) Lack of diligence by the party against whom the defence is asserted; and

(2) Prejudice to the party asserting the defence.

86. Claimant points to the following evidence in opposing the defence of laches:

- The initial fraudulent sale of "***070***" and "***071***" to **Gum So Leung** in late 2001 was pursued by the Claimant filing **CC120/2001** and that sale was effectively cancelled and reversed and by Consent Order lease "***070***" and "***071***" were to be registered in the Claimants' names with all necessary paper work completed and official fees paid;

- From 2001 to 2010 the First Claimant labored under the mistaken belief that she had been registered as a proprietor of "***071***" and when she discovered in 2010 that she was not registered, she caused a caution to be lodged on the title in June 2010 which the Director of Lands accepted. During this time First Defendant was in China and had not entered into any Sale and Purchase Agreement to purchase lease "*071*" and could not be prejudiced by this 9 year delay;

- After lodging the caution the First Claimant sought the assistance of the Director of Lands to administratively rectify the leases exercising his powers under **Section 99** as well as employing former Magistrate Rita Naviti to try and mediate a settlement between the claimant and her estranged husband and family members;

- When the First claimant came to Vanuatu in March 2015 she met with the First Defendant and advised him to get his money back from Loung Fong as she was pursuing her rights to rectify the leases;

- The First Defendant offers no cogent reason why Claimant was not being diligent in continuing under the hope of achieving a Director's rectification under **Section 99** as the First Defendant had yet to be registered and was not "*in possession*" of lease "***071***";

- The First Defendant has suffered no damages because he already has judgment in the Supreme Court and Court of Appeal for vacant possession and costs against Loung Fong and other former tenants of his premises. The First Defendant remains the registered proprietor of lease "***071***" and is currently in possession;

- The Claimants never allowed or let Loung Fong remain as sole proprietor of "***070***" and "***071***" once they discovered his "*fraud*" in 2001 and the fact that their signed Transfer of Leases were not registered in 2010 is part of the Director's negligence in his dealings with the Claimant. According to the consented to and signed Transfers Loung Fong was to become one of five named proprietors with a minority (20%) share in the leases;

- On 8 July 2014 BRED BANK through Geoffrey Gee & Partners searched title "*071*" and found two (2) cautions registered on it. Nowhere in the evidence does it show Bred Bank was not aware of the cautions and advanced the loan and lodged the transfer and mortgage due to its ignorance of the caution;

- The claimant asserted her claim to lease "***071***" before the First Defendant obtained "*possession of lease 071*" on 6 April 2016. These are evidenced by her following actions:

  (a) 27 April 2015 through Rita Naviti's caution on claimant's behalf;

  (b) 28 May 2015 when a new caution was lodged by Ridgway Blake on the claimant's behalf and registration fees were paid; and

(c) 3 July 2015 when the claimant filed for rectification "***071***" in **CC142 of 2015** which the First Defendant tried to join as a party by an application dated 27 October 2015 (withdrawn on 13 Nov. 2015).

But, in any event, such is not a requirement of a claim for rectification under Section 100 of the Land Leases Act.

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

88. In light of the foregoing, I order rectification of lease "***071***" by cancelling the First Defendant's registration as sole proprietor as well as the registration of BRED BANK's mortgage on lease "***071***". In lieu thereof I direct the lease "*071*" title be registered in the names of **Ly Nu Loung**, **Millie Ogden**, **Felix Loung** and **Vincent Loung** as proprietors in common with equal undivided shares.

89. The reason I have agreed to cancel the registration of BRED BANK's mortgage is that is a logical and necessary step as the mortgage is a dealing between the First Defendant and the Bank and therefore cannot be allowed to remain on lease "*071*" which ceased to belong to the First Defendant upon the cancellation of his registration.

90. In this regard I agree with the Claimant's submissions at para. 62 where it writes:

"*Only on 24 September 2014 was it safe to rely on the 071 lease as security for a loan to draw down funds from. However one year prior, on 29 August 2014, Bred Bank issued a cheque to have VT30 million funds drawn down prior to:*

(i) Its mortgage being signed;
(ii) A transfer of lease dated 18 September 2014 being executed; and
(iii) The registration of the transfer and mortgage.

All these "out-of-procedures" records indicate Bred Bank took their own risk and disregarded the high likelihood of the mistake it was making in allowing its money to be drawn down ...".

And later at para. 64:

"*... the bank is a sophisticated entity and it was commercially unreasonable for the bank to have loaned out the money* (to the First Defendant) *and let it all be drawn down on 29 August 2014 prior to securing and having the 071 lease registered on 15 April 2015 and prior to receiving their lawyers Certificate of Mortgage letter on September 2014 that it is now safe to draw down the* (loan) *funds*".

91. Needless to say a mortgage is only a security interest and does not operate as a transfer [***see***: Section 51(3)]. Whatsmore it is only as good as the mortgagor's interest in the mortgaged property so that if the mortgagor has no interest in the property the mortgage cannot attach to it and mortgagor cannot offer it up for mortgage.

92. The Claimant also says Bred Bank's mortgage was not in registrable form in that when it submitted its application for Ministerial consent on 31 July 2014 it was

aware of the existence of the Claimant's caution on lease "*071*" which highlighted that something irregular might have occurred with the creation of lease "*071*". In other words, Bred Bank was not an innocent party (***see***: ANZ (Vanuatu) Ltd v Gougeon [1999] VUCA 15).

93. In similar vein after considering the competing submissions of the Second and Third Defendants and the claimants in response, I prefer the submissions of the Claimant and I reject and dismiss the defences of the Second and Third Defendants.

94. For completeness I award the claimant damages against Chen Jinqui and the Republic of Vanuatu and JM Pierre jointly and severally to be assessed at a separate hearing for that purpose.

95. The Claimants are awarded costs to be taxed if not agreed.

DATED at Port Vila, this 4th day of October, 2019.

BY THE COURT

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX REPUBLIQUE DE VANUATU

D. V. FATIAKI
Judge.