

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

**Civil Appeal**  
**Case No. 24/325 COA/GIVA**

**BETWEEN:**     **NORRIS JACK**  
                          Appellant

**AND:**           **MARCEL ANDRE BRUGGER AND FABIENNE BRUGGER**  
                          First Respondents

**AND:**           **THE REPUBLIC OF VANUATU**  
                          Second Respondent

***Date of Hearing:***                     **10 May 2024**

***Coram:***                               **Hon. Chief Justice V. Lunabek**  
  **Hon. Justice J.W. von Doussa**  
  **Hon. Justice R. Asher**  
  **Hon. Justice D. Aru**  
  **Hon. Justice W.K. Hastings**

***Counsel:***                             **J. Tari for the Appellant**  
  **M. Fleming for the First Respondent**  
  **F. Bong for the Second Respondent**

***Date of Decision:***                 **17 May 2024**

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**JUDGMENT OF THE COURT**

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1. This is an application for leave to appeal a decision by the primary judge in which he declined to vary Orders made in the Supreme Court on 23 September 2023. The Orders relate to the property known as the Aquana Resort which is situated on two leasehold titles, 12/0932/137 and 12/0932/138. The boundary between the two properties is now disputed.
2. The second respondent will abide the decision of the Court.
3. We will consider the merit of the appeal in deciding whether or not to grant leave.
4. The Orders made on 23 September 2023 effectively restrained the first respondent from entering the land covered by leasehold title 137 (Order (a)). All parties were required not to interfere with the execution of the rights and duties prescribed by the Order (Order (b)). The appellant was restrained from interfering with the first respondents' access to the resort buildings, whether or not that access was across the boundary between the two leasehold titles (Order (c)). The



appellant was required to return the keys to the resort buildings (Order d) and to return chattels that were not part of the 13 bungalows situated on leasehold title 138 (Order (e)). The first respondents were to be given access to leasehold title 138 for 30 days to recover and remove the chattels (Order (f)). The appellant was also Ordered to pay into a lawyer's trust account any money collected by him that was incidental to any past bookings made by third parties, and to account for these payments within 7 days (Order (h)).

5. The appellant arranged for a new survey that purported to shift the boundary between the two leases to the appellant's advantage. The appellant now seeks to vary the Orders as follows. He applies for Order (a) to be varied to prevent the appellant from entering leasehold title 137. He asks that Order (b) be varied to read that all parties shall not interfere with the execution of the rights and duties prescribed by the Land Leases Act in relation to both leasehold titles. He requests Order (c) be amended to restrain the first respondent from accessing leasehold title 137 through leasehold title 138. He applies to vary Order (d) to require him to return the keys to all buildings on leasehold title 137 to the first respondent, and for the first respondent to return the keys to all buildings on leasehold title 138 to him. The appellant asks that Orders (e), (f) and (g) be removed because he said the process has been completed. He applies to have Order (h) removed claiming he had none of the records specified in the Order.
6. The primary judge declined to vary the Orders because he said to do so would essentially mean the appellant would be obtaining final Orders, thus ousting the jurisdiction of the Court and abusing its process.
7. It is necessary to traverse some of the history behind these two leasehold titles to understand better the nature of the dispute between the parties.

## Background

8. A survey map stamped by the Department of Lands and Survey and annexed as NJK1 to the sworn statement of Norris Jack Kalmet (the appellant) dated 21 May 2023 shows the boundary between leasehold titles 137 and 138. The boundary appears to run through the main resort building. Thirteen bungalows, and the road to access the resort, appear to be located on leasehold title 138.
9. The claim was filed on 10 May 2023. In it, the appellant seeks an Order that the second respondent, through the Director of Lands, rectify the register by removing the first respondents as the recorded lessee of leasehold title 137 and substituting the appellant as lessee.
10. The appellant was the lessor of leasehold titles 137 and 138. The first respondents were lessees of leasehold title 138 on which they built the Aquana Resort. The appellant alleges in the claim that the first respondents mistakenly constructed some bungalows for the resort on leasehold title 137. He claims he and the first respondents agreed in 2015 that the appellant would surrender leasehold title 137 and create a new lease that would cover all of the resort development. He claims the first respondents did not fulfil their obligations under the transfer of

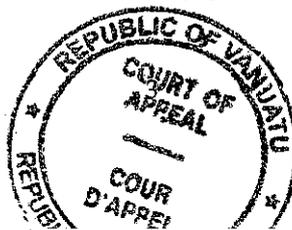


lease to pay the appellants VT 20,000,000. He claims as a result the transfer of leasehold title 137 to the first respondents was obtained by fraud.

11. The amended defence and counterclaim were filed on 19 March 2024. The first defendants allege the appellant misled them about the location of the boundary which caused the first defendants to think they were building entirely on leasehold title 138, whereas they actually built partly on leasehold title 137. The first defendants say they agreed to buy leasehold title 137 to rectify the erroneous boundary and to obtain finance to further develop the resort.
12. The counterclaim alleges that the appellant interfered with the attempt by the first respondents to sell the resort following their inability to make mortgage payments as a result of the Covid 19 lockdown through assertions that the boundary was not where it was shown. The mortgagee sold leasehold title 138 to the appellant at what is claimed to be a price below market value because of the dispute over the boundary. The first respondents claim the appellants hold resort property encroaching on leasehold title 137 under a constructive trust for the benefit of the first respondents, which is an overriding interest in terms of s 17(g) of the Land Leases Act, and an order that the boundary between leasehold titles 137 and 138 be rectified by enlarging leasehold title 137 to include resort property building and access to the resort. Alternatively they seek damages of VT 220,000,000 for the reduction in value of leasehold title 138 caused by the appellant's conduct and VT 100,000,000 for the loss of opportunities to deal with leasehold title 137.
13. A defence to the counterclaim has not yet been filed.

## Discussion

14. The appellant claims he did not consent to the orders made on 23 September 2023 so far as they affect leasehold title 138. This does not matter. The orders were made and must be complied with. By seeking to vary the orders, the appellant acknowledges they must be complied with.
15. Mr Fleming submitted that the rights of the first respondents would be lost if the variations sought were granted. He submitted there are serious questions to be tried, the appellant retains the 13 bungalows on leasehold title 138 he bought from the mortgagee, and he should not now be able to take possession of the whole resort. He also submitted the appellant does not come to Court with clean hands as there is evidence that he has defied the Orders by doing extensive building work on buildings he was restrained from entering.
16. We turn to the variations sought. If the variation sought to Order (a) were granted, the appellant would be able to enter all the resort buildings because the new, disputed, survey shows them to be located on leasehold title 138. This would effectively condone an alleged breach of the original Orders. Injunctive relief is intended to maintain the status quo until there can be a trial of disputed facts. To grant this variation would effectively give the appellant what he seeks in his claim without a trial.



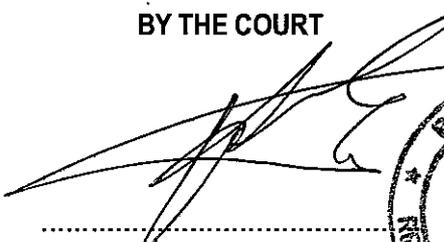
17. If the variation to Order (b) were granted, it would effectively revoke and substitute a new Order (b) that reflects the appellant's argument that the Land Leases Act gives him the freedom to do what he likes on his own leases, the boundaries of which remain disputed.
18. If the variation to Order (c) were granted, it would effectively reverse the original Order (c). Order (c) restrained the appellants from interfering with the first respondents' access to any of the resort buildings, whether or not that access was across the boundary between leasehold titles 137 and 138. The variation sought would restrain the first respondents from accessing leasehold title 137 through 138 which, on the new survey, would prevent their access to the resort buildings.
19. The variation sought to Order (d) also effectively reverses Order (d). The appellants have offered no evidence that Orders (e), (f) and (g) have been complied with, or that there are no records of money paid by third parties for bookings.
20. The appellants are seeking not just a variation of existing Orders. The appellants have come to this Court seeking what are effectively new Orders reversing the effect of the original Orders. Rather than preserving the status quo, the new Orders sought would effectively undermine the basis of the original orders and grant the appellant's claim without a trial of the disputed facts upon which the claim is based. Indeed, Mr Tari acknowledged that the effect of the new Orders sought would give the appellant control of both leasehold titles. This is the opposite of what injunctive relief is intended to achieve.

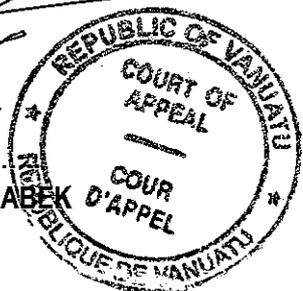
## **Result**

21. As the appeal is without merit, the primary Judge was correct not to grant the application to vary the Orders. The application for leave to appeal the primary judge's decision not to vary the Orders is dismissed.
22. Costs are awarded to the first respondent in the amount of VT100,000.

**DATED at Port Vila, this 17<sup>th</sup> day of May, 2024.**

**BY THE COURT**

  
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**Hon. Chief Justice Vincent LUNABEK**

  
REPUBLIC OF VANUATU  
COURT OF APPEAL  
COUR D'APPEL  
REPUBLIQUE DE VANUATU