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

Civil Case No. 731 of 2016

BETWEEN: ANZ BANK (VANUATU) Ltd
Claimant

AND: REPUBLIC OF VANUATU
First Defendant

AND: STARFISH Ltd
Second Defendant

Hearing: *22nd March 2017*
Before: *Chetwynd J*
Counsel: *Mr. Hurley for the Claimant*
Mr Kalsakau for the First Defendant
No appearance for or by the Second Defendant

Judgment

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1. This is a claim by ANZ Bank (Vanuatu) Ltd ("ANZ") against the First Defendant the Republic of Vanuatu in the guise of the Director Department of Land Records ("the Director"). There is a Second Defendant a limited company called Starfish Ltd ("Starfish"). Whilst there is no specific claim by ANZ against Starfish there is a Cross Claim or Counterclaim by the First Defendant against Starfish. The basic facts behind the claims are relatively straightforward and not much in dispute.

2. Starfish was the registered proprietor of leasehold property comprised of strata title numbers 5/SP0008 ("lot 5") and 6/SP0008 ("lot 6"). It wanted to develop a restaurant and apartment complex on land. In order to do so it needed to borrow funds and so entered into an agreement with ANZ. The agreement is evidenced in the sworn statement of Mariana Sharan Lal filed on 18th October 2016 on behalf of ANZ which, at pages 5 to 12 of the annexure MSL1, exhibits a copy of a letter of offer signed as accepted by Starfish. The letter is dated 27th June 2008. As part of the security for the loan Starfish agreed to provide a collateral mortgage over lots 5 and 6.

3. A copy of the mortgage provided by Starfish is to be found at pages 21 to 55 of annexure MSL1. At page 21 the property which was subject to the mortgage is described as titles numbered "5/SP008 and 6/SP008 (Being Lots 5 and 6 in Strata Plan 008)". Page 21 also shows the mortgage was made on 20th August 2008. At page 54 is a certificate by the Director acknowledging the mortgage was deposited with him for registration on 16th October 2008. The certificate of registration shows the mortgage was registered on 8th September 2011. There is plainly a significant gap between the document being deposited and its registration.

4. In December 2008 Starfish asked to borrow more money. A letter of offer dated 18th December 2008 was provided by ANZ and the offer accepted the next day by Starfish (see pages 13 to 20 of MSL1). Security was provided over lots 5 and 6 (pages 56 to 95 of MSL1). On the face of it the mortgage was made or dated on 1st March 2011, deposited with the Registrar on 9th March 2011 and registered on 1st March 2011. Of course, it will be noted that, on the face of it, the second collateral mortgage was registered before the first. The reason for this, and for the delay mentioned in paragraph 3 above, is explained in the sworn statement of the Director of the Department of Land Records Jean-Marc Pierre filed on 6th February 2017.

5. On 9th April 2009 the Director acknowledges he approved a survey plan for the subdivision of lot 6. The lot was divided into lots numbered 12 to 17. New certificates of title for the 6 "new" lots were issued on 9th April 2009. ANZ was not asked to consent to the subdivision.

6. In 2012 ANZ discharged its mortgage over lot 5 in order to allow the sale of that lot to Challenger Ltd.

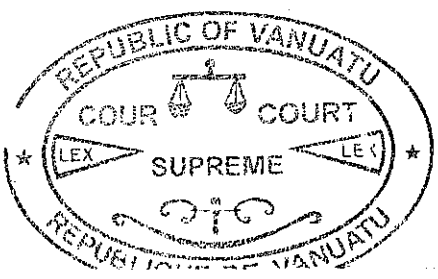
7. Starfish defaulted on its loan payments. In July 2014 ANZ served a Notice of Demand on the company which was not complied with. ANZ commenced a mortgagee power of sale action, Civil Case 365 of 2014 and obtained an order for possession and sale dated 4th February 2015. The order covered both lot 5 and lot 6. Nothing turns on the point that, as noted earlier, ANZ had discharged its mortgage over lot 5 and the order could not affect any rights or interests in that lot. When ANZ lawyers carried out searches at the land registry as part of the process of enforcing the order the records showed that the two ANZ mortgages had been registered and that they had not been discharged. In March 2015 ANZ contacted an estate agent (Messrs Caillard Kaddour) to market and sell the property the subject of the order for sale granted by the Supreme Court in February. At that time ANZ were informed that, "Lot 6 does not exist anymore".

8. As a result of that answer ANZ's lawyers made further enquiries. Those enquiries revealed the subdivision of lot 6 in 2009 and the transfer of 5 of the subdivided plots to new proprietors and their subsequent mortgage to other banks by the new registered proprietors. The lawyers for ANZ discovered that Starfish only owned 1 of the new lots (lot 12) which it had mortgaged to the National Bank of Vanuatu. This is seen from the annexures to the sworn statement of Sylvianne Stevens filed on 7th October 2016 on behalf of ANZ. This was the first that ANZ or their lawyers knew of the details of what had transpired since 2009.

9. ANZ are seeking an order that pursuant to section 101 of the Land Leases Act [Cap 163] ('the Act") the First Defendant indemnifies it for its losses. The First Defendant defends that claim by saying, in effect, the Director acted in good faith and Starfish was in breach of its obligations under the mortgages to ANZ. The First Defendant has a counterclaim or cross claim against Starfish for the recovery of any award of indemnity to the Claimant.

10. There is agreement between ANZ and the Director that the triable issues in this case are:-

For the purposes of s.101 of the Act



a) Did any mistake or omission of the Director in relation to the register of lot 6 cause loss or damage to ANZ and if so what was that mistake or omission ?
b) Can any such mistake or omission be rectified under the Act ?

Secondly, if the answer to a) is yes;

a) Was Starfish wholly or partly responsible for such loss or damage ?
b) What is the percentage proportionate liability of Starfish, if any ?

Thirdly, for the purpose of s102 of the Act, what is the amount of the indemnity to be awarded to ANZ ?

I agree that the issues identified would resolve the matter.

11. Section 101 of the Act states:

101. Indemnity

(1) Subject to the provisions of this Act and of any law relating to the limitation of actions any person suffering damage by reasons of –

(a) any rectification of the register under this Act;

(b) any mistake or omission in the register which cannot be rectified under this Act; or

(c) any error in a copy of or extract from the register or any copy of or extract from any document or plan in each case certified under this Act;

shall be entitled to be indemnified by the Government.

(2) No indemnity shall be payable under this section –

(a) to any person who has himself caused or substantially contributed to the damage by his fraud or negligence or who derives title, otherwise than under a registered disposition made bona fide for valuable consideration, from a person who so caused or substantially contributed to the damage;

(b) in respect of any loss or damage occasioned by the breach of any trust; and

(c) in respect of any damage arising out of any matter into which the Director is exonerated from enquiry under section 24.

12. It is necessary to first look at the land registration system adopted in Vanuatu. There is no mystique in identifying it as a Torrens system of land registration. It is

similar to systems in the other jurisdictions in the Pacific and is based on one that apparently came into effect in New Zealand in the 1860's. What the system involves has been identified by courts in other Pacific jurisdictions on many occasions. For example recently the Solomon Islands Court of Appeal [1] has said:

> *"The Land and Titles Act is based on the Torrens system of registration of titles in land which has been adopted in many jurisdictions. It is a system in which registration is everything. Once a title is correctly registered, it is protected by the fact of registration. It is, in the oft-quoted phrase from Breskvar v Wall [1971] 126 CLR 376, 385, a system of title by registration as opposed to a system of registration of title. Authority can be found from many jurisdictions confirming that proposition and it is no different in Solomon Islands as many decisions of this Court have confirmed. The aim of the Torrens system is to provide certainty of title. The fact of registration confers an indefeasible title".*

However, as long ago as 1985 [2] the Supreme Court in Papua New Guinea cited *Breskvar* agreeing with the view of Barwick CJ that:-

> *"That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration, itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void. The affirmation by the Privy Council in Frazer v Walker of the decision of the Supreme Court of New Zealand in Boyd v Mayor of Wellington [1924] NZLR 1174 at 1223 now places that conclusion beyond question. Thus the effect of the Stamp Act 1894 (Qld) upon the memorandum of transfer in this case is irrelevant to the question whether the certificate of title is conclusive of its particulars."*

In this jurisdiction in 2007 the Court of Appeal in *Ratua* [3] said of the Act:-

> *"The Act creates in Vanuatu a "Torrens" system of land registration similar to the systems which have operated with conspicuous success in terms of simplicity and certainty of land tenure in New Zealand, most of the Australian states and territories and elsewhere for well over 100 years. In one striking respect, however, the Vanuatu Act is unique: it applies to leasehold estates or interests in land only. "*

Later in the same case the Court said :-

> *"The register is everything".*

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[1] *SMM Solomon Ltd v Axiom KB Ltd* [2016] SBCA 1; Civil Appeal 34.2014 (21 March 2016)
[2] *Mudge and Mudge v Secretary for Lands, The State and Delta Developments Pty Ltd* [1985] PGLawRp 387 (6 December 1985)
[3] *Ratua Development Ltd v Ndai* [2007] VUCA 23; Civil Appeal Case 32 of 2007 (30 November 2007)

In a case decided in 2011, *Colmar,* [4] the Court of Appeal confirmed an essential feature of the Torrens system :-

> *"In common with legislation adopting the Torrens system in both Australia and New Zealand, there are limited circumstances in which a registered interest can be attacked. This is known as the principle of indefeasibility, discussed in some detail in Frazer v Walker [1967] NZLR 1069 (PC). Under Australian and New Zealand law, the interest is subject only to a fraud exception, under which it is necessary to establish actual dishonesty on the part of a party: see Assets Company Ltd v Mere Roihi [1905] AC 176 (PC)."*

12. Given the principle of indefeasibility it is essential that the register is accurate. As Spear J pointed out in the case of *Leong* [5] :-

> *The land registry system here is different in Vanuatu to that in New Zealand and certain States of Australia that have a "Torrens" land registration system. In New Zealand, it is well understood that a title reference is to a particular block of land defined as a lot number on a certain deposited plan. Dealings on the title are then registered on the title; such as leases, transfers, mortgages and suchlike. What appears to occur here in Vanuatu is that when a lease is entered into and presented for registration, a lease title is issued which relates just to that particular lease. When that particular lease is cancelled for whatever reason, and a new lease (or leases) is presented for registration over the same block of land, a new lot number is inserted in the title reference to create a new title reference. Of course, cancellation of a lease may arise not just through forfeiture but also because the lease is surrendered for a subdivision or suchlike.*
>
> *This practice of creating a completely new lease title reference when a lease is cancelled should not cause complication or confusion providing that this is appropriately noted on the lands leases register together with the necessary cross referencing and all in a timely fashion. This is to ensure that anyone who searches the lands leases register to ascertain the status of the block of land in question will be able to ascertain the exact status of the land with confidence.*

The case went to appeal [6] where Spear J's decision was upheld with the Appellate Court commenting:-

> *"Any other system would mean a return to a situation akin to the English deeds system of Victorian times, where it was necessary to carry out multiple checks before any settlement. The Torrens system was designed to bring the*

[4] ***Colmar** v Rose Vanuatu Ltd* [2011] VUCA 20; Civil Appeal 06 of 2011 (20 July 2011)

[5] *Leong v Huang Xiao Ling* [2013] VUSC 45; Civil Case 247 of 2011 (22 March 2013)

[6] *Huang Xiao Ling v Leong* [2013] VUCA 15; Civil Appeal 14 of 2013 (26 July 2013)

delay, expense, and uncertainty of that process to an end. When a title is first created, that is the title for priority purposes and remains so until it ceases to exist in accordance with the Act, and any later title that is created over the same land is subject to the rights on that first original title."

13. Not only is it essential the register is accurate it is also essential that amendments and/or additions to it are "*appropriately noted*" and that this is done *"in a timely fashion"*. This point was also made with regard to cautions by Tuohy J in *Inter- Pacific Investments* [7] :-

"It is essential to the proper functioning of a Torrens system that cautions are entered on and removed from the register immediately upon lodgement or withdrawal."

As counsel for ANZ submit, the comments would apply to any other registerable interest in the property.

14. It is clear that the Director and his staff failed to register ANZ's mortgage when it was lodged. The mortgage made or signed on 20th August 2008 was lodged with the Director on 16th October 2008. The Director's certificate (see paragraph 3 above) is conclusive in that regard. The mortgage was not registered until 2011. What the Director says about that is set out in paragraph 10 of his sworn statement filed on 6th February 2017. The Director states,

"However, in 2008 the department had a manual registration process which had caused a backlog of 3,000 applications to occur and files were everywhere. That is the main reason why we had overlooked to register the mortgage in 2008"

The final sentence above is a clear admission of a mistake or omission by the Director. The failure to register the mortgage meant that the protection which should have been afforded to ANZ simply did not exist. The failure to register the mortgage in 2008 meant that the appropriate entry was not made in the register. Had the appropriate entry been made in 2008 it would have been notice to persons involved in the subsequent dealings with lot 6. Had those persons (including the Director) had notice of the ANZ's mortgage they would, likely as not, not have proceeded with their intended dealing. Had they proceeded they would have acquired their interest in the property subject to ANZ's mortgage and the latter would have been protected. It cannot be said that ANZ caused or substantially contributed, by its own fraud or negligence, to the failure to register the mortgage in a timely manner.

15. It is submitted on behalf of the First Defendant that the Director's omission in registering the mortgage in a timely manner did not on its own cause loss to ANZ because Starfish "saw it as a perfect opportunity to take advantage of the

[7] *Inter-Pacific Investments Ltd v Sulis* [2007] VUSC 6; Civil Case 72 of 2005 (22 March 2007)

unregistered mortgage" presumably to subdivide and sell lot 6. I do not accept that argument. The plain truth is had the mortgage been registered Starfish would not have had that "perfect opportunity". It is the Director's mistake or omission which caused the loss. I do agree that Starfish must have known about its obligations under the ANZ mortgages and it is difficult to imagine that what Starfish did was not done deliberately to avoid those obligations. I do remind myself that the company has taken no part in these proceedings and there is no evidence from it or its officers and there may be a perfectly sound explanation for what happened.

16. In any event the Director then compounded the problem with a second mistake. Having already registered and issued certificates of title for the new leases following the subdivision, this was done on the Second Defendant's evidence in April 2009; he proceeded to register the mortgages in 2011. It is not exactly clear how he managed to so given that lot 6 had ceased to exist 2 years earlier. In simple terms the Director and his staff should have been aware of what had gone wrong on 1st March 2011 when the second collateral mortgage was registered or on 8th September 2011 when the first mortgage was registered. The Director explains the delay in registering the mortgages but he does not offer any explanation as to why they were registered over a, by then, none existent lot.

17. The answer to the question, did any mistake or omission of the Director in relation to the register of lot 6 cause loss or damage to ANZ and if so what was that mistake or omission; is yes. ANZ have lost the security of a registered mortgage over lot 6 because of the delay in registering the first mortgage when it was lodged with the Department of Lands on 16th October 2008. Basically everything else flows from that omission and there is no need to consider any further mistakes or omissions.

18. For the sake of completeness though there were other mistakes and omissions, the Director should not have allowed the subdivision in 2009 without asking for ANZ's consent and the Director should not have registered the mortgages in 2011 if lot 6 had ceased to exist.

19. The second leg of the first question is, can any mistakes or omissions be rectified under the Act ? Both the Claimant and the First Defendant say the answer to that question is no. I accept the reasons put forward by ANZ, namely that because mortgages have been given in favour of other financial institutions following subdivision and on the basis that there is no evidence that those mortgages were acquired other than *bona fide* for valuable consideration, rectification is not available under the Act.

20. I have to confess to a modicum of uncertainty due to the reasoning of the Court of Appeal in the *Leong* [8] case cited earlier when it said:-

[8] *Huang Xiao Ling v Leong* [2013] VUCA 15; Civil Appeal 14 of 2013 (26 July 2013)

> *"The existence of a parallel title not recording what was on the earlier title is an event that should not have happened and should never happen. Such a mistake is very serious as it drives a stake through the heart of the Act, which is to give absolute primacy to the registered title. If there are two inconsistent titles, the reliability of the register is undermined, and the registration system will break down.*
>
> *It could be argued that Mrs Ling was entitled to rely on indefeasibility herself, and call in aid the same indefeasibility provisions of the Act to say that she relied on the primacy of her title, and for that reason cannot now have her interest defeated. But there can be no doubt which title has primacy. It must be the title that is first in time. Only thus can the integrity of the system of indefeasibility of title be maintained."*

However the appellate court in *Leong* was dealing with a situation where there were two conflicting titles resulting in two different registered proprietors plus an issue concerning the *bona fide* purchase for value by one of them. In this case the mortgages had not been registered until after the damage had been done and then there appear to be bona fide transactions for value. In the circumstances I accept the answer to the question is no for the reasons set out in paragraph 19 above.

21. There is no short answer to the second main issue of whether Starfish was wholly or partly responsible for the loss. The loss occurred primarily due to the failure of the Director and his staff to register the mortgage when it was lodged for registration in October 2008. Neither ANZ nor Starfish are culpable for that failure by the Director and his staff. However, there is no doubt that the actions by Starfish in subdividing and then mortgaging or transferring the subdivided plots exacerbated the problems. That is when the loss actually occurred. If Starfish has simply sub divided lot 6 there would probably have been an opportunity for ANZ to rescue the situation even though its security was unregistered and unenforceable. The loss crystallised when Starfish transferred or mortgaged the subdivisions.

22. As between the Claimant and the First Defendant the final issue is what is the amount of indemnity which can be awarded to ANZ ? Section 102 (1) (a) of the Act limits the amount that can be recovered to the value of the interest at the time when the mistake or omission which caused the damage was made. Both protagonists say the effective date should be the date when the subdivision occurred, 9th April 2009. ANZ have obtained a valuation of lot 6 in an undivided state. The Director does not dispute that valuation. The valuation is in the sum of VT 6,700,000. When I heard argument from counsel I did not see any reason not to concur with what was said. The easy way forward for me would be to award that sum. However, having had an opportunity of considering the question I now have reservations that that is the correct amount of the indemnity.

23. My concern is simply this; is the value of the registered interest the same thing as the value of the registered property ? Whilst there is a logic to saying that is

correct following the reasoning mentioned in the *Presbyterian Church Trust* case [9] (at paragraph 27) I bear in mind that that case involved competing claims as registered owners. In this case the registered interest is not the property itself but a mortgage over the property. The value of that is easily ascertained even if it is not the same as the value of the property. At the time it was lodged for registration a fee had to be paid. That fee was calculated in accordance with the Schedule to the Act. At clause 3 which is headed Payment of ad valorem fees clause 3(e) says :-

> *"Where a mortgage has been created ... the fee payable shall be assessed on the maximum sum up to which advances may be made..."*

In other words, for the purpose of calculation of fees the value of the interest to be registered is the maximum sum up to which advances may be made and in the present case that was assessed at VT 110,000,000. The appropriate *ad valorem* fee on that sum was paid. If the *ad valorem* fee or the fee payable "according to value"[10] is based on maximum sum up to which advances can be made then is that not the value of the interest registered. If that is so then could it not be said that in those circumstances ANZ can recover up to VT110,000,000. The value of the mortgage is not the same as the value of the property mortgaged. Of course, even on that argument ANZ would only be able to recover its ***actual losses***.

24. I will not fix the amount of the indemnity to be paid at this stage. I will invite counsel to provide further written submissions on that issue alone. If counsel would like a further hearing I would be happy to arrange one. If, on the other hand counsel are content for me to deal with the issue solely on the basis of written submissions I will do so. I would suggest that written submissions are filed and served by close of business on May 31st. If counsel feel they might require longer then I am amenable to extending that deadline.

25. Whilst I have not handed down a completed judgment at this time I am able to indicate that the proper decision on costs in this case should be that the First Defendant pays the costs of the Claimant [11]. Such costs are to be taxed on a standard basis if not agreed.

26. Turning now to the Counterclaim or Cross Claim of the First Defendant against Starfish, again I am conscious that the company took no part in these proceedings. That was a decision it or rather its proper officers reached. I am aware that Starfish was struck off but that in itself is no reason for it not to have been represented. Starfish and/or its proper officers were aware of the proceedings.

27. In relation to s.104 of the Act, I accept the submissions of the First Defendant that Starfish substantially contributed to the loss by its fraud or negligence. I do so in accordance with my comments set out in paragraph 21. In addition there was

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[9] *Presbyterian Church Trust Association v Moore[2013] VUCA 2; Civil Appeal 03-13 (26 April 2013)*
[10] Black's Law Dictionary 7th Edition
[11] See Rule 15.1(1) of the Civil Procedure Rules No. 49 of 2002

undoubtedly a contract between ANZ and Starfish for the payment of monies loaned by ANZ to Starfish. In terms of section 104 of the Act the First Defendant can recover what ANZ would have been entitled to enforce in relation to the matter in respect of which the indemnity had been paid. That would amount to the full indemnity which will eventually be paid. The First Defendant is also entitled to the costs in respect of the Cross or Counterclaim as against the Second Defendant, such costs to be taxed on a standard basis if not agreed.

Dated at Port Vila this 10th May 2017

BY THE COURT

David Chetwynd
Judge

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