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

CIVIL APPEAL CASE No.04 OF 2007

30 NOV 2007
AG-15/29/07-TJB

BETWEEN: **INTER-PACIFIC INVESTMENT LTD**
Appellant

AND: **CHRIS SULIS**
First Respondent

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

Coram: *Chief Justice Vincent Lunabek*
Justice Bruce Robertson
Justice John von Doussa
Justice Oliver Saksak
Justice Hamlison Bulu

Counsel: *Mr James Tari for the Appellant*
Mr Sam Rosewarne for the First Respondent
Mr Frederick Loughman for the Second Respondent

Date of hearing: *21 November 2007*
Date of judgment: *30 November 2007*

JUDGMENT

Introduction

There were various appeals, cross-appeals and cross-contentions arising out of three decisions of Justice Tuohy delivered in this case. The first on 22nd March 2007 following a hearing on 15th and 16th February, the second on 23rd April following a further hearing on 17th April and a final ruling as to costs on 15th May 2007.

Prior to the appeal hearing, documents have been filed on behalf of the Second Respondent seeking leave to amend its defence to specifically place in contention Section 9 of the Land Leases Act [CAP.163] (the Act). The

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failure to plead this had been discussed in the Supreme Court hearing and is referred to in the judgment.

After a sustained discussion Mr Loughman sought leave to withdraw the application to amend which was granted and the appeal proceeded on the basis of the pleadings which had applied in the Supreme Court.

The background

The litigation arises out of the fact that Chris Sulis registered cautions under Section 93 of the Act against 16 titles to leasehold land registered in the name of Inter-Pacific Investment Ltd (IPI). At the time IPI had contracts to sell some of those titles. IPI contended that it suffered loss as a result of the cautions because in some cases contracts were cancelled and in others settlement was delayed.

The land in question was previously registered in the name of Mariner's Cove Ltd (MCL) with a mortgage to Westpac. Westpac transferred its interest to John Douglas and Robert Guthrie. They obtained an Order from the Supreme Court to sell under the mortgage and IPI purchased from them.

The cautions were lodged by Mr Sulis on the 2nd September 2005 and registered three days later. Although they were on the form required, the statement as to the grounds of the claim and the nature of the interest asserted were left blank.

On 24 November 2005 MCL commenced proceedings in the Supreme Court, (CC 209/2005) against Mr Douglas and Mr Guthrie claiming that they sold the land to IPI at an under value in breach of their duties under the mortgage.

IPI was named as a Third Defendant in that proceeding. It was asserted that the reason for this was to ensure that any money due to Mr Douglas and Mr Guthrie would be paid into court until the outstanding issues were resolved.

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Mr Sulis said that he acted upon legal advice when he lodged the cautions. They were lodged in anticipation of the proceedings against Mr Douglas and Mr Guthrie although the relevant Court action was not commenced for 2½ months.

On 27th September 2005, the then Director of Land Records wrote to Mr Sulis advising that the form of the caution did not comply with Section 93 of the Act and therefore they would not be registered.

Truth to tell that the cautions had already been registered.

Mr Sulis wrote back to the Director of Land Records on 15th October acknowledging receipt of the 27 September letter and advising he wanted to withdraw the cautions over the 16 Titles.

The Judge found that this letter was received by the Director of Land Records but it was not actioned.

Suffice to say that there was a series of administrative inefficiencies thereafter and a stand off between the Director of Land Records and the Principal Land Officer in the Department of Land Records about when the cautions could be removed and who had powers to do anything about it.

There were a number of posturing letters written.

Although we do not have details about them, on 23 and 24 February 2006, MCL also lodged cautions against these 16 Titles.

Eventually on 7 March 2006 Mr Sulis requested that the cautions in his own name and those in the name MCL be withdrawn. Consent orders to that effect were noted by the Supreme Court in CC 209/2005 on 13 March 2006. Somehow the chapter of mistakes continued and it was not until the 30 March that the cautions were actually withdrawn.

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IPI claims against Mr Sulis pursuant to Section 97(5) of the Act which provides that any person who lodges a caution without reasonable cause shall be liable to pay such compensation as the Court thinks fit to anyone who sustains damages and incurs costs or expenses thereby.

Section 93 sets out four categories of persons who may lodge a caution.

For reasons which we need not traverse the Judge found there were no reasonable grounds for MCL to lodge a caution against any of the Titles and even less so for Mr Sulis to do so.

Therefore Justice Tuohy found that however honest their beliefs might have been with regard to an entitlement, none of their beliefs related to the statutory grounds and there was therefore liability to pay compensation.

That liability was not in contention before this Court.

The question then arose as to the liability of the Government as the employer of various persons who have been involved in the registering of the cautions which were not in proper form and in the failure to remove them.

The Judge unsurprisingly found that there have been serious failure to act in accordance with the statute in registering the cautions in the first place and then in allowing him to remain on the Titles long after they were requested to remove them. The Government was held to be vicariously liable for damage suffered by IPI as a result of the acts or omissions of its employees.

That liability also is not in contention in this Court.

Having found liability in favour of the Appellant against each of the Respondents, the Judge noted that the liability of Mr Sulis was under the Act whilst the Government was liable at common law. Correctly he noted that this did not alter the fact that IPI must prove what it had suffered by way of loss as a result of which it was entitled to be compensated.

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The Judge indicated that the evidence in relation to this was not impressive. Having reviewed the material which was available, (noting that in respect of some of the titles it had been very much to the advantage of IPI that initial sales had fallen over) he concluded there was no adequate or persuasive evidence of the actual loss incurred in respect of which compensation could be ordered.

He then invited the parties to consider whether non suit was available in Vanuatu as there was no specific power in the Civil Court Rules. The Judge requested additional submission on the point.

Following the April hearing Justice Tuohy concluded that the remedy of non suit was not available. He therefore entered Judgment for the Respondents upon the basis that although the Appellant was entitled to compensation it had failed to prove any loss and therefore the Court has no power to provide relief.

The Judge expressed the view that each of the 16 titles needed to be looked at separately, a matter to which we will return as we do not agree that is the correct way conceptually to assess damages. However it does not affect his fundamental conclusion that there was no proper proof of loss.

In the second judgment the Judge indicated that he thought that in all the circumstances costs should lie where they fell but said that he would consider submissions on the point.

Having received submissions he was not persuaded from that view. Although the Respondents have been successful in avoiding judgment being entered against them, they have been each found to be in breach of the law. The only reasons judgment was entered for them was that the Appellant had failed to prove the loss that it had sustained.

The Judge therefore exercised the power under rule 15.1 not to have costs follow the event.

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He specifically noted:-

"Both defendants strenuously denied any liability. The establishing of liability was the primary focus of the dispute. It accounted for most of the expenditure of legal costs, both pre-trial and at trial. In justice, the costs of their unsuccessful efforts to avoid liability should fall on the defendants. My view on costs would be different if the defendants has conceded liability and the dispute had related to quantum only."

The appeal

It is against this background that the appeal claims now before the Court are to be considered.

There are two substantial issues:

(a) Did the Appellant properly prove loss in respect to which it was entitled to compensation from Mr Sulis or damages from the Government?

(b) Were the Orders with regard to costs made by the Judge within his discretion in all the circumstances of the case?

Compensation or Damages

This relied upon the sworn statement of Mr Kaltonga on the basis that 9 of the 16 titles had Agreements for sale and purchase which were due for settlement on 30 October 2005. He said that because of the caution they were not settled. The Appellant sought to be compensated for interest which continued to run on loans of AU$540,000.00 and AU$310,000.00 on which interest was accruing. On the first there was a penalty rate of 20%; on the second no interest rate was actually shown but the calculation was advanced on the basis of 10%. Mr Kaltonga also deposed that he had a bank overdraft of 10,000,000 Vatu and that interest of 605,117 Vatu accrued on that during the relevant period.

The Judge recognised that there was a potential for loss with regard to this evidence but there was no differentiation between the 9 titles in respect of

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which there were Agreements for sale and purchase and the other 7 which they were not. Clearly there had to be apportionment and no evidence was available as to how that would occur. Equally there needed to be detailed and specific evidence as to what was happening with the other 7 titles and whether the caution was causing a real difficulty.

With respect to 5 Agreements which were cancelled, some were resold, in some cases at prices which were higher than the first contract but again no detail was available.

On the face of the Agreements it was also clear that quite apart from the caution there were various conditions which had to be met prior to settlement. There was no evidence that these conditions had been satisfied and therefore no basis to conclude that any loss which could have been quantified was due to the registration of the cautions and would not have occurred in any event.

The Appellant as the Claimant in the Supreme Court had to do two things with regard to each of the Respondents. First it had to prove liability and then it had to prove loss. As the trial Judge rightly found it was not enough for a witness on behalf of IPI simply to make generalised assertions. IPI was entitled to compensation or damages for the actual losses which it incurred. It could only succeed if there was a clear analysis undertaken in respect of every title showing where there were contracts which were avoided because of the cautions. It required information that all other conditions have been satisfied and were no impediment to settlement. Any holding costs had to be specifically related to the particular titles on an individual basis. There had to be a breakdown for subsequent sales and an accounting for any profit which had arisen.

It is hard to see how all this could be achieved without detailed expert evidence from an accountant with all the facts presented.

The Judge, with the best will in the world, correctly found that there was no evidence of actual loss on which any determination could be made. This

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decision on loss was correct and the appeal in this regard is accordingly unsustainable.

Costs

Was the Judge's Order that costs should lie where they fell properly available? There was a specific appeal by IPI about this. The First Respondent Mr Sulis by notice under rule 23(2) of the Court of Appeal Rules (1973) sought effectively to cross-appeal against the costs Order (or the absence of one). That was not the correct procedure to adopt but the error has no effect on our resolution of the case. The Government did not challenge the absence of costs Orders by Justice Tuohy.

Mr Tari contended that his claim has been successful on the fundamental issue of liability and that the only reason that judgment was not entered for the Appellant was its own failure to establish its actual loss for which it was entitled to be compensated.

Mr Rosewarne's argument was that judgment had been entered in his client's favour because there were two aspects to the claim. The purpose of the proceedings has been to get an award of damages or compensation. On this the Appellant was unsuccessful and therefore his client was entitled to costs.

It was common ground that costs normally follow the event. It was equally acknowledged that a Judge has a discretion to order otherwise. Mr Rosewarne was keen to have this Court lay down guidelines or principles about when the exception might operate. We specifically reject the invitation to do so. It is of the essence of costs awards that they reflect the reality of what has occurred in a particular piece of litigation.

As acknowledged by all counsels costs are a discretionary matter and therefore an Appeal Court would have to be satisfied that the exercise of discretion was such as not to be available to a judge reasonably assessing all the circumstances. That could not possibly be the conclusion in this case.

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IPI had cautions put on each of its titles which should never have been there. Mr Sulis personally had no right. His company MCL had no right. The forms used were incomplete with regard to fundamental information which the statute requires to be provided. The cautions should never have been accepted. They should never have been registered. When the problems were identified the cautions should immediately have been removed.

Although IPI failed to meet its onus to prove the detriment which it suffered as a result of these wrongful acts, it was still in a real sense successful in a fundamental part of the litigation. Nothing advanced before us on either a theoretical or pragmatic level suggests that the Judge's decision to leave everybody to pay their own costs was an unavailable response, lacking in integrity or contrary to the interest of justice in this particular case.

That aspect of the appeal challenge by both IPI and Mr Sulis must fail.

Costs of the appeal

Costs in this appeal must also be considered. We acknowledge that in the normal course of event the Appellant having been unsuccessful, it could expect costs Order against it. In a sense Mr Sulis was also unsuccessful as he apparently wanted a costs Order in his favour.

We do not intend to make any award of costs because although the Respondents have held their position before this Court and have not been required to pay money to the Appellant each in their own way have been the authors of their own misfortune in getting caught up in this litigation.

Although it is technically correct to say that when the Supreme Court proceedings were commenced on 16th April 2006 the cautions had been removed, there had been a course of unlawful conduct which had extended for more than six months to which each had contributed. Each had acted not only unlawfully but without any proper justification.

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Although the Respondents have been able to resist having to pay damages for what they did, the fact that they became involved in this litigation was entirely of their own making. People who do not follow the statutory requirements and indiscriminately file cautions do so at their peril.

Equally if officers of the Government receive and maintain cautions which can not be justified, and are not in the form and on the basis required by Parliament, they expose themselves and their employers to costs and loss.

Accordingly in this Court the appeal is dismissed and costs again will lie where they fall.

DATED at PORT-VILA this 30th day of November 2007

BY THE COURT

VINCENT LUNABEK CJ	**BRUCE ROBERTSON J**

JOHN VON DOUSSA J	**OLIVER A. SAKSAK J**	**HAMLISON BULU J**