

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

Civil Appeal Case No. 16/3470 CoA/CIVA

BETWEEN: CHRISTIANE BRUNET
Appellant

AND: ASCENSION LIMITED
First Respondent

AND: THE REPUBLIC OF VANUATU
Second Respondent

AND: ROBERT EDGAR SUGDEN
Third Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John von Doussa
Hon. Justice John Mansfield
Hon. Justice Mary Sey
Hon. Justice David Chetwynd
Hon. Justice Paul Geoghegan

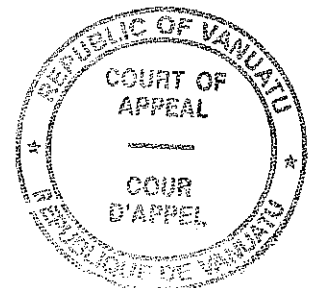
Counsel: *Mr Edward Nalyal for the Appellant*
No appearance for the First Respondent
Mr Kent Tari (SLO) for the Second Respondent
The Third Respondent in person

Date of Hearing: *Wednesday November 9th 2016 at 10 am*
Date of Judgment: *Friday November 18th 2016 at 4 pm*

JUDGMENT

Introduction

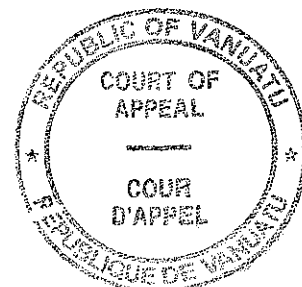
1. This is an appeal by leave from orders made on 9 September 2016 (the September 2016 Orders) which varied interlocutory orders in Supreme Court action 95 of 2014 (the Brunet claim) made on 15 June 2015 (the June 2015 Orders).



2. The Brunet claim was against Ascension Limited (Ascension). In the Brunet claim, a default judgment against Ascension was entered on 25 November 2014 for a total of Vt 62,598,560.

3. Obviously to try and ensure that the judgment was paid, Ms Brunet then obtained the June 2015 Orders. They were made in respect of registered lease owned by Ascension (lease 11/OC22/009), over the land known as the Iririki Landing next to the Grand Hotel (the lease). The June 2015 Orders prevented Ascension from dealing with the Iririki Landing lease, and prevented the Republic of Vanuatu through the Director of Land Records from registering any transfer of the lease over the Iririki Landing.

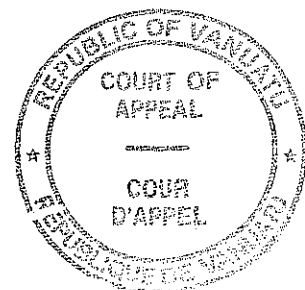
4. Wellington Lodge Holdings Pty Ltd (in liquidation) (Wellington) held a mortgage over the lease, granted to it by Ascension on 19 June 2007 to secure certain monies that may have been payable to Wellington by Ascension. Mr Sugden acquired that mortgage in 2012. In the normal course, any mortgagee such as Wellington, as a secured creditor, would be entitled to sell the lease to recover its debt owed to it by Ascension. The June 2015 Orders stopped Wellington or Mr Sugden from exercising those rights. The September 2016 Orders varied the restriction so that Wellington's mortgage was registered, and then it was transferred to Mr Sugden so that he could exercise the rights under the mortgage to sell the lease and recover any amount owing to Wellington by Ascension and secured by the mortgage.



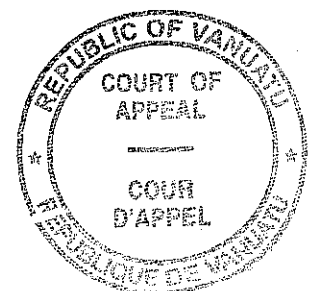
5. The normal course was not accepted by Ms Brunet. This appeal challenges the September 2016 Orders varying the injunction in that way. The Court has been told that in fact, pursuant to the Wellington mortgage, (which was duly registered) the transfer of that lease to Mr Sugden has now been registered.
6. For the reasons set out below, the Court considers that there was no error in the primary Judge's exercise of a discretion to vary the June 2015 Orders by permitting the mortgagee to enforce its mortgage, that is by permitting the transfer of the Wellington mortgage, to be registered.
7. The appeal is therefore dismissed. Brunet should pay the costs of the Republic of Vanuatu fixed at VT 75,000 and it should pay the proper disbursements of Mr Sugden in relation to his disbursements on the appeal. As Mr Sugden appeared in person, and not as a legal practitioner representing a client, he is not entitled to recover professional fees.

Background

8. Stated in that simple way, it is hard to understand Ms Brunet's decision to bring this appeal. However, the background is somewhat more complex.
9. In Supreme Court case 168 of 2010, Mr Sugden himself made a claim against Ascension to recover a substantial amount of outstanding legal fees. On 30 May 2013, Mr Sugden obtained judgment against Ascension for those fees then totaling Vt 20, 119, 413. That too was by way of a default judgment.



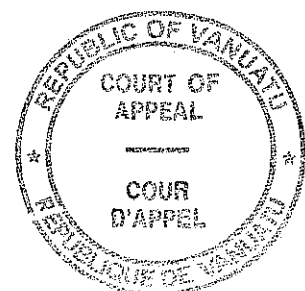
10. In that action, in anticipation of obtaining a judgment, and to prevent Ascension from transferring the lease of the Iririki Landing land so that the lease might not be available to support the recovery processes of any judgment, Mr Sugden had obtained an Order on 20 October 2011 also restraining any dealing with the lease . It was in much the same terms as the June 2015 Orders obtained by Brunet.
11. The material before the primary judge also showed that both Ms Brunet and Mr Sugden were conscious of the significance of the Wellington mortgage. Each endeavored to acquire the Wellington mortgage from Wellington (which by then was in liquidation and was being administered by a liquidator). As it happened, Mr Sugden was successful, and the liquidator of Wellington transferred the Wellington mortgage and the rights under the mortgage to Mr Sugden on 16 October 2012.
12. It is necessary to note that the lease itself was briefly removed from the Register, but subsequently restored to the Register of the Director of Lands. Nothing turns on that matter.
13. Obviously it was in Mr Sugden's interests, as the holder of the Wellington mortgage and the security which it provided over the lease (to the extent of Wellington's proper debt owed to it by Ascension) to ensure that the mortgage could be executed. He therefore applied in the Brunet claim, to be made a party to that claim by consolidating his claim with it. That application was unsuccessful.



14. In our view, the primary judge however very sensibly made Mr Sugden an Interested Party to the Brunet claim, simply because there was otherwise a stale mate between them as to whether or not the transfer of the Wellington mortgage would be registered, and possibly therefore whether either of them could enforce their respective judgments against Ascension by selling the lease.
15. It was in that context that the September 2016 Orders were made, permitting Mr Sugden as the holder of the Wellington mortgage to have the transfer of the Wellington mortgage registered.

The Primary Judge's Reasons

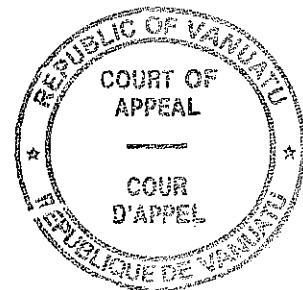
16. The primary Judge gave reasons for his interlocutory ruling. He took the following steps:-
 - (1) The Wellington mortgage granted on 26 November 2007 by Ascension to Wellington, was first registered by the Director of Lands over the lease on 14 June 2008.
 - (2) When Wellington went into liquidation, and before it was deregistered, the liquidator sold the debt of Ascension to Wellington to Mr Sugden under a Deed of Assignment, Release and Indemnity dated 31 August 2012, including Wellington's interest under the Wellington mortgage, and Mr Sugden paid the agreed price to complete that transaction before Wellington was deregistered on 11 February 2013.



- (3) Mr Sugden therefore had a valid registerable interest as transferee of the Wellington mortgage, to which the Minister of Lands gave consent for registration on 21 April 2016.
- (4) The subsequent deregistration of Wellington did not affect the validity of that transaction.
17. On that basis, the primary Judge was satisfied that Mr Sugden had a valid transfer of the Wellington mortgage capable of being registered, and entitled to be registered. There was no other reason why the injunction protecting Ms Brunet should not otherwise have been varied in the terms of the September 2016 Orders.

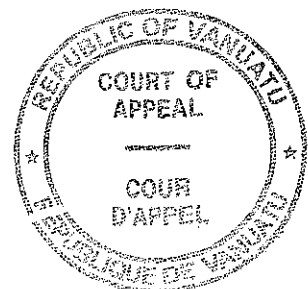
Consideration

18. The amended notice of appeal was converted by counsel for Ms Brunet into a series of 14 propositions which, it was argued, demonstrated error on the part of the primary Judge. It is convenient to address them in sequence, although some of them can be dealt with together.
19. First, it was argued that the Wellington mortgage could only be dealt with by the Australian Securities and Investment Commission after 11 February 2013, when Wellington was deregistered.
20. That contention was not significantly developed in oral submissions, and it is not correct. The Wellington mortgage is a commercial instrument which, as noted above, is registered as a mortgage over the lease. It would have to be given effect to, unless it



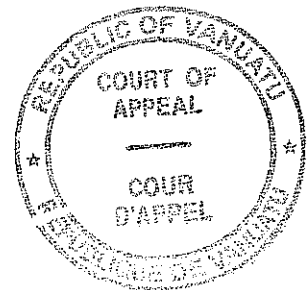
were set aside. The fact that it was transferred to Mr Sugden by Wellington when it was in liquidation does not diminish that proposition. Indeed, once the Wellington mortgage was transferred to Mr Sugden, he became entitled in equity to its benefits as between himself and Ascension, and as Ms Brunet was at material times aware of that mortgage (because it was registered) she would not be in a position, in any event, to dispute that equitable entitlement of Wellington (as transferred to Mr Sugden).

21. Second, it was argued that the default judgment of Sugden against Ascension “is *questionable*” because the circumstances in which the legal costs giving rise to the entitlement to the default judgment “*were obtained in questionable circumstances*”, by reference to some observations of another judge of the Supreme Court on an interlocutory hearing.
22. That is plainly a proposition which is not correct.
23. The default judgment obtained by Mr Sugden in Supreme Court action 104 of 2012 is a valid judgment. It is sealed. There has been no appeal from that Order, nor any application to set it aside. It is doubtful whether Ms Brunet has the entitlement, in any event, to challenge the final order of the Court in an action where she was not a party to that action and has no relevant direct interest in it.
24. The appeal book filed by or on behalf of Ms Brunet only belatedly contains material which includes, as an exhibit to an affidavit, a judgment of a judge of the Supreme



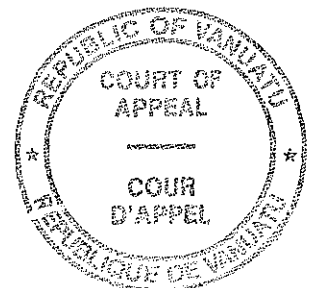
Court in CC 104 of 2012 which (the submission says) suggests that the costs which gave rise to the default judgment were questionable.

25. That judgment concerns Ms Brunet as an interested party in CC 104 of 2012 seeking that the Director of Lands revisit the decision to cancel the lease, which had been removed from the Register of Land Leases on 6th September 2011 after Ascension itself became deregistered. It was not a judgment relating to the nature or extent of any legal work provided by Mr Sugden or his firm to Ascension. The application for such a direction to the Director of Lands was refused, because it was out of time. It does not provide any foundation upon which Ms Brunet is entitled to, or can effectively, challenge on this appeal, the order in CC 104 of 2012 in which the default judgment was entered in favour of Mr Sugden.
26. As is now clear, Ascension which was struck off the Register of Companies under section 335 of the Company's Act, on 20 April 2012 was re-instated. It is also accepted that the decision of the Director of Lands to reinstate the lease itself, as an asset of Ascension, once Ascension was restored to the Register of Companies is simply a fact. It is a fact which underlays and supports the prospects of both Ms Brunet and Mr Sugden recovering their default judgments from the sale of the lease.
27. For the sake of completeness, it is noted that the appeal book provided by or on behalf of Ms Brunet also contains as an exhibit to an affidavit a copy of a decision of a judge in Civil Case No. 168 of 2010 declining to enter summary judgment in favour of Hudson and Co. (Mr Sugden) on 4 October 2012. It is plain that the reasons for that refusal was



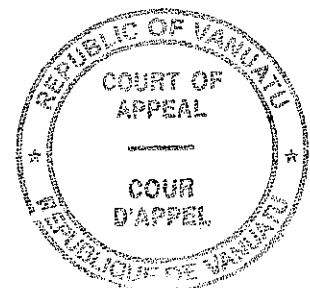
because that Judge was not satisfied that Ascension had, by that time, properly been served with the claim itself: see decision 4 October 2012 at [9]-[10]. It does not provide any basis for disputing the judgment Mr Sugden obtained in CC 104 of 2014.

28. The next contention is that Mr Sugden has abused the process of the Court by obtaining a default judgment in one proceeding (CC 168 of 2010) but then seeking to enforce his judgment in the Brunet claim. Counsel for Ms Brunet was unable to explain why that was so. It is an inappropriate assertion. It was entirely sensible for Mr Sugden to make an application first to consolidate the two claims (rejected following the opposition of Ms Brunet) and then, as an Interested Party, to seek a variation of the injunction orders to enable the registration of the transfer of the mortgage. It would have been inappropriate had Mr Sugden attempted to do so without indicating to the Court the way in which the separate injunction orders were operating to impair the ability of both Mr Sugden and Ms Brunet from enforcing their separate judgments by seeking to realize the value of the lease.
29. There is a complaint that the primary judge made the September 2016 Orders, but only published reasons some time later on 21 October 2016.
30. That does not render the September 2016 Orders invalid, under rule 13.1 of the Civil Procedure Rules. Counsel for Ms Brunet accepted that. Nor, in the circumstances, does it generate any prejudice to Ms Brunet for two reasons. First, to the extent that it impaired her ability to institute and prosecute this appeal, she has been given leave to appeal out of time and to amend her notice of appeal so as to reflect what she wished



to say in the light of the reasons. Second, Mr Sugden has accepted that the proceeds of the realization of the lease, which he can now arrange under the mortgage transferred to him and now registered, will not be disbursed until any dispute as to the extent of the entitlement of Wellington (Mr Sugden as transferee) under the mortgage are determined.

31. There are several grounds under the heading: "*The mortgage between Ascension and WHL (Wellington).*"
32. The complaint is diverse. It is said that the primary judge erred by not hearing and determining the meaning and the effect of the Wellington mortgage, that is what monies it secured. That is wrong. The primary judge was not required to do that. That is a task which remains to be addressed, but it was not relevant to the decision whether or not to vary the June 2015 Orders in terms of the September 2016 Orders.
33. It is unnecessary to address the "*issues*" about the sale of the mortgage or the circumstances which might render the sale of the Wellington mortgage void. In particular, it is said that Ms Brunet had offered to purchase the Wellington mortgage from the liquidator for a considerably higher sum than that at which it was sold to Mr Sugden. It is not clear that the circumstances in which the later sale of the Wellington mortgage to Mr Sugden by the liquidator of Wellington were in any sense comparable to the circumstances which existed at the time that the liquidator decided to reject Ms Brunet's offer. In any event, those who may have suffered if there was a sale at an undervalue do not include Ms Brunet. She is neither a creditor nor a member of

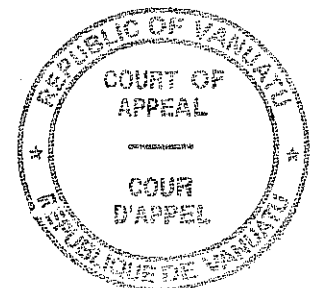


Wellington. It was the liquidator's duty to realize the assets of Wellington (including the mortgage) at the best price reasonably obtainable. There is nothing to indicate that the liquidator did not fulfil that function. Ms Brunet clearly has no standing to raise the issue about the making of the liquidator's decision.

34. The remaining two arguments are related, although they appear under separate headings "*Unjust Enrichment*" and "*What the mortgage secured*". They are related because, in essence, the complaint is that the primary Judge erred by not ascertaining the extent of the amount secured under the Wellington mortgage. That amount will be paid to discharge the mortgage, before the unsecured creditors (both Mr Sugden and Ms Brunet on their respective default judgments) will have access to the available funds. Simply, that was not a matter for the primary Judge on the application.

35. The determination of how much is owing to Wellington under the mortgage is a matter to be separately addressed. In any event, the process will have to be undertaken at some point. It will be necessary to resolve the amount owing to Wellington as mortgagee (and now Mr Sugden as the transferee of Wellington's interest) under the Wellington mortgage and so the amount Mr Sugden may recover from the proceeds of sale of the lease as the transferee of the mortgage.

36. Both Mr Sugden and Ms Brunet through her counsel agreed that, to the extent that there are available funds after discharge of the amount owing under the Wellington mortgage, it would be appropriate to share pro rata those funds according to the respective levels of their debts at that time.

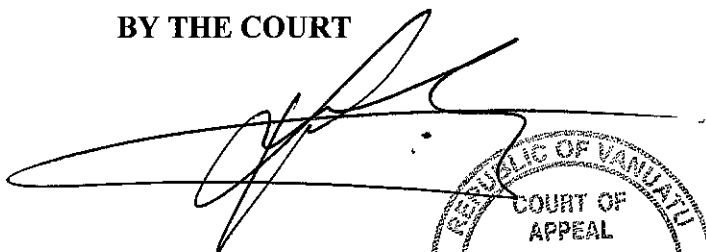


Conclusion

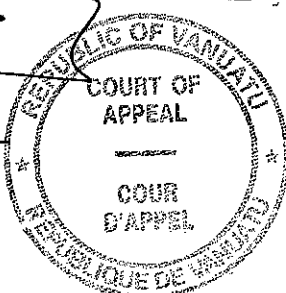
37. As indicated earlier in these reasons, the primary Judge is not shown to have erred by making the September 2016 Orders. The appeal should be dismissed. The Republic is entitled to its costs of the appeal, which are fixed at Vt 75,000. Mr Sugden, for the reason given, is entitled to his disbursements. It is clear that those disbursements will include the costs of preparing the appeal book which he did, in circumstances where Ms Brunet had not complied with the direction of the Court relating to the timing of the preparation of an appeal book.

DATED at Port Vila this Friday 18th day of November, 2016

BY THE COURT



Vincent LUNABEK
Chief Justice



The seal is circular with the text "REPUBLIC OF VANUATU" at the top and "REPUBLIQUE DE VANUATU" at the bottom. In the center, it reads "COURT OF APPEAL" and "COUR D'APPEL".