

BETWEEN: ROBERT EDGAR SUGDEN

Appellant

AND: THE REPUBLIC OF VANUATU

Respondent

Before:

Justice B. Robertson
Justice O. Saksak
Justice J. Mansfield
Justice D. Aru

Appearances:

R Sugden for the Appellant
L. Huri for the Respondent

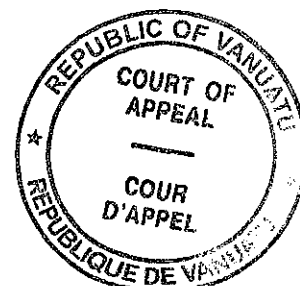
Date of Hearing: *Thursday 12th day of July 2018 at 2 pm*

Date of Judgment: *Friday 20th day of July 2018 at 3 pm*

JUDGMENT

Introduction

1. This appeal concerns the application of section 48B of the Land Leases Act [Cap. 163] as amended on 27 February 2015. If it applies, on its proper construction, the alternative issue is whether it is inconsistent with, and therefore invalid by reason of Article 5 (1) (j) of the Constitution.
2. The relevant facts are not contentious.



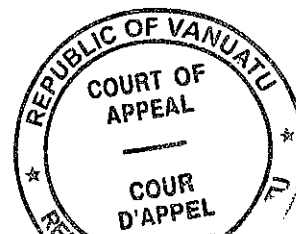
3. The appellant Mr Sugden became the holder of a mortgage over registered lease 11/0C22/009, after the mortgage was transferred to him. The lessee defaulted in complying with the terms of the mortgage. Mr Sugden as mortgagee in possession entered into a contract in February 2018 for the sale and transfer of the lease. In May 2018, that contract was settled and the transfer of the lease duly registered.
4. The question at issue is whether, from the proceeds of sale, or in order to properly effect the sale and transfer of the lease, Mr Sugden was obliged to pay what he called in the course of his submissions "lessor's benefit" as well as "land rent". The issue of land rent was not the subject of the appeal.
5. The Republic says that, in the particular circumstances, the lessors benefit was payable under section 48B.
6. Sensibly, the parties agreed to sale of the lease being achieved subject to the resolution of that question. The amount in issue is held in a trust account pending the hearing and determination of the application in the Supreme Court to resolve that issue, and now pending the hearing and determination of this appeal.

The Supreme Court judgment

7. The issues were addressed by the Supreme Court in a judgment delivered on 30 April 2018.
8. The short answers to the issues raised are expressed in the judgment and then challenged in the notice of appeal.
9. The Supreme Court decided that section 48B of the Land Leases Act applied to transfers by a registered proprietor of an urban land lease (as the subject lease is) even though the land lease was granted and registered before the commencement of section 48B, and that section 48B is not invalid in its operation in the present circumstances.
10. It also decided that section 48 applies in circumstances where the transfer of an urban land lease is made by a registered mortgagee in possession.
11. Thirdly, it decided that, on its proper construction, in circumstances where section 48B commenced operating only from 27 February 2015, the amount payable under section 48B (2) is the difference between the unimproved land value of the leased land at 27 February 2015 and the unimproved land value of that land at the date of the transfer of that land.

The Relevant Provisions

12. Section 48A of the Land Leases Act was introduced by the Land Leases (Amendment) Act 2004 and amended by the Land Leases (Amendment) Act 2007 and further amended by the Land Leases (Amendment) Act (Act No. 35 of 2014) and further amended by the Land Leases (Amendment) Act 2017 (Act No. 2 of 2017). Taking in the amendments from time to time, it presently provides:-



"48A Payment for sale of a rural lease

- (1) *This section applies only to leases of Rural Land.*
- (2) *Subject to subsection (2A), if a proprietor of a registered lease sells that lease, the proprietor must pay to the lessor 10% of the difference in amount between:*
 - (a) *the unimproved market value of the land at the time it was purchased or the purchased price at the time it was purchases, whichever is lower; and*
 - (b) *the unimproved market value of the land at the time of the present sale or the sale price at the time of present sale, whichever is higher.*
- (2A) *Subsection (2) does not apply where the lessor and lessee have entered into other arrangements.*
- (3) *If the proprietor of a registered lease sells a lease that is created by a sub division, the proprietor must pay to the lessor, 5% of the unimproved market value of the land at the time of sale or the sale price of the land at the time of sale, whichever is the higher unless the lessor and lessee have entered into other arrangements".*

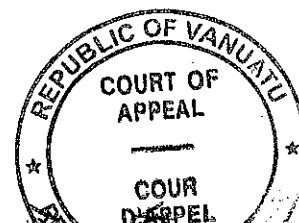
13. Section 48B was introduced by the Land Leases (Amendment) Act 2014 (Act No. 35 of 2014). When it was introduced, it provided:-

"48B Payment for transfer of urban lease

This section applies only to the transfer of an urban lease.

- (2) *If a proprietor of an urban lease transfers that lease, the proprietor must pay to the lessor 5% of the difference in amount between:*
 - (a) *the unimproved market value of the land at the time it was purchased or the purchase price at the time it was purchased, whichever is lower; and*
 - (b) *the unimproved market value of the land at the time of the present sale or the sale price at the time of present sale, whichever is higher.*
- (3) *Subject to subsection (4), subsection (2) does not apply where the lessor and lessee have entered into other arrangements.*
- (4) *The Minister must obtain the prior approval of the Council of Ministers before entering into any other arrangements under subsection (3)."*

14. The Land Leases (Amendment) Act 2017 (Act No. 2 of 2017) amended section 48B to include the additional words at the end of section 48B (2) (b) "*or the sale price at the time of present sale, whichever is higher*". Initially, when introduced, the comparison which was between the unimproved market value of the land at the time it was purchased and the unimproved market value of the land at the time of the transfer.
15. In addition, section 48C was also introduced in 2014 to provide an exemption from payment for transfer of lease under section 48B in the case of Intra-Family Transfers.
16. It is also noteworthy that, in the same amendment in 2014, section 38B was introduced. It concerns transitional provisions for existing leases to be developed. Its terms do not have particular significance to the present issue, but it indicates that Parliament was conscious of the

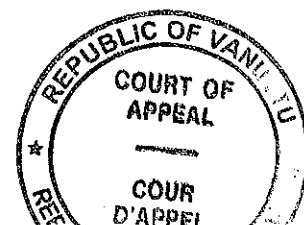


need to consider whether transitional provisioning was necessary in relation to the introduction of sections 48A and 48B.

17. The 2017 amendments came into force on 30 June 2017.
18. It is important to note that the basis of the assessment of the "lessor's benefit" payment which the Republic seeks in relation to Mr Sugden's land is the difference between the unimproved market value of the land at the time section 48B first came into force on 27 January 2015 and the unimproved market value of the land at the time of the present sale, that is in February 2018.
19. It is therefore not necessary to consider the significance if any of the alternative circumstances to reach section 48B (2) might now apply where leased land has been improved between purchase and transfer. The land in question was unimproved at the time Mr Sugden as mortgagee in possession sought to exercise rights to sell it, and is still unimproved land.

Consideration

20. Section 48B (2) does not have a direct retrospective effect. It applies to transactions, namely the transfer of an urban lease, which takes place after its commencement.
21. It imposes an obligation on the holder of an urban lease, if and when (after its amendment) that lessee transfers the lease to make a payment to the lessor.
22. The proposition that section 48B applies to urban leases which existed or were in existence prior to 27 February 2015 was disputed by Mr Sugden both at first instance and on appeal. The Republic maintains the position that it applies to all leases, whether existing before that date or not.
23. In our view, section 48B clearly applies to all leases in existence at 27 February 2015 and leases entered into after that date. The words are quite clear. It would be very surprising if Parliament intended to refer only to leases entered into after 27 February 2015.
24. As noted, the primary judge determined that section 48B (2) applied only from the commencement of the amending legislation on 27 February 2015, and that therefore the starting calculation should be the value of the unimproved land at 27 February 2015, rather than the date the lease was first acquired by the entity which granted the mortgage to Mr Sugden, so that it applied to urban leases in existence prior to as well as after 27 February 2015. But the calculation of the lessors benefit payment should be made by reference to the value of an existing lease commencing at 27 February 2015 rather than when the lease was acquired.
25. The Republic has not sought to cross appeal from the decision of the primary judge that the proper calculation to determine the amount payable is unimproved land value only from 27 February 2015 rather than from the date upon which the lease to be transferred was purchased.
26. Consequently, we can proceed on that basis. We do not need to consider whether Parliament intended the starting point to be the date of purchase. That may arise in another matter.



27. We agree with the primary judge that, at least, the clear intention of section 48B (2) is to require, on the transfer of the lease in February 2018, an impost of 5% of any increase in the unimproved value of the land between 27 February 2015 and that date.
28. We also agree with the primary judge that the fact that the transfer of the lease is made by a mortgage in possession does not make any difference. In a practical sense, by being in a position to exercise the power of sale and transfer, the mortgagee in possession is exercising the rights of the lessee. It would be very surprising if Parliament had intended to give a mortgagee in possession exemption from payment of the impost. There is authority that says, sensibly, that the mortgagee in possession is as if it is the nominee of the lessee: see e.g. *Re: Mc Meekin* [1974] STC 429.
29. We do not consider that the imposition of the fee of 5% on any increase in the unimproved value of the land over the period is an unjustified deprivation of property contrary to Article 5 (1) (j) of the Constitution. It is a modest impost on a transaction. It does not alter the unimproved value of the land, either at the starting date or at the transfer date. The value fluctuates over time with economic circumstances. It is not shown here to have been altered by any steps taken by Mr Sugden.
30. That is sufficient to dispose of this appeal. It is dismissed with costs, which we fix at VT 80,000.
31. We note that section 48B, in other circumstances, might give rise to more difficult questions. It is an impost on transfer transactions which, as we have noted, by reason of the 2017 amendment might apply in other wider circumstances. It is not dissimilar to what is called in other jurisdictions a capital gains tax. Counsel in this matter did not draw to our attention any decision from any other jurisdiction which involved the possible invalidity of such an impost because it was an unjust deprivation of property, or which involved an entitlement to compensation for the acquisition of property by reason of the impost.
32. In this case, where the land was unimproved, those issues are less significant. Courts are tending to address issues such as the present by practical assessments rather than formulaic presumptions: see *Re: Lord Mustill in L'Office Cherifiendas Phosphates v Yamashita Shianation Steamship Co. Ltd; The Boucraa* [1994] 1 All ER 20.

DATED at Port Vila this 20th day of July, 2018

BY THE COURT

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Justice B. Robertson

