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

Civil Appeal
Case No. 18/888 CoA/CIVA

BETWEEN: TRUSTEES INTERNATIONAL LIMITED
First Appellant

AND: BARRETT & PARTNERS
Second Appellant

AND: ROBERT POTTS
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John von Doussa*** ***Hon. Justice Ronald Young*** ***Hon. Justice Daniel Fatiaki*** ***Hon. Justice Dudley Aru*** ***Hon. Justice Gus Andrée Wiltens***
Counsel:	*Mr. M. R. Hall and Christina Thyna Gesa for the Appellants* *Mr. R. E. Sugden for the Respondent*
Date of Hearing:	*Friday 9th November 2018*
Date of Judgment:	*Friday 16th November 2018*

JUDGMENT

1. This is an appeal from a decision of the Supreme Court which awarded the respondent AUD$185,000 jointly and severally against the appellants for breach of trust and for a failure to exercise sufficient care in protecting the interest of the respondent in leasehold property.

2. The respondent's claim arose out of the dealings between the parties and others over the development of two leaseholds titles of land on the outskirts of Port Vila. The role of the appellants was to assist the parties in carrying out the development. The first appellant, Trustees International Limited (TIL) is a trust company incorporated in Vanuatu. The second appellant, Barrett & Partners (BP) is a firm of chartered accountants carrying on practice in Vanuatu. TIL offers services in Vanuatu as a trust company including to the clients of BP. All the shares in TIL are beneficially owned by BP.

3. For the purposes of the development, TIL acted as a trustee of the Angelfish Cove Trust which in the circumstances described below became the registered lessee of the land subject to the development.

4. The judgment against the appellants arose from findings that BP failed to exercise sufficient care to ensure that an allotment of land in the development (Lot 11 in the strata plan) intended to be beneficially held by the respondent was not encumbered by a mortgage registered in favour of the National Bank of Vanuatu (NBV). First, the Court found that BP and TIL had notice of the respondent's interest in this allotment before the registration of the mortgage to the NBV occurred. Secondly, that in any event the appellants failed to exercise sufficient care in establishing whether the respondent had an interest in Lot 11 before consenting to the registration of the mortgage.

The Development

5. In early 2008 Mr and Mrs Hanckel together with a Mr Simpson and Ms Sparrow were planning to sub-divide leasehold title 12/0844/058 (058). Mr Simpson and Ms Sparrow consented to Mr and Mrs Hanckel borrowing against the lease and to a mortgage being registered over it in favour of the NBV. The respondent agreed with the lessees to purchase one of the future allotments, described as, Villa 3, "*off the plan*" for AUD$295,000.

6. The respondent learned that Mr and Mrs Hanckel were intending to acquire the adjoining leasehold title 12/0844/059 (059). The respondent agreed with them to pay a one third share of the costs of acquiring and developing 059. At the time, lease 059 was not encumbered. The respondent did not become a named lessee of either 058 or 059.

7. Mr and Mrs Hanckel, Mr Simpson, Ms Sparrow and the respondent then decided to create one strata title out of the two leases. To this end in January 2009 they took advice from an Australian lawyer named John Mulally and then from BP. Mr Mulally met at the offices of BP on 23rd January 2009 with a staff member of BP, Mr Hanckel and Mr Simpson. An email sent by Mr Mulally following the meeting to the BP staff member, and also to a partner of BP recorded the matters which had been discussed.

8. The email recorded the identity of the parties presently registered as the holders of 058 and 059 and their intention to create strata titles from these leases. It recorded that it was intended to set up a trust to be the lessee of the new strata development. The present lessees and the respondent would be the beneficiaries under the trust. Mr and Mrs Hanckel would be entitled to one of the new strata lots, Mr Simpson and Ms Sparrow to another, and the respondent to

Villa 3. The email concluded by saying it will be necessary for the beneficiaries to have an agreement dealing with the relevant party's individual rights including to dwell on their allotment and to receive the net proceeds of the sale. The email concluded with the observation that care was required in determining the share of the beneficiaries to the proceeds of sale of lots and the obligation of the parties to contribute to expenses because of their uneven ownership across the entire project site.

9. The respondent was not at the meeting but he does not deny that the arrangements outlined in the email were what he anticipated.

10. BP responded by email to Mr Mulally, copies to Mr Hanckel and Mr Simpson, that they considered a partnership agreement between the parties should be prepared and provided to the trustee to hold on file. The evident purpose of this would be to notify the trustee of the respective entitlements of each of the five parties in the trust property.

11. No partnership agreement was prepared at that time.

12. BP took the steps necessary on behalf of the leasehold owners to prepare and obtain approval to a new strata plan, and create the new title.

13. There were delays in the legal steps necessary to bring about the changes in title, but the development continued in the meantime. Mr and Mrs Hanckel continued to draw down on the mortgage over 058 which grew to about VT90 million (AUD$1,200,000) by the end of 2009. Finally on 6th April 2011 surrenders of the existing leases 058 and 059 were registered and a single new lease issued to TIL over the whole of the development area. The existing mortgage granted by Mr and Mrs Hanckel over 058 was surrendered and a new mortgage issued over the new strata lots brought into existence over the same physical area. On registration of this strata plan new titles came into existence for each of the strata lots. TIL was the registered lessee of each lot on behalf of the Angelfish Cove Trust.

14. The new strata plan had 13 allotments. Lots 1 to 7 were created out of the area which was previously 059 and lots 8 to 13 were created out of 058. Lots 8 to 13 were subject to the new replacement mortgage. The former proposed villa 3 allotment, which the respondent believed he had agreed to purchase some two years earlier, became lot 11 in the new strata plan. Lot 11, created on the former 058, was subject to both the outgoing and incoming mortgages to the NBV.

15. Whilst the respondent had agreed in 2009 to acquire interests in the proposed future villa 3 allotment and in the 059 lease, he took no part in dealings with BP, and in the steps being taken by them to create a new strata title. Until about July

2011 he left everything in the hands of Mr Hanckel. In his amended statement of claim he pleads that Mr Hanckel was agent for the purpose of accepting the terms of the appellants' retainer including the provision of the necessary trustees services by TIL. The terms of the appellants' retainer included the terms of BP's Client Services Agreement (the CSA). The respondent was based in New Zealand. The respondents' evidence is that Mr and Mrs Hanckel were "*on the ground*" in Vanuatu and he was content that Mr Hanckel handle matters for him in Vanuatu.

16. In September 2010 the NBV asked BP to provide a list of who would have a beneficial interest in each of the proposed strata lots once the strata plan was registered. BP passed that request onto Mr Hanckel who provided BP with a list but the list did not show the respondent as having any interest in the new lot 11, or in any other allotment that would be subject to the replacement mortgage over the lots formerly in the area of the 058 lease.

17. BP provided that list to the NBV and also incorporated it into a draft "*partnership agreement*". The "*partnership agreement*" did no more than set out the respective interest which each of the participants in the development would hold. It was not a partnership agreement in any other sense.

18. At trial, several versions of this partnership agreement were in evidence. As first prepared and issued in draft by BP, it expressed the instructions received by BP from Mr Hanckel that the respondent's interests were confined to lots in the land formerly covered by the 059 lease, and therefore unaffected by any mortgage. The draft was sent to Mr Hanckel on 22nd October 2010 with a requirement that he have the parties sign it.

19. Sometime later, someone <u>not</u> from BP or TIL, and probably Mr Hanckel and the respondent, amended the document to show the respondent as claiming lot 11. This amended document is referred to in the evidence and judgment below as ""*Version C*". The trial judge found that the respondent, Mr Simpson and Ms Sparrow signed the *"Version C"* in March 2011 and the signed version was given to Mr Hanckel on or before the 22nd March 2011.

20. The critical question is when *"Version C"* was transmitted to BP as it is common ground that this document when it was received by the appellants put them on clear notice for the first time that the respondent claimed to have acquired the beneficial interest in lot 11. It is also common ground that the claim was to an unencumbered interest.

21. The respondent's case is that a copy of *"Version C"* was sent to BP as an attachment to an email sent by Mr Hanckel on 22nd March 2011 before the new mortgage to the NBV was registered over the allotments in the area formerly

covered by 058, including lot 11. The registration occurred on 6th April 2011, although the mortgage had been executed by TIL on behalf of Angelfish Cove Trust months before in December 2010.

22. The appellants at trial denied receiving the email on 22nd March 2011, and denied receiving a copy of *"Version C"* until a hard copy of the document signed by several of the parties was hand-delivered to their office on or about 17th May 2011. The appellants led evidence as to the sophisticated electronic system in their office used to record all incoming emails and documents. They contended that every other email relating to the transaction involving Angelfish Cove Trust and its developers, there being a great number, was duly recorded in their system and that the absence of any record of an email from Mr Hanckel on 22nd March 2011 established that this email was not received by them.

23. The trial Judge did not accept that position. He said "*I much prefer the evidence of the claimant* (now respondent) *and I find BP received a copy of the further amended agreement, ie. "Version C" by way of a scanned copy attached to an email dated 22nd March 2011*".

24. The trial Judge concluded that the failure of BP to act on the knowledge conveyed in *"Version C"* to protect the respondent's interests in lot 11 from becoming the subject to the new mortgage constituted a breach of trust by TIL. Further, the trial Judge also held that BP and TIL had an obligation to ensure the interests of the beneficiaries (the partners) were protected. In order to do that they were obliged to hear from the beneficiaries with confirmation of what each thought he or she was entitled to. If the appellants did not receive copies of the partnership agreement approved by each of the beneficiaries, the trial Judge held that they were not entitled to rely on what Mr Hanckel had told them (as reflected in the draft partnership agreement drafted by BP). The trial Judge noted that from the beginning that Mr Mulally had said in his email "*establishing the parties share will require care because of their uneven ownership across what will be the entire project site*".

Issues on appeal

25. The central issues in this appeal are whether the finding that the appellants received a copy of *"Version C"* on 22nd March 2011 and whether, if they did not, they were entitled to rely on the instructions they received from Mr Hanckel that had not disclosed to them that the respondent claimed an interest in any of the allotments in the area of the former lease 058.

26. If the appellants fail to establish these issues in their favour, they challenge findings of the trial Judge that they are not entitled to protection from the

respondent's claim by the terms of the CSA which contained terms limiting liability and giving indemnity.

27. The notice of appeal also challenges the assessment of damages.

28. By counterclaim the respondent seeks to vary the order made by the trial Judge for costs in his favour from standard costs to indemnity costs, and for an award of exemplary damages, a claim made in the pleadings but not considered by the trial Judge.

Was the email received on 22nd March 2011?

29. The appellants contend that whilst the trial Judge said he much preferred the evidence from the respondent on this question, the difficulty with the finding is that the respondent did not know what Mr. Hanckel had done. Mr. Hanckel, who had disappeared, was not called by either party to give evidence. The finding is not based on an acceptance of the oral evidence of the respondent but on inference drawn from the date shown on a copy of the email produced from the papers of Mr Simpson, namely 22nd March 2011. That inference does not prove that the email was actually transmitted. The appellants contend that the much stronger inference arising from their electronic recording system shows, that the email was not received, and the trial Judge should have so found.

30. The respondent argues that the appellants' submissions misunderstands the basis of the finding of the trial Judge, and that the "*evidence from the claimant*" on which the Judge relied was not just the inference to be drawn from the date on the email. Counsel for the respondent spent much time taking this court through chains of emails and other documents which he contends show that the appellants must have received the email as they knew at least by 20th April 2011 that the respondent claimed ownership of Lot 11.

31. Much of the material referred to by counsel established that by 22nd March 2011 Mr Hanckel had received *"Version C"* signed by a number of the other participants, but that was not an issue in contest. The issue was whether he sent *"Version C"* on to BP.

32. The balance of the material referred to by counsel concerned correspondence between BP and Mr Simpson's solicitor Ms Amy Collins in April and May 2011 and correspondence relating to the proposed sale of Lot 7 and 8 by Mr Hanckel in March and April 2011. The respondent argued that these materials established that the appellants had received the ownership information contained in *"Version C"* well before May 2011. The material about lots 7 and 8 as confusing, and in

our opinion fails to establish that *"Version C"* was received by the applicants any earlier than May 2011.

33. However, we consider the correspondence with Ms Collins does support the submission that BP knew of the respondent's interest in lot 11 at least by 20 April 2011.

34. Mr Simpson in his sworn statement made on 18th December 2015 attached an email which according to its text was copied to him by BP on 20th April 2011. It attached *"Version C"* signed by three of the partners including the respondent, and which showed the respondent as entitled to Lot 11. This email is evidence that BP had received a partially completed copy of *"Version C"* showing the respondent's interest before May 2011. How and when BP came into possession of the document transmitted to Mr Simpson is not explained by other evidence, and absent an explanation it was open to the trial Judge to hold that *"Version C"* was transmitted to BP as an attachment to the email of 22 March 2011.

35. A note made by the trial Judge in recording the evidence of Mr Sinclair when he was cross-examined about the email to Ms Collins dated 20 April 2011 is revealing. Mr Sinclair gave evidence that BP's electronic recording system recorded the email of 20 April 2011 to Ms Collins, but had no record of the attachment, *"Version C"*. The judge noted "*only two relevant documents have been lost too much coincidence*". That BP's electronic system did not record the attachment to Ms Collins justified the trial Judge having doubt about the assertion that its failure to record the email of 22 March 2011 was certain proof that it was not received.

36. The attack on the finding that the email of 22 March 2011 was received by BP is not made good. This ground of appeal fails.

Reliance by BP on instructions from Mr Hanckel

37. At trial the appellants contended that they were entitled to rely on instructions received from Mr Hanckel that the respondent's interest in the development were confined to allotments in the former lease 059 and therefore unaffected by the mortgage. The trial Judge does not address this submission in his reasons for judgment but his ultimate finding that "*the defendants did not exercise sufficient care in what the claimant's exact share ... was*" implies that it was rejected.

38. The appellants have repeated their submission to this court.

39. At the outset the respondent's assertion that the appellants were not entitled to rely on the instructions given to them by Mr Hanckel faces difficulty on the

pleadings. The amended statement of claim pleads that Mr Hanckel was agent for the other participants in engaging the services of the appellants. One of the documents completed by Mr Hanckel to engage the services of the appellants was an APPLICATION FOR SETUP OF A TRUST IN VANUATU. Paragraph 6 of that document says that the persons authorized by the beneficial owner (defined to include the respondent) to issue instructions as authorized representatives were Greg and Hanna Hanckel.

40. Then follows the progress of the development. From 2009 until about July 2011 the respondent on his own evidence left Mr Hanckel, the person "*on the ground*" in Vanuatu, to handle the matters for him.

41. In these circumstances there was no reason for the appellants to question the authority of Mr Hanckel to give them instructions about the development and the interest held by the participants, and in our opinion they were justified by relying on those instructions until the respondent in July 2011 instructed otherwise.

42. BP were entitled to rely on instructions given to them in 2010 by Mr Hanckel about the entitlement of each of the participants in the development, those being instructions that were reflected in the first draft of the partnership agreement. Further, we consider they were entitled to continue to rely on those instructions during the period when the arrangements were being made with the NBV to surrender the mortgage over 058 and take a new mortgage over allotments being created over the same area of land in the strata title. We consider they were entitled to rely on his instructions as to the entitlement of the respondent until they were notified otherwise by the receipt of the *"Version C"* transmitted to them on 22nd March 2011. That version had been signed by the respondent.

43. Until that date we consider the finding that TIL and BP did not exercise sufficient care by not going behind Mr Hanckel's instructions and seeking to verify the ownership entitlements with the respondent cannot be upheld. However, from 22nd March 2011 they were on notice from *"Version C"* that the respondent claimed Lot 11.

The Limitation and Indemnity Clauses

44. Ground 3 of the appellants' notice of appeal contends that the respondent's claim was barred Clauses 2.1(d) and 4.2(c) of the CSA entered into between the appellants and the respondent in March 2009.

45. The CSA was one of the documents that BP required the participants in the development to sign as part of their engagement at the outset of BP's involvement. A copy was sent to the respondent in March 2009, but he never signed it.

46. In his evidence the respondent agreed that he had received the CSA on 11th March 2009 and that he still had a copy in his possession on 22nd March 2011. He agreed that he had taken part in a telephone meeting with the other participants in March 2009 when the need for them to complete the documents received from BP was mentioned. The CSA was one of those documents. He was aware that the documents contain the terms and conditions by which the participants would deal with TIL and BP. He opened the CSA and looked at it but could not recall whether he had read all the way through it. He agreed he was familiar with the processes by which professional organizations like accounting firms set out in advance the terms and conditions on which they will provide their services.

47. The respondent did not tell TIL or BP that he did not agree to the terms and conditions in the CSA. From March 2009 he accepted their services including paying their invoices.

48. We have already referred to the pleading by the respondent that Mr Hanckel was agent for the participants in engaging the services of the appellants.

49. In these circumstances we consider that the respondent is bound by the terms of the CSA which comprised part of the appellants' retainer.

50. The CSA defines the respondent and the other developers as the "*Principal*" and the "*Company*" as meaning TIL, the principals of BP and the officers and employees of that firm.

51. By Clause 2, in consideration of the Company agreeing to provide the Services (which are widely defined to include services of a kind actually provided) subject to the Standard Terms and Conditions (which are defined to include the terms and conditions set out below) the Principal appoints the Company to provide the Services and by Clause 2.1(d) gives a comprehensive indemnity to the Company against claims arising by reason of the provision of the Services. That indemnity however does not extend to indemnity for losses arising from "willful negligence or willful misconduct of the Company". It is not alleged by the respondent and it has never been part of his case that the appellants had been guilty of willful negligence or willful misconduct.

52. The appellants rely in particular on the provisions of Clause 4.2 of the CSA including:

"(a) The Company will at its discretion act on the instructions given or purported to be given by the Principal or any other person with the ostensible authority of the Principal

and may in its discretion require such instructions to be in writing or in any form satisfactory to the Company;

(b) The Company shall not incur any liability for any failure on its part to comply wholly or partly with any instructions and shall not be responsible for any non-receipt of such instructions or errors or ambiguities therein or lack of authority on the part of the person giving the said instructions. The Company shall not be required to make any enquiry in respect of the authority or otherwise of any person giving instructions;

....

(h) The Company shall incur no liability whatsoever should there be any fraud or acts of dishonesty or misrepresentation on the part of the Principal, and the Company shall be fully indemnified by the misrepresentation on the part of the Principal in the event of any loss or damage occasioned thereby.

..."

53. These clauses provide in very broad terms a limitation on liability and an indemnity to the appellants. We consider the width of these Clauses covers the conduct complained of by the respondent, and provides the appellants with a complete defence to the claim.

54. The respondent seeks to avoid this result by a contending that the CSA is not the agreement which governs the relationship between the parties. Clause 4.2(r) of the CSA is relevant to this argument. It reads:

"*(r) Notwithstanding anything to the contrary which may appear to be contained herein, when the Company act in the capacity of a Trustee, the Trust Settlement Deed under which the Company acts will take precedence over this document in all cases*".

55. A Trust Settlement Deed was one of the documents created by BP as part of their services, namely the Angelfish Cove Trust. Counsel for the respondent also argues that the CSA was not an issue at trial and the appellants should not be allowed to rely on it now.

56. The Angelfish Cove Trust Deed also contains broad terms limiting the trustees liability and granting it indemnity against the claims in Clauses 9.7 and 9.8. Clause 9.7(a) provides that the trustees shall not be liable for any loss not attributable to its own dishonesty or the willful commission by it of an act known by it to be a breach of trust. TIL relied on these terms in its defence.

57. The respondent does not allege dishonesty or a willful commission by it of an act known to be in breach of trust, and this has never been an issue in the case.

58. At trial, counsel for the respondent developed a complex argument that the Angelfish Cove Trust Deed had no operation in relation to the allotments held by TIL in its name as lessee under the strata plan. This argument emerged during the hearing of an application for summary judgment made by the respondent to the trial Judge ahead of the trial. The trial Judge noted that on paper this appeared to be a strong argument, and his reasons for finding that the appellants had an arguable defence, and for dismissing the application for summary judgment, appear to rely, in part at least, on that argument.

59. Referring back to Clause 4.2(r) of the CSA, if the Angelfish Cove Trust did not apply then it could not take precedence over the CSA.

60. Counsel for the appellants concedes that at trial the appellants accepted that the Angelfish Trust Deed was not helpful, and they therefore reverted to relying on the limitation and indemnity clauses in the CSA. The CSA had not been expressly pleaded in the defence of the appellants, although the Trust Deed had been pleaded by TIL. The cross-examination of the respondent and the appellants' closing submissions to the trial judge make it plain that the CSA and its limitation and indemnity clauses were in issue at trial.

61. In his reasons for judgment on the claim, the trial Judge does not address the appellants' submissions about the CSA. The Judge referred again to the arguments being advanced by counsel for the respondent as to why the Angelfish Cove Trust did not apply, and expressed some difficulty in understanding an aspect to that argument. He concluded his discussion on that topic by saying:

> "*In any event, I do not believe the exact nature of the arrangements as trustee and beneficiary between the claimant and the defendants is relevant in deciding liability in this case. This case is about a breach of trust. There is no doubt TIL assumed the role of trustee and BP controlled the trust corporation*".

62. We agree with the assessment of the trial Judge that, regardless of the legal intricacies governing the relationship of the respondent and the appellants, the case was to be decided on the basis that TIL had assumed the role of trustee, but not under the terms of the Angelfish Cove Trust Deed, and BP controlled TIL. In these circumstances we consider the CSA does control the relationship between the appellants and the respondent, and in turn that the appellants are entitled to the benefit of the limitation and indemnity clauses which, in our view, bar the respondent's claim in its entirety.

Conclusions

63. The remaining issue in the appeal concerns the assessment of the quantum of damages. In light of the conclusion already expressed, it is unnecessary to discuss the submissions received on that ground. However, as it was argued, we indicate that we agree with the submissions of the appellant that the function of the Judge, if liability existed, was to value a chance that it may have been possible by 22nd March 2001 to persuade the bank to release lot 11 from the proposed mortgage, and to accept alternative security over other allotments in the former 059 area owned by Mr Hanckel. By 22nd March 2011 arrangements had already been concluded with the bank, and we think the chance of re-arranging securities so as to release lot 11 would have been very low. If the bank refused to rearrange the mortgage the only option would have been for the registration of the strata plan to go ahead as proposed, or for the whole development to fail.

64. For these reasons the appeal will be allowed. The orders of the court are:

(a) Appeal allowed;

(b) Judgment in the Supreme Court in favour of the respondent is set aside and his claim stands dismissed;

(c) The respondent must pay the appellants' costs in this court and in the Supreme Court on the standard basis.

DATED at Port Vila, this 16th day of November, 2018.

BY THE COURT

Hon. Vincent LUNABEK
Chief Justice.

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