

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

Civil
Case No. 20/3303 SC/CIVL

BETWEEN: Pakea Limited
Claimant

AND: Wendy Bourdet as Administrator of the Estate of Jimmy
Jones, Cliff Jones and Jay Jones
Defendant

Coram: Justice Aru
Counsel: Mr. A. Bal for the Claimant
Mr. R. Tevi for the Defendant

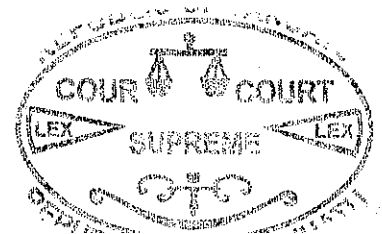
JUDGMENT

Introduction

1. This is a claim by Pakea Limited against the defendants namely: the estate of Jimmy Jones and Cliff Jones and Jay Jones.

Background

2. The late Jimmy Jones was the original leasee of lease title 02/07112/001 (the Head Lease) covering Pakea Island near Vanua Lava in Torba Province.
3. On 30 November 2007, the claimant entered into a Sale and Purchase Agreement with Jimmy Jones for the sale and purchase of the Head Lease by the claimant. It was agreed that the claimant shall surrender the Head Lease and create two new titles in favour of the claimant, an agricultural lease and a commercial lease. The total agreed purchase price was VT47,000,000. The claimant made part payment in the sum of VT29, 500, 000 including a house and land, a boat and a Toyota Land Cruiser. The balance remaining was VT17, 500,000. The parties agreed that the remaining balance was to be paid after the Head Lease was surrendered and the two new leases were created.
4. Around June 2008, the Head Lease was surrendered and two new leases were created namely: Lease title **02/0712/002** (agricultural lease) and lease title **02/0712/003** (a commercial Lease). The two leases were only registered on 28 January 2020 some 12 years after they were created.
5. In a related proceeding Jimmy Jones -ats- Pakea Limited filed sometime in 2015, consent orders were entered on 14 December 2015 regarding payment by the claimant of the outstanding balance of VT17,500,000. Order 3 of the consent orders state: -



"3. the final and conclusive sum of seventeen million five hundred thousand Vatu (VT17,500,000) must be settled to the claimant pending the occurrence of the of the successful registration of both the Agricultural Lease and the Commercial/Tourism Lease of Pakea Limited."

6. The leases have now been registered but the defendant says it is yet to receive payment in accordance with the terms of the consent orders.
7. The claimant on the other hand in this proceeding alleges it is unable to enjoy the leases due to the defendants' actions.

The claim

8. The claimant claims general damages for trespass, harassment, and threatening illegal fishing, unpaid fees for grazing cattle, losses suffered by Kwakea Island Adventures and expenses for the delay and inability of the claimant to enjoy his leases over Pakea Island.
9. The relief sought is: -
 - An order that the defendants pay the claimant the sum of VT 8,265,000 being for expenses incurred over the years;
 - General damages in the sum of VT 14,000,000 or such sum as the Court may award;
 - Interest at 5%; and
 - Costs
10. In support of its claim and defence to the counterclaim, the claimant relies on the sworn statements of Terrence Jonh Kerr, Brett Kerr and Roger Quarani.

Defence and Counterclaim

11. The defendants deny all the claims against them and assert in their counterclaim that the claimant must now settle the balance of the purchase price immediately in line with the terms of the 2015 Consent Orders. The defendant relies on the sworn statements of Wendy Bourdet, Cliff Jones, Jay Jones, Natalie Wood and James Bon Mwarakurmes and the relief they seek on the counterclaim are: -
 - General damages to be assessed;
 - 10% interest for the late payment of VT 17,000,000 in the sum of VT 17,500,000
 - Costs

Discussions

12. The trial of the matter was listed several times but never proceeded partly due to the fact that some of the claimant's witnesses were overseas and some of the defendant's witnesses were at Sola, Vanua Lava and the trial had to be adjourned several times. First on the 10th and 11th March 2022



and later from 30th June and 1st July 2022 and again from 25th and 26th October 2022. Mr. Ngwele of Counsel filed a notice of ceasing to act for the claimant on 24th October 2022. Mr. Bal then began acting for the claimants. A further trial was listed for 10th April 2023 at Sola but that did not proceed due to the deferral of the court circuit. The trial was then relisted for 8th June 2023 but again adjourned due to the unavailability of the claimant's witnesses and was further adjourned to 8th July, 28th July 2023. The trial did not proceed.

13. On 1st February 2024 the parties agreed to proceed by filing agreed facts and issues with written submissions and for judgment to be issued on the papers. To date no agreed facts or issues were filed and no submissions were filed by the claimant by the due date of March 2024.
14. The defendants filed their submissions on 26th March 2024. The claimant has not filed any submissions.
15. This is a civil proceeding which requires prove on the balance of probabilities. The evidence has not been tested in cross examination but considering all the evidence it is more probable than not that the filing of the current proceedings is simply to delay or avoid payment of the balance of the purchase price as consented to in the 2015 Consent Orders. Those orders have not been appealed or set aside and have therefore given finality to the issue of payment once the two leases are registered which they have.
16. Wendy Bourdet in her sworn statement of 31st August 2021 denies the allegations that the defendant's actions delayed the registration of the two leases. She states that the delays were caused by the claimant alone as the applications to create the two titles were lodge in 2008. Registration fees were only paid by the claimant on 20 January 2020 to enable registration. (**Exhibit WB 6** – copy of the receipt). Given the delays in payment, the claimant was made to pay penalty fees in addition to the registration fees.
17. The other cause of delay in registration was the fact that the Company was removed from the Companies Register since 8 August 2007 as it was not in good standing. It was only re-registered on 22 September 2016. (**Exhibit WB 7** – copy of the company extract for Pakea Limited).

Claim for VT500 per head cattle per week for 8 years.

18. The claim that the parties agreed for the defendant to continue to raise his cattle on the property at a cost of VT500 per head per week is contrary to what Ms Bourdet says Mr Kerr conveyed to her in his email of 17 October 2017 that he did not want any cattle on the property. (**Exhibit WB 8** – email re- Jimmy Jones possessions). In addition, there was nothing agreed in the sale and purchase agreement that the defendant would continue to raise cattle on the property at VT500 per head per week.

Trespass by the defendants on Pakea Island.

19. The evidence of the defendants shows that they never trespassed on the property. It was the custom owner's representatives who had issues with the claimant and would from time to time enter the property without the claimant's knowledge or authorisation. This is confirmed by James Bon



Mwaraksurmes who is one of the land owners in his sworn statement filed on 6 December 2021. He says at paragraphs 2 and 3 of sworn statement that: -

“ ...

(2) Mr Terry hemi stap claim se tufala brothers blong Wendy Jones Bourdet I bin tekem action towardem hem.

(3) Mi stap confirmem long Court se action towardsem Mr terry mi wetem tufala tawian blong mi (Sammy wetem Jules) nao i bin mekem, be ino tufala brothers blong Wendy Jones Bourdet (Jay Jones wetem Cliff Jones) olsem we Mr Terry I claimem.

...”

20. Cliff Jones and Jay Jones both confirm in their sworn statements filed on 21 October 2021 that when entering Pakea Island on all occasions, they had to get permission or authorisation from Mr Kerr or his Manager on Pakea Island Nathalie Wood. Wendy Bourdet confirms in her sworn statement filed on 10 June 2022 that Cliff and Jay Jones are the only two brothers she has.
21. Nathalie Wood who has been managing Pakea Island from 2006 to December 2020 confirms in her sworn statement filed on 21 October 2021 that the only people who have trespassed on Pakea Island and threatened their employees are relatives of the custom land owners.

Claim for loss of business by Kwakea Island Adventures (KIA)

22. The claimant claims that KIA was initiated as a dive business to attract interested divers and tourists to Pakea Island as a means of generating revenue. As a result of the defendants' actions, the business suffered huge losses. Brett Kerr in his sworn statement filed on 18 February 2021 stated that in roughly nine months from 1 June 2019 to 25 March 2020 the business earned AUD\$34,803.43. No invoices or receipts of payments were provided in support. A profit and loss statement of KIA was provided. Despite this claim, Wendy Bourdet on the other hand says that the claimant has never registered a tourism business as alleged and has never obtained a business licence from the Torba Provincial Government to run such a business. **(Exhibit WB 10)**
23. The Torba Province Government on 23rd February 2021 confirmed by letter as follows: -

“To: Whom This May Concern

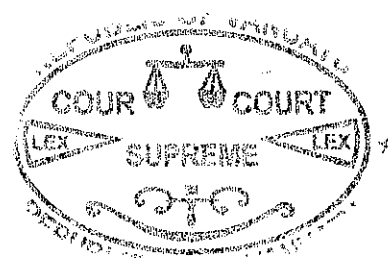
This is to certify that Mr Terry Kerr of Pakea Island has not made any payment of licence fee to Torba Provincial Government for any business operating on Pakea Island ever since his settlement on the island.

...

(signed)
Reynold Surmat
Secretary General
Torba Province

...”

(signed)
John Robert
Accountant
Torba Licence



24. The business by KIA was either conducted illegally or was never operational as there is no evidence of any income it says it made. There is no basis for the claim.

Expenses incurred by the defendant

25. In defending this proceeding, the defendant seeks general damages as well. Upon instructing Yawha & Associates, initially they paid them VT253, 125 and paid an amount of VT800,000 to Tevi Bulu Lawyers. The only expense claimed is VT500,000.

Result

26. Having considered the above, the claim is hereby dismissed and I enter judgment on the counter claim in favour of the defendants as follows: -

- a) The sum of VT17, 500, 000 be paid immediately with 10% interest (as agreed in the sale and purchase agreement) for late settlement. The interest is to run from 14 December 2015 (date of consent orders) until payment.
- b) Damages for loss and expenses assessed at VT500,000.
- c) This matter is listed for enforcement conference **at 8.30am 25 June 2024** for the Defendant to inform the Court: (i) that he has complied with the Orders or (ii) to explain how he intends to do so. Proof of service of this judgment and the summons must be filed before then.

DATED at Port Vila this 23rd day of May, 2024

BY THE COURT

