

IN THE HIGH COURT OF FIJI
AT LABASA

Civil Action HBC No: 26 of 2015

Between : GLUCK WHIPPY PILOT WHIPPY as the
Administrator of the Estate of SAMUEL WHIPPY
deceased

PLAINTIFF

And : THE REGISTRAR OF TITLES OFFICE

DEFENDANT

Coram : The Hon. Mr Justice David Alfred

Counsel : Ms. S. Devan for the Applicant
Mr. J. Pickering for the Respondent.

Dates of Hearing : 6 and 7 April 2017

Date of Judgment : 28 November 2017

JUDGMENT

1. According to the Statement of Claim the Plaintiff is the Administrator of the Estate of Samuel Whippy (Estate) by an High Court Order made on 21 June 2007.

2. The Estate is the registered proprietor of the land held under Certificate of Title Folio No.4268, Register Volume 43 (the Title) being the property known as Yadali (the Land)
3. The Defendant is the statutory office holder under the Land Transfer Act (the Registrar).
4. On or about October 2014 when applying for a provisional title to the Land, the Plaintiff discovered the Registrar had on or about 1 June 1995 issued a new certificate of title (the new title) to Jacob Andrews (Andrews) and David Chang (Chang) over 200 acres part of the Land held under the Title.
5. A further search revealed that:
 - (i) On or about 26 October 1994, the Registrar registered a transmission by death against the Title as Dealing No.370218.
 - (ii) A request for a new certificate of title was registered by the Registrar as dealing No.378221 on 1 June 1995, but the memorial relating to the new title was not endorsed on the Title.
 - (iii) The new title was issued upon a Request for New Certificate of Title lodged by Andrews and Chang as administrators.
 - (iv) The request for a new title did not specify in whose estate Andrews and Chang were appointed as administrators or whose estate they represented.
 - (v) The transmission by death is missing from the Register.
 - (vi) The new title was issued on an unregistered and unapproved deposit plan known as DP 7550.
6. The Registrar owed a duty to the Estate by virtue of the following sections of the Land Transfer Act (Act):
 - (a) Section 13
 - (b) Section 16
 - (c) Section 17

- (d) Section 19
- (e) Section 20
- (f) Section 36
- (g) Section 93
- (h) Section 35
- (i) Section 129
- (j) Section 166

7. The Registrar, personally or through her officers or clerks breached the above duties.

PARTICULARS

- (a) Failed to ascertain prior to the registration of the transmission by death regarding the interest that Andrews and Chang had in the Estate.
- (b) Failing to be satisfied of the estate claimed by Andrews and Chang when registering the transmission by death.
- (c) Failing to require Andrews and Chang to support their claim to be entitled to the estate in the land subject to the title.
- (d) Failing to obtain the duplicate title before registering the request for a new title.
- (e) Issuing a new certificate of title on an unregistered deposit plan.

8. By reason of the breaches of duty or omissions or misfeasance the Estate has sustained loss and damage and been deprived of an estate in the land and Andrews and Chang have unlawfully harvested timber.

SCHEDULE OF SPECIAL DAMAGES

(a) Loss of value of Land (200 acres)	-	\$816,000
(b) Loss of valuable trees	-	\$142,458.42
Total	-	\$958,458.42

9. Wherefore the Plaintiff claims:
- (a) Special damages.
 - (b) General Damages
 - (c) Interest and post-judgment interest.
 - (d) Costs
10. The Defendant in its Statement of Defence states:
- (1) It issued a new title to Andrews and Chang.
 - (2) The Deposit Plan was approved and registered on 1 June 1995.
 - (3) The transmission by death was registered on 26 October 1994 but is now missing.
 - (4) Andrews and Chang as administrators applied for a new title over 200 acres which was issued on a registered DP 7550
 - (5) The Defendant obtained the duplicate title when a request for a new title was made.
 - (6) The Defendant denies the allegations of negligence and prays the Plaintiff's claims be dismissed.
11. A Reply to the Defence was filed.
12. The Minutes of the Pre-Trial Conference held on 28 July 2016 include, inter-alia, the following:
- Agreed Facts
- (1) The Plaintiff was appointed administrator of the Estate by order of the High Court on 21 June 2007.
 - (2) The Estate was the registered proprietor of the Land comprised in the Title.
- Issues to be determined
- (1) Whether the Registrar owed a duty to the Estate and had breached the duties.
 - (2) Whether the matters constitute an omission or misfeasance on the part of the Registrar.

- (3) Whether the Estate has sustained loss and damage.
 - (4) Whether Andrews and Chang, have been unlawfully harvesting timber.
 - (5) Whether the Defendant is liable to pay damages under s.140 of the Act to the Estate.
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13. At this juncture, I am constrained to point to Order 34 rule 2(4) of the High Court Rules which makes its mandatory for the Solicitors after such a conference to draw up a minute containing "a succinct statement" of the agreed matters and :the issues remaining for determination by the Court.
 14. The Oxford Advanced Dictionary of Current English defines "succinct" as "expressed briefly and clearly".
 15. The conference minutes here are anything but succinct, as it includes a regurgitation of the pleadings and take all of 9 pages. In the interest of the public this has to stop. The public deserve better of their solicitors. Verbiage and voluminous paper ill serves the litigants.
 16. The hearing commenced with the Plaintiff, (PW1) the Administrator giving evidence. The deceased was his great, great, great, grandfather. About 2002 he met his 3 cousins who told him they had read in the Fiji Times that one, John Simpson was going to be the administrator of the deceased.
 17. They asked him to act because the land was going from the Whippys to Simpson. His application to challenge Simpson's appointment was litigated and in 2005 the Judge ordered Simpson and PW1 to be the joint administrators of the estate of the deceased. Simpson got sick and died in 2006. In 2007, he was appointed by the High Court, Suva as the sole administrator.
 18. The Order of the Master made on 21 June 2007 is Exhibit P1. The estate owned the land specified in the Order. PW1 did not know where the original duplicate of title was. He

tried to apply for a provisional title but was not given it by the Registrar. He discovered 200 acres had been issued out of the main title to Chang and Andrews who have no relationship to the deceased and have no interest in the estate.

19. He had not been served with the Court documents that these 2 persons have any interest in the Estate. He did a search at the titles office and discovered 200 acres had not been registered on the deceased's head title, the Title. The Registrar could not explain of which estate Chang and Andrews were administrators. When the Registrar opened the box file she found the applications by Chang and Andrews has been torn out. The Registrar did not comply with his request for her to cancel the 200 acres title.
20. He therefore filed the instant action. He said no one was the administrator of the Estate when the 200 acres were transferred to Andrews and Chang in 1995. He had read the will of the deceased. The Land was given to Maria, the deceased's daughter. Andrews and Chang were not related to Maria. He knew of Lota Andrews (Lota) who was the grandfather of Jacob Andrews. Lota is not related to Chang nor to the deceased.
21. Under cross examination PW1 said Andrews and Chang were not entitled to the land as they applied for the estate of Lota and not the deceased. He said no beneficiary of the Estate of the deceased has lodged a transmission by death. He first became aware of the land which was taken out when he applied for a provisional title. He applied in his name as the sole administrator appointed by the Court. No survey was done by the Estate to determine the area of the Land.
22. The next witness Tevita Bulai (PW2), was the principal forestry officer, Ministry of Forestry. He oversees the operational side. He said it is correct that 2 logging licences to Chang were issued on 28 August 2005 and on 23 November 2009. He confirmed the figures were correct.

23. Under cross-examination, PW2 said both licences had already expired and there was no application for an extension.
24. The next witness was Silio Koroï Toronibau (PW3), the managing director of Northern Property Valuation and Consultant Limited, a registered valuer. At the Plaintiff's request he prepared a valuation report on 7 March 2017. The valuation for the new title No. CT 29326 was \$816,000. This is the current market value.
25. With this the Plaintiff closed his case and the Defendant opened theirs.
26. The Defendant's sole witness was Ms Torika Solicake Goneca (DW1) the Deputy Registrar of Titles. She was aware that a transmission by death was registered on 26 October 1994 on the title, and Andrews and Chang were registered as administrators. Both of them filed an application with the Registrar for a provisional title. A caveat was lodged by Simpson which was removed on 14 June 2005. It was not registered on C.T.4268. The transmission by death was lodged on 26 October 1994 for the estate of Lota for C.T. 43/4268. Andrews and Chang applied for a provisional title for C.T. 4268.
27. Under cross-examination DW1 said in 1995 she was in the Registry but did not deal with any of these documents. She was not aware of how land from the Estate became part of Lota's estate. A provisional title replaces the original duplicate title and is only issued if the original cannot be located or is destroyed. The Plaintiff applied for a provisional title. A provisional title had been issued to Andrews and Chang. Lota was never registered as the proprietor of CT 4268, thus the transmission by death should not have been registered on CT 4268.
28. With that the Defendant closed her case.
29. Counsel for the Plaintiff then submitted. She said there was no need to file an action against Andrews and Chang. Time ran from October 2014 when the Plaintiff applied for

a provisional title. The Court should value the land at today's market value as the land appreciates in value. There was a breach of statutory duty.

30. Counsel for the Registrar then submitted. He asked why was the Plaintiff not making enquiries in 2005 and raised the defence of limitation.
31. Counsel for the Plaintiff replied that the Registrar could have filed but did not, a Third Party action against Andrews and Chang. She said Counsel for the Registrar did not cross examine the Plaintiff on matters like why he did not act earlier.
32. At the conclusion of the arguments I said I would take time for consideration. I now proceed to deliver my judgment.
33. The pivotal issue here is section 149 of the Land Transfer Act. S.149 (1) lays down that no action for damages shall lie or be sustained against the Registrar unless such action is commenced within 6 years from the date the right of action accrued. The remainder of the subsection does not concern us as the Plaintiff was not under any disability.
34. The legislative intention behind this sub-section is patent. The use of the word "shall" clearly means that it is mandatory or obligatory for the plaintiff to commence an action within 6 years from the date his right accrued.
35. S. 149(2) lays down that "the date when the right to bring an action accrues shall be deemed to be the date on which the plaintiff becomes aware, or but for his or her own default might have become aware, of the existence of his or her right to make a claim". In other words, the draftsman here is contemplating a situation where the Plaintiff is actually aware or may have become aware of the missing 200 acres and of his entitlement to make a claim, if he had not failed to act or to perform his duty as Administrator.

36. From the Plaintiff's own evidence he had read the will of the deceased, which gave the land concerned to Maria. Again from his own testimony he and Simpson were ordered by the Court in 2005 to be joint administrators of the Estate. Simpson died in 2006 and he, the Plaintiff was appointed by the High Court, Suva in 2007 as the sole Administrator. This Order given on 21 June 2007 by the Master expressly appoints the Plaintiff as the sole Administrator of the Estate of the Deceased of CT 4268 "and has the powers to enter into the subject property".
37. Thus it became the duty of the Plaintiff to attend to the transfer of the assets of the Estate including the above subject property. The Plaintiff would have immediately become aware of the missing 200 acres of land. If he were to allege he were not aware then of this, such an allegation collapses because all that had transpired were on public record in the Registry of Titles. If he were to allege he was unaware of the limitation of actions under s.149(1), "ignorantia juris non excusat".
38. I am therefore of opinion that if the Plaintiff had not failed in his duty as administrator, he would or may have become aware of his right to make a claim and also of his obligation to make that claim within 6 years from 2005, as a co-administrator or within 6 years from 2007, as sole Administrator. Instead he only filed the instant action in 2015. In the result, the action cannot be sustained against the Registrar.
39. The wording of the section is so peremptory that it is unnecessary for the Court to assess the damages for the sake of completeness. Nevertheless I shall say this. Even if the action was not time – barred the claim as set out in the Schedule of Special Damages would not have succeeded as that sets the 2017 valuation of the land and loss of trees whereas s.148 states the value of the land at the time of deprivation (1995) shall be the measure of damages, of which no evidence was provided to the Court.

40. In fine, the action is hereby dismissed with costs summarily assessed at \$1,500 to be paid by the Plaintiff to the Defendant.

Delivered at Suva this 28th day of November 2017.



David Alfred

JUDGE

High Court of Fiji