

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

Civil Appeal Case No.14 of 2013

BETWEEN: MRS. HUANG XIAO LING
Appellant

AND: MIHA LEONG AND BETTY LEONG
First Respondents

AND: BRED (VANUATU) Limited
Second Respondent

**AND: THE GOVERNMENT OF THE REPUBLIC OF
VANUATU**
Third Respondent

Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice John Von Doussa
Hon. Justice Raynor Asher
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice Mary Sey*

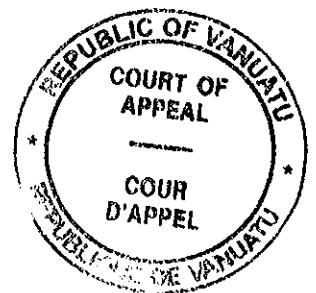
Counsel: *Mr. Saling Stephens and Mrs. Marisan Vire for the Appellant
Mr. John Malcolm for the First & Second Respondent
Mr. Frederick Gilu for the Third Respondent*

Hearing: 19 July 2013

Judgment: 26 July 2013

JUDGMENT

1. This appeal concerns a piece of land where two different lessees, the first respondents the Leongs and the appellant Mrs Ling, have apparent good title. One title, lease title 03/0174/012 shows Miha and Betty Leong as lessees, and another, 03/0174/051, shows Huang Ling as lessee. There is no cross referencing between the titles, or any entry indicating any imperfection in each parties' interest.



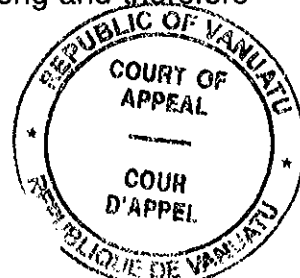
2. On 22 March 2013 the Supreme Court ordered rectification of the land leases register by cancelling the registration of lease title 03/0174/051 and thereby confirming the title of the Leongs. The Court stated that lease title 03/0174/012 contained the only lawfully registered lease of the land, and that Miha and Betty Leong were the lawful proprietors of this lease.
3. The Appellant Mrs Ling appeals that decision. She asks for the judgment to be set aside, and the proceeding to be sent back for a retrial by a different judge.
4. There was a chronology set out in the judgment of Spear J which was not disputed during the appeal, and which we follow with some changes:

Chronology

- | | |
|---------------------|--|
| 1 October 1987 - | Lease title 03/0174/012 registered between Luganville Urban Land Corporation as lessor Botleng Island Trading (Botleng) as lessee; |
| 14 June 1994 - | Botleng struck off the register of companies for non-payment of annual fees; |
| 12 August 2005 – | Botleng restored to the companies register by order of the Supreme Court; |
| 28 August 2006 – | Cancellation of lease title 03/0174/012 entered on the land lease register; |
| 25 January 2008 – | Restoration of lease title 03/0174/012 was entered on the land leases register; |
| 10 September 2009 – | New lease title 03/0174/051 registered between the Minister of Lands and Natural Resources as lessor and Huang Xiao Ling as lessee, for the consideration of Vt 1,163,000 paid to the Minister of Lands; |
| 1 February 2011 – | Transfer of lease title 03/0174/012 from Botleng to Miha and Betty Leong entered on the land leases register in respect of that lease, the consideration being Vt 10,000,000 paid to Botleng. |

Issues

5. This summary reflects exactly the relevant events and they require no elaboration by way of introduction. There are sixteen grounds of appeal listed, but in our view two key points arise:
 - whether the effect of striking off Botleng from the Register of companies resulted in an automatic cancellation of lease title, so that the assets of Botleng and therefore



the lease became the property of the Republic, which it could deal with as it wished, including by creating a new lease.

- whether the holder of lease title 03/0174/051 (the 051 title) has priority over the holder of lease title 03/0174/012 (the 012 title).

The effect of striking off and restoring Botleng

6. In 1994 Botleng had got into financial difficulties and stopped paying the required annual fees to the Registrar of Companies. The Registrar has the power to strike off defunct companies under s.334 (1) and (3) of the Companies Act, and this is what happened. The 012 title, the only title at that point, did not record any cancellation of lease at the time, but curiously did so on 28th August 2006 when the company was in fact already restored.

7. After there has been a striking off, the Supreme Court has the power under s.334 (4) to order the name of the company to be restored to the register. That section provides that upon an order of restoration being delivered to the Registrar for registration:

"...the company shall be deemed to have continued in existence as if its name had not been struck off; and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off."

Emphasis added

8. In the course of submissions a key issue arose as to the effect of striking off a company. If its assets are forfeited to the Republic, any interest it may have as a lessee could be lost to the Republic theoretically forever, and the argument that a new title could be created could be determined by that factor. If on the other hand striking off the register did not result in the assets being so permanently forfeited, and they remained with the company, then a leasehold interest might survive striking off.

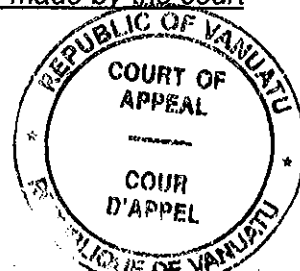
9. It is provided in s.335 (1) that the notice that the Registrar may publish will be that at the expiration of three months

"...the name of the company mentioned therein will unless cause is shown to the contrary, be struck off the register and the company will be dissolved."

(Emphasis added)

10. Mr Stephens for the appellant argued that this meant that the effect of striking the company off the register was akin to winding up, in that its assets were forfeited to the Republic. He relied on s.336 (1) which provides that:

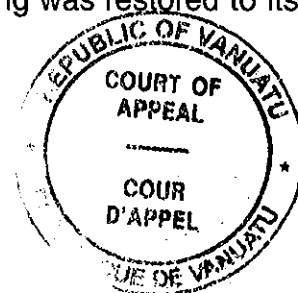
"Where a company is dissolved, all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution (including leasehold property but not including property held by the company on trust for any other person) shall, subject and without prejudice to any order which may at any time be made by the court



under sections 334 and 335, be deemed to be forfeited and shall accordingly belong to the Republic."

(Emphasis added)

11. We agree that the plain meaning of s 335(1) is that on striking off a company is dissolved. However we do not accept the appellant's further submission that on restoration a specific order is required before assets are restored to a struck off company.
12. Section 336 (1) is stated to be subject to s. 335. As we have set out, s.335 (4) provides that on restoration a company is deemed to have continued in existence as if the name had not been struck off. There are some authorities that were referred to by the appellants, in particular Tymans Ltd v Craven [1952] All ER 613 where it was stated that the English equivalent section to s. 334 (4) did not validate any acts of the company made during the period of dissolution unless a specific Court order to that effect was made.
13. However in this situation there were no acts of the company that required validation. Anything that might have happened to the assets of the company on being struck off the register was not a consequence of any act of the company. It was no more than an automatic consequence, prescribed by statute, of the striking off.
14. We have no doubt that the provision in s 334 (4) that on restoration the company is deemed to have continued in existence applies to its title to real estate leased by the company at the time of striking off, and that on restoration to the register the company is deemed to have had the pre-striking off assets that it had before it was struck off.
15. Any other conclusion would have alarming consequences. A striking off the register would have the effect of effecting a transfer of all the company's assets to the Republic, which would require a Court order to unravel. Striking off and restoration would cease to be the relatively straightforward exercise it is at present, and become a major and sometimes fraught undertaking.
16. Indeed, it is relevant that under s 331 (1) of the New Zealand Companies Act 1991 and s.601AH (5) of the Australian Corporations Act 2001 and, as far as we can ascertain, other common law jurisdictions, on restoration to the register property vested in the Crown on striking off vests back in the company as if it had not been removed from the register.
17. It was also submitted for the appellants that it was necessary for the Republic to have disclaimed the leasehold interest, before the Botleng interest was restored. This is not correct. Disclaimer of an asset is a separate process occurring after dissolution and prior to any restoration, and has nothing to do with the events that as a matter of law follow restoration.
18. Therefore we cannot accept the appellant's submission that the lease was lost by Botleng to the Republic, and remains lost in the absence of a specific Court order relating to that lease. On its restoration on 12 August 2005, Botleng was restored to its

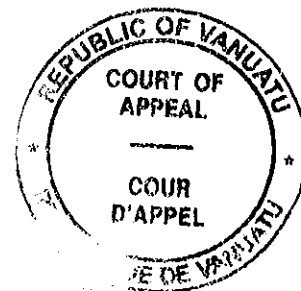


leasehold interest in the land, and that was reflected in the 012 title recording the restoration of the lease on 25th January 2008.

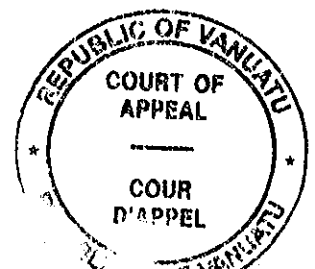
19. However, this is subject to any land law considerations, which we now consider.

The competing titles

20. Like the judge, we start by considering the provisions of the Land Leases Act (the Act), which set out the principles governing the registration of interests in land, and the protection of such interests.
21. Section 14 provides that the registration of a leasehold interest will vest that leasehold interest in the person named.
22. Importantly s.15 provides that the rights of the proprietor of a registered interest shall not be liable to be defeated except as provided in that Act.
23. Section 21 (1) provides that every document purporting to be signed by the Director of Lands shall be presumed so signed unless the contrary is proved, and sub section (4) provides that every entry or note in or on a register shall subject to certain provisions be received in all proceedings as conclusive evidence of the matter or interest which it records.
24. Section 23 provides that no person dealing for valuable consideration with the proprietor of a registered interest shall be required or in any way concerned to enquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor was registered. This section has particular relevance.
25. It has been observed in other cases, in particular in Ratua Development Ltd v Ndai [2007] VUCA 23, that the effect of these provisions is to create a regime for the protection of interests of land based on the concepts of the Torrens system, which applies to land in many Pacific jurisdictions. However, the Vanuatu Act has the particular feature of applying to leasehold estates and interests only. Only indigenous persons can own land, but that land may be leased to other persons.
26. The concept of the indefeasibility of that leasehold title is, by virtue of the provisions of the Act just outlined, made paramount. The register is everything. The title of the registered proprietor and all persons acquiring an interest from that proprietor is protected from adverse claims, subject only to any provisions of the Act.
27. The “*register*” is defined in s. 4(1) as comprising a register maintained in respect of each lease required to be registered under the Act. Its make up into three sections is set out, and it is stated in s. 5 that registration shall be effected by an entry in the register in such a form as the Director of Lands may direct “... *and by the cancellation of the entry, if any, which it replaces.*” Under s. 6 the Registrar may at any time open a new edition of a register “...*showing only subsisting entries and omitting therefrom all entries which have ceased to have any effect.*” The Registrar may cancel obsolete entries under s. 7 and has wide general powers in relation to the Register under s. 8.



28. The Director may therefore, under s. 6 open a new edition of the register, but only on the basis that it shows subsisting entries. Here the leasehold interest of Botleng, having been restored, was on the register on 10 September 2010. However on that day a new title, the 051 title, was created. It did not show the existing Botleng interest. On the face of it this was in breach of the Director's duties under s. 6 to show subsisting entries, in the event of a new edition of a register.
29. There was some explanation as to how this happened given at the hearing which it is not necessary to traverse in this appeal. We agree with Spear J that the reasons for the mistake were not adequately explained.
30. For the reasons given we have found that the restoration of Botleng to the Company register restored its leasehold interest, and that restored interest was validly recorded and thereby achieved the primacy dictated by s. 15. Unless the specific grounds set out in the Act applied (and they did not in this case), Botleng's interest had complete primacy, and a bona fide purchaser for value without notice could rely on it, and call on the complete protection of the Act.
31. The Huangs were such purchasers. Under ss. 15 and 23 they could rely on the 012 title and Botleng's registered interest, and not make further enquiry. Their interest could not be defeated by another interest not registered on the 012 title prior to their interest. They got clear title from Botleng.
32. The existence of a parallel title not recording what was on the earlier title is an event that should not have happened and should never happen. Such a mistake is very serious as it drives a stake through the heart of the Act, which is to give absolute primacy to the registered title. If there are two inconsistent titles, the reliability of the register is undermined, and the registration system will break down.
33. It could be argued that Mrs Ling was entitled to rely on indefeasibility herself, and call in aid the same indefeasibility provisions of the Act to say that she relied on the primacy of her title, and for that reason cannot now have her interest defeated. But there can be no doubt which title has primacy. It must be the title that is first in time. Only thus can the integrity of the system of indefeasibility of title be maintained. Mrs Ling may have some rights arising from this unfortunate sequence of events, (although we express no view on that), but those rights cannot be against Botleng and its successors in title.
34. Any other system would mean a return to a situation akin to the English deeds system of Victorian times, where it was necessary to carry out multiple checks before any settlement. The Torrens system was designed to bring the delay, expense, and uncertainty of that process to an end. When a title is first created, that is the title for priority purposes and remains so until it ceases to exist in accordance with the Act, and any later title that is created over the same land is subject to the rights on that first original title.
35. We note that Mr Gilu for the Minister of Lands made no submissions, but did not support the appeal. At the Supreme Court hearing he requested that an undertaking be recorded to the effect that if Mrs Ling lost, the Republic would reimburse her for the

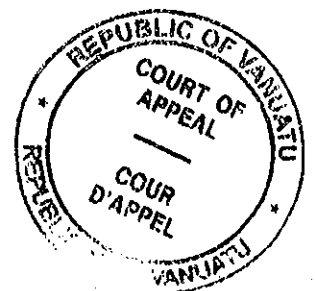


amount she paid to the Minister of Lands for the grant of the 051 lease and any land rates, together with interest.

36. It follows that the judge was right to rectify the Register to cancel the 051 registration and any dealing entered relating to the land. We uphold his orders and dismiss the appeal.
37. There is a further factor in this case. Mrs Ling may not have been a bona fide purchaser for value without notice. She paid Vt 1,163,000 for the lease whereas she had earlier dealt with Botleng, and indeed offered to pay it Vt 10,000,000. The Leongs paid VT10,000,000 to Botleng. There is no explanation as to why Mrs Ling paid so little. There was some further evidence indicating that she had or should have had knowledge of the 012 lease.
38. Thus there may well have been a further argument open to the respondents. In the end the judge, because of his finding as to the Leong's right to rely on the indefeasible title of Botleng, did not determine that issue. We record that in the light of the factors mentioned, Mr Malcom may well have succeeded on that further argument.

Other points

39. We do not consider it necessary to go through all the other points made by Mr Stephens many of which, with respect, we have not found relevant. However there are some matters we need to refer to.
40. Mr Stephens was critical of the fact that Botleng was not joined as a party to the proceedings. However, it was not necessary to join Botleng as a party. It had transferred its leasehold interest and had no interest in the proceedings. If Mr Stephens wished to attack its actions he was free to do so, and did not need it to be joined.
41. The further submission that the judge should have recused himself after declining an application to join Botleng had no merit and should not have been made. A judge's impartiality is not in any way impugned because he has made an earlier adverse ruling against a party.
42. It was suggested that Botleng should have challenged the cancellation under s.106 of the Act. However, while that may have been possible within six months of the creation of the 051 lease, Botleng did not know of that creation, and even if it did, had no duty to take steps under s.106. The section creates a remedy that is available to aggrieved persons, but no duty on them to take any step.
43. Bred (Vanuatu) Ltd was a party to the proceedings and Mr Stephens submitted that it had suffered no loss and should not have been a party. However, it had an important interest in the outcome of the proceedings, and there is no basis for any criticism of its joinder. It was properly joined as the Leongs' mortgagee, and was sensibly represented by Mr Malcolm who also appeared for the Leongs.



Conclusion

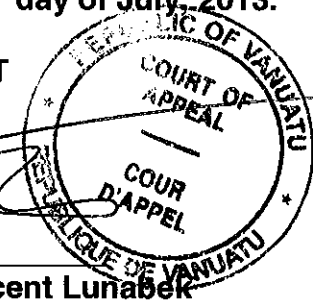
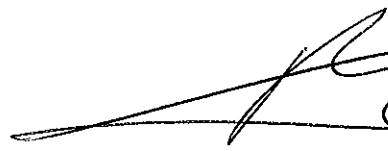
44. As we have observed, the creation of two conflicting titles was a mistake that should not have happened. We ask that this judgment be referred to the Director of Lands and the Minister of Lands, and that steps be taken to ensure that there is no repeat of the error, which, as we have said, strikes at the integrity of the system of leasehold land ownership and registration in Vanuatu.
45. For the reasons outlined, we agree with the judge's decision, and the appeal was dismissed.

Result

46. The appeal is dismissed.
47. The first respondents are entitled to be paid costs by the appellants at the standard rate,

DATED at Port Vila, this 26th day of July, 2013.

FOR THE COURT



Hon. Chief Justice Vincent Lunabe