

(Civil Jurisdiction)

BETWEEN: WU KIM MING

Claimant

AND: WU KIM KUEN

First Defendant

AND: KWANG SING SIX EIGHT COMPANY

Second Defendant

**AND: MINISTER OF LANDS AND NATURAL
RESOURCE**

Third Defendant

AND: DIRECTOR OF LAND RECORDS

Fourth Defendant

Mr Justice Oliver A. Saksak
Mrs Anita Vinabit – Clerk

Mr Daniel Yawha for the Claimant
Ms Jennifer La'au for the First and Second Defendants
Mr Justin Ngwele for the Third and Fourth Defendants

Date of Hearing: 25th August 2011
Date of Judgment: 29th February 2012

JUDGMENT

Introduction

1. This is a claim made pursuant to Section 100 of the Land Leases Act Cap 163 (the Act).



2. The Claimant and the First Defendant are brothers. The First Defendant is the eldest of four children. He was born on 24th February 1956. His sister Wu Kim Kam was born on 3rd July 1957 and his other sister Wu Kim Ping was born in March 1959. The Claimant is the youngest of them. He was born on 19th March 1961. These facts are not disputed.

Relevant Background Facts

3. On 7th September 1990, the father of the Claimant and First Defendant the late WU LIU STO made his will and last testament duly witnessed and signed before Mrs Rital Bill Naviti, Commissioner For Oaths. The Will is annexed to the further sworn statement of the Claimant filed on 10th May 2011. The existence of the Will and its validity is not under challenge.

4. In the said Will the late Wu Liu Sto bequeathed as follows:-

"For the properties and building situated at Boulevard Higginson Title No. 03/TP00/181.

EXT – T – No. 1438/1 Business – Commercial Zone.

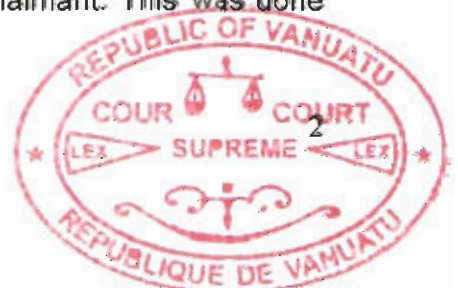
EXT – T – No. 1438/3 Business – Commercial Zone.

EXT – T – No. 1438/4 Business – Private dwelling – Commercial Zone.

EXT – T – No. 1438/5 Private dwelling – Commercial Zone.

That the Land and the Buildings (Identified under Old Title No. 1438) are given to my two sons: Mr Wu Kim KUEN and Mr Wu Kim MING without dividing them in equal parts."(Emphasis added).

5. On 10th June 2003, the First Defendant registered the property under Leasehold Title No. 03/OI93/028 (the Title) under his own name as trustee for both himself and his brother, the Claimant. This was done



pursuant to advice given to the First Defendant by the Lands Department in Luganville.

6. The Claimant and First Defendant reside and do business on the land and buildings within the said Title. The Claimant occupies 2/3 of the property including a foreshore development.
7. On registration of the Title, the First Defendant acknowledged the Claimant's 50% entitlement or interest in the Title.
8. On 26th June 2009, the Third Defendant gave consent for the transfer of the Title to the Second Defendant Company.
9. On 12th November 2009 the First Defendant transferred the Title to the Second Defendant Company as transferor, transferee and director of the Company.

Complaints

10. The Claimant therefore complains that –
 - (a) The transfer was done by the First and Third Defendant through fraud and mistake.
 - (b) The First Defendant breached his fiduciary duty as trustee.
 - (c) The First Defendant in so doing had unjustly enriched himself.
 - (d) The First, Second, Third and Fourth Defendants' conducts constituted omission and mistake.
 - (e) The First Defendant's actions caused loss and damages to the Claimant.

Relief's Sought

11. The Claimant seeks the following relief's –



- (a) An Order that the transfer of Title No. 03/OI93/028 to Kwang Sing Six Eight Company be cancelled.
- (b) An Order for damages and/or losses in the sum of VT1,757,100.
- (c) Costs; and
- (d) Any other Orders deemed fit by the Court.

Burden And Standard of Proof

12. In this case the Claimant has the burden of proof on the balance of probabilities which is applied flexibly according to the seriousness of the matters to be proved. See Solomon v. Turquoise Ltd [2008] VUSC 64; Civil Case No. 163 of 2006 & 29 of 2007 (8th August 2008).

13. Evidence

A. By the Claimant

The Claimant relied on his evidence by sworn statements dated 10th February 2010, of 7th June 2011 and of 10th May 2011. He confirmed these in examination-in-chief and was cross-examined by Counsel for the Defendant Ms La'au and Mr Ngwele. The statements were tendered as Exhibits C1 and C3. He relied on two further documents which were tendered as Exhibits C4 and C5.

B. By First and Second Defendants

The First and Second Defendants relied on the evidence of Wu Kim Kuen by sworn statement dated 18th May 2011 (Exhibit FD1) and various photographs of the foreshore development being carried out on the property by the Claimant (Exhibit FD2). He was cross-examined by Mr Yawha and Mr Ngwele.



C. By Third and Fourth Defendants

The Third and Fourth Defendants relied on the evidence of Mr Jean Marc Pierre in his sworn statement dated 31st May 2011 (Exhibit TD1). He was cross-examined by Mr Yawha.

14. Issues

The Claimant raised the following four issues:-

- (i) Whether or not Lease Title No. 03/OI93/028 registered under the Second Defendant's name held in trust for the Claimant?
- (ii) Whether the First Defendant's conducts by transferring the Title to the Second Defendant were in breach of his duty as trustee?
- (iii) Whether the First, Second and Third Defendants conducts constituted fraud?
- (iv) Whether the First, Second and Third Defendants conducts constituted omission and mistake?

The First Defendant raised the following one issue: Whether the First Defendant acted lawfully as trustee or contrary to the terms of the trust and registered proprietor in respect to leasehold title 03/OI93/028?

The Third and Fourth Defendants did not file any written submissions.

15. Discussions

- 15.1. In respect to the issue in paragraph 14 (i) above, there is no issue. The First Defendant acknowledged clearly in his oral evidence that he holds the property in trust for both himself and his brother, the Claimant.



15.2. In respect to the second issue in paragraph 14 (ii) above, the evidence by the First Defendant is that –

- (a) He holds the property on trust.
- (b) He owns 50% interest and the Claimant owns the other 50% interest.
- (c) In reality the Claimant occupies 2/3rd of the property and he occupies only 1/3rd of it.
- (d) The Claimant is carrying out foreshore development without the First Defendant's agreement and authorization.
- (e) The development stopped only after the First Defendant incorporated the Second Defendant Company and transferred Lease Title into its name.
- (f) A real estate Company prepared documents for registration and the legal firm Bani Law incorporated the Company.
- (g) He never saw the will but was told by her sister that it existed. The Claimant kept custody of the Will and never disclosed it.
- (h) He was advised by the Lands Department in Santo to register the Lease against title 03/OI93/028 and accordingly he applied.
- (i) He has paid all land rents from 29th March 1995 to date totaling about VT6,489,026.
- (j) His relationship with the Claimant as brother has broken down resulting in non-communication between them for several years to date.

15.3. Mr Yawha submitted the legal provisions of Sections 14, 15, 23(2) and 73(1) of the Land Leases Act Cap 163. These provisions are not applicable now that the First Defendant has accepted that he is the trustee of the property.

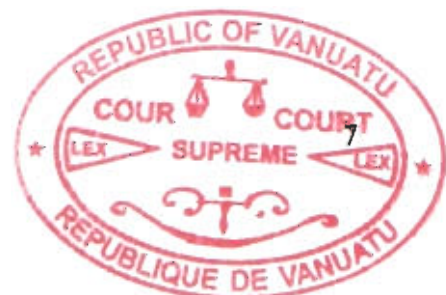
The real issue is whether the First Defendant had and owes a fiduciary duty to the Claimant. It seems according to the ruling in



the case of Selangor United Rubber Estates Ltd v. Craddock (a bankrupt) & Others No. 3 [1968] 2 All ER, 1073 at p. 1091 per Ungood – Thomas J the First Defendant has and owes that duty.

- 15.4. The next real issue is whether as trustee having a fiduciary duty, he acted unlawfully in transferring the lease to the Second Defendant? From the evidence which the Court accepts, the First Defendant never saw the Will. He received advice from Lands Department and acted upon it. His documents were prepared by a Real Estate Agent. His Second Defendant Company was incorporated by a lawyer. All that contributed to his belief that what he was doing was proper. He therefore acted in good faith. The Government is the lessor and the Minister gave Consent to the transfer. Section 36 of the Land Leases Act therefore was complied with. The Claimant was not required to give consent. Only the First Defendant was the registered proprietor of the Title therefore Section 70 of the Act has no relevance. Mr Yawha cited the case of Bristol and West Building Society v. Mathew [1998] Ch. 1 in support of his submission that the First Defendant had breached his fiduciary duty. This case really is against Mr Yawha and his client. In the very passage, Mr Yawha has quoted Millet LJ said this –

"The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith, he must not make a profit out of his trust, he must not place himself in a position where his duty and his interest may conflict, he may not act for his own benefit or the benefit of a third person without the informed consent of his principals..."(Emphasis added).



The First Defendant was the principal. He has paid out all previous land rents in the sum of VT6,489,026. That is loyalty on his part. The Claimant has not shown the First Defendant making any profit as a result of the Transfer. The Claimant has not shown any conflict between the First Defendant's duty and his interest. As principal, the First Defendant is entitled to give his consent and/or authorization to the foreshore development. He has declined to give such consent or authorization. But despite that, the Claimant went ahead and carried out the foreshore development relying only on the Ministerial consent. In so doing, he has incurred costs and expenses which he now claims as losses attributed to the First Defendant creating the Second Defendant Company and transferring the Title to it. The Claimant is not entitled to that relief.

- 15.5. The Claimant took issue with the First Defendant because of the absence of the terms "As Trustee" on the Transfer of Lease Document. Despite this fact which the Defendants accept, the First Defendant's evidence is that the Claimant is still the beneficiary under an existing Will and that his entitlement is 50%. However in terms of physical occupation, the Claimant is occupying 2/3rd of the property contrary to the intents of the Will. The First Defendant has never denied he is still holding the property in the Second Defendant's name in trust for both the Claimant and himself. As such, the Court accepts that Section 89(1) of the Land Leases Act is relevant. It states:-

"A person acquiring a registered interest in a fiduciary capacity may be described by that capacity in the instrument of acquisition and if so described, shall be registered with additional words " as trustee, but the Director shall not enter particulars of any trust on the register." (Emphasis added).



The Court accepts Ms La'au's submission that the term "may" used in section 89(1) of the Act indicates the provision is not mandatory. As such the absence of the terms "as trustee" in the transfer document does not of itself indicate or is evidence of fraud and/or mistake.

Fraud must involve dishonesty of some sort by the First Defendant. See Assets Company Ltd v. Mere Roihi & Others [1905] AC 176 per Lord Lindley at p.210. There is no evidence by the Claimant that the First Defendant committed fraud in his actions.

- 15.6. In relation to Mistake on the part of the Third and Fourth Defendants, they deny the allegation. They asserted in their opening submissions at trial that they acted in good faith and relied on Sections 9 and 24 of the Land Leases Act. The Claimant argued that the speedy registration of the transfer of lease to the Second Defendant was done without adequate consultation and scrutiny of transfer documents, constituted omission which amounted to mistake under Section 100.

The Court notes the Consent to Transfer signed by the Minister of Lands on 26th June 2009. It reads –

"Consent to Transfer 03/OI93/028 from Wu Kim Kuen as trustee for Wu Kim Kuen & Wu Kim Ming as transferor; to the benefit of KWANG Sing Six Eight Company of P. O. Box 188 – Luganville Santo for Nil Consideration (Family Transaction)." (Emphasis added).

Pursuant to this Consent, the Transfer was effected and registered on the same day. The Government through the Minister recognized this as a family transaction and therefore placed urgency on the matter. But evidence shows other facts that called for the matter to be given urgent attention. The Claimant was carrying out foreshore



development on the property without authority from the First Defendant. Despite written demands to stop the work by Counsel (see letter dated 15th September 2009 – Exhibit C1) the Claimant continued only until the Second Defendant was incorporated and the Title was transferred to it on 26th June 2009. Under those circumstances, speedy actions cannot be used as a ground to allege there was mistake and/or omission on the parts of the Third and Fourth Defendants unless there is evidence to show other factors to warrant those speedy actions. There are no such other factors in this case.

Conclusions

16. From the foregoing discussions, the Court reaches the following conclusions –

(a) As to the issue of whether the First Defendant committed a breach of his fiduciary duty?

The answer is "No".

(b) As to the issue of whether the conducts of the First, Second and Third Defendants constituted fraud?

The answer is "No".

(c) As to the issue of whether the conducts of the First, Second and Third Defendants constituted omission and mistake?

The answer is "No".

(d) As to whether the Claimant has suffered losses and is entitled to damages?

The answer is "No".



(e) As to whether the First Defendant benefited from any personal gains following the transfer?

The answer is "No".

(f) Is the Claimant entitled to any reliefs sought?

The answer is "No".

Relief's Sought By First Defendant

17. The First and Second Defendants have sought several orders in their written submissions. These are refused simply because they failed to file any counter-claims in accordance with the Rules, to which the Claimant could be given the opportunity to respond. The second reason is that the Will is specific that the property cannot be divided up into equal parts.

18. Final Orders

(a) The Claimant is unsuccessful and therefore his claims are dismissed in their entirety.

(b) The Claimant must pay the costs of and incidental to this proceeding to the First and Third Defendants. Costs shall be on the standard basis as agreed or taxed.

DATED at Luganville this 29th day of February 2012.

BY THE COURT


OLIVER A. SAKSAK
Judge

