

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

Civil Appeal
Case No. 19/2625 CoA/CIVA

BETWEEN: VMB Industries Limited
Appellant

AND: Republic of Vanuatu
Respondent

Date of Hearing: 11 February 2020

Before: Chief Justice V. Lunabek
Justice J.W. Hansen
Justice R. C. White
Justice D. Aru
Justice G.A. Andrée Wiltens
Justice V. M. Trief

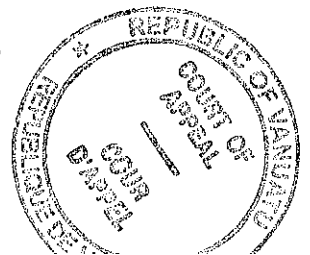
In Attendance: Ms M. Nari for the Appellant
Ms J. Toa for the Respondent

Date of Decision: 20 February 2020

JUDGMENT

A. Introduction

1. The brick-making business of VMB Industries Limited ("VMB") folded in mid-2016. This was alleged to be the result of not being able to obtain registration of a lease in respect of the land being used in that endeavour.
2. This action was then commenced to hold the Government vicariously responsible for the alleged undue delay in registration of the lease, and to obtain damages for the loss said to be occasioned thereby.
3. The Claim was dismissed in its entirety, with costs ordered against VMB.



4. This appeal seeks to overturn that dismissal of the Claim, and to have the case remitted to the Supreme Court for an assessment of appropriate damages.

B. Background

5. By virtue of an August 2010 agreement between VMB and James Tura, who claimed to be the custom owner of the land in question at Million Dollar Point, Espiritu Santo, VMB was granted permission to use the land for the purposes of brick-making. A secondary agreement relating to quarrying on other land has no relevance to this appeal.
6. Lease 04/3024/099 ("Lease 099"), dated 17 September 2013, was duly prepared and signed by VMB and James Tura. It was said to have been "lodged" with the Ministry of Lands for registration at that time.
7. VMB commenced its brick-making business on the site in 2013. It ceased to conduct that business in mid-2016, allegedly due to the lack of a registered lease making the business untenable – very little detail regarding the causative aspect was presented to the Court.
8. VMB sought VT 34.5 million damages from the Government, on a vicarious basis, for losses said to have accrued to VMB between January and September 2016 due to the non-registration of the lease.
9. VMB alleged that the Director of Lands had delayed the registration "...without any legal justification". VMB produced a series of correspondence in which the Director of Lands was urged to complete registration – to which no reply was received.
10. Registration of Lease 099 eventually occurred on 15 June 2017, but the date recorded in the Register was 9 December 2015.
11. The relief sought included an order pursuant to section 30 of the Land Leases Act [Cap 163] ("the Act") that registration of the lease occur within 14 days – although by the time the Claim was heard registration had already been effected.
12. In defence of the Claim, the delay in registration was said to be due to the fact that James Tura was not the declared custom owner of the land in question, and that there were other disputing parties claiming to be custom owners. There were proceedings on foot in the Santo/Malo Island Court relating to whom the custom



owners were, which proceedings remained undetermined until 2017. James Kura was then declared to be the custom owner of the lease in Land Case No. 12/1 of the Santo/Malo Island Court, which decision was later appealed.

13. In those circumstances, the defence maintained that registration by the Director prior to 15 November 2017 was inappropriate and relied on section 8(c) of the Act.
14. The defence contended there was no liability for any award of damages, and also challenged the quantum sought.

C. The Decision

15. The primary judge accepted that Lease 099 was registered as at 9 December 2015, the day the documents had been lodged with the Ministry of Lands for that purpose. Accordingly he rejected that Lease 099 had not been registered until 15 June 2017.
16. The primary judge further found that the delay in registration was only a period of 2 years 3 months – from 17 September 2013 to 9 December 2015.
17. Further, that as the lease had been registered on 9 December 2015, the period in which any loss was said to have occurred due to non-registration can only have occurred prior to registration. The Claim was for loss occasioned between January and September 2016.
18. Accordingly, the primary judge dismissed the Claim as being misconceived and ordered VMB to pay costs.

D. Grounds of Appeal

19. Firstly, it was submitted that the primary judge had insufficient regard to the fact that the parties were negotiating settlement of the Claim. It was submitted that, in those circumstances, it was not open to the primary judge to find the Claim misconceived.
20. Secondly, it was submitted that the primary judge had failed to understand the case and had not given full consideration to the evidence. The delay in registration attracted particular submissions, with counsel advocating that the Director was obliged to register once the completed paperwork had been formally lodged for registration. The authority cited to support that proposition was *Green Peak Limited v Republic of Vanuatu* [2015] VUCA 5 where the Court of Appeal opined the Director



was "...duty-bound to register...without hesitation" once all the necessary information had become available.

21. The submission was advanced that the refusal to register by the Director was "without legal basis" as the justification pleaded by the Director for not registering did not provide lawful authority for the Director to so act. Emphasis was placed on the interpretation of section 8(c) of the Act:

"(c) he [the Director] may refuse to proceed with any registration if any instrument, or other document, or plan, information, or explanation required to be produced or given is withheld or any act required to be performed under this Act is not performed;"

22. It was submitted that all required information and documents had been supplied by VMB to the Director. Ergo he had no lawful ability to decline to register.
23. Thirdly, the submission that the Director's actions had been unreasonable was aided by his lack of response to queries and by reference to the fact that two other transactions involving land in the same (contested) area were registered by the Director; namely, the registration of Lease 001 on 21 September 2012, and the transfer of Lease 096 on 2 October 2015.
24. Lastly, it was submitted that by submitting the claim for damages was excessive and proposing a lesser figure, that amounted to an admission of liability.

E. Discussion

25. We see no merit in the first or fourth grounds. Parties are free to enter into negotiations for any number of reasons, not all of which indicate an acceptance of any liability. To challenge quantum by pointing out a basic arithmetical error which must reduce the claim cannot be seen to amount to an admission of liability.
26. We are of the view that the evidence of having "lodged" Lease 099 for registration in 2013 cannot be correct. We consider it more likely than not that it was formally lodged on 9 December 2015.
27. There is clear evidence to show that:

- the Minister of Lands only signed his consent to the transfer of Lease 099 from James Tura to VMB on 26 November 2015 – this was a pre-requisite to registration;



- Stamp Duty of VT 79,100 was only paid on 3 or 8 December 2015 – also a pre-requisite to registration; and
- Mr Gambetta, the then Director of Lands, provided evidence to the effect that the application to register the lease was not actually lodged with the Department of Lands until 9 December 2015.

28. The Director's defence required to be considered in light of the then current legislation. The Land Leases (Amendment) Act No. 35 of 2014 had come into force on 27 February 2015, which appears to have been overlooked by counsel. As can be seen this has the effect of imposing different obligations on the Director:

"8. ...

(c) he or she **must refuse** to proceed with any registration if:

- (i) an instrument, document, plan, information or explanation required to be produced or given is withheld; or
- (ii) an act required to be performed under this Act is not performed; or
- (iii) he or she is in **possession of an information which he or she reasonably believes would, if the instrument were to be registered, result in the rectification of the register** under section 99 or 100;" (emphasis added)

29. The fact that until 2017 there was no formal declaration of custom ownership in relation to the land incorporating Lease 099, with several competing claimants, should be seen as not only justification for the Director not registering prior to that date, but imposing a mandatory duty on the Director to have refrained from doing so.

30. We consider the Director to have acted both reasonably and properly in accordance with the law in not registering Lease 099 until 2017.

31. We would further point out that the evidence of a valid cause of action on the part of VMB against the Director was wanting.

F. Result

32. We respectfully agree with the primary judge's conclusions that this Claim was misconceived, although for different reasons.



33. This appeal is accordingly dismissed. Costs are to follow the event. We fix them at VT 75,000, to be paid within 21 days.

34. We wish to address two further matters:

- It is difficult to understand why the Director was unwilling/unable to reply to perfectly reasonable correspondence seeking an explanation as to why registration was delayed or not effected. We consider that to not only be highly impolite, but also a derogation of the Director's obligations; and we trust that there will be no repetition of such behaviour.
- Lease 099 was registered on 15 June 2017. There is no provision in the Act that enables back-dating. Lease 099 must be forthwith rectified to accurately and correctly record the date it was registered. The back-dating which occurred in this case was material because it misled the primary judge into thinking that Lease 099 had been registered on 9 December 2015 when that was incorrect.

Dated at Port Vila this 20th day of February 2020

BY THE COURT

Chief Justice V. Lunabek

