

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

(30)

Civil Case No. 70 of 2007

**BETWEEN: IRIRIKI ISLAND HOLDINGS  
LIMITED**

Claimant

**AND: ASCENSION LIMITED**

Defendant

**Coram:** Justice C.N. Tuohy

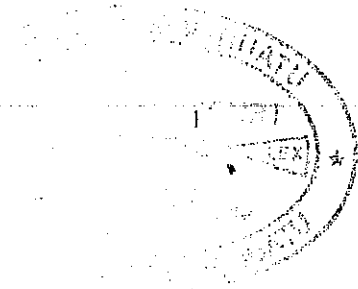
**Counsels:** Mr. Ozols for Claimant  
Mr. Sugden for Defendant

**Date of Ruling:** 30 May 2007

**Date of Decision:** 31 May 2007

**RULING**

1. The Claimant has applied for interim relief pending final determination of this proceeding. The primary order sought is that the Defendant be restrained "*from interfering in the Claimant's rights of access and carriage way and other rights previously used by the Claimant*".
2. The Claimant operates a resort on Iririki Island. Access to the island for its guests, employees and suppliers is by way of a ferry from Port Vila. The ferry terminal on the mainland is situated on "the Mainland Title" and people using the ferry as access to and from Port Vila must cross the Mainland Title in order to reach the road and the town.



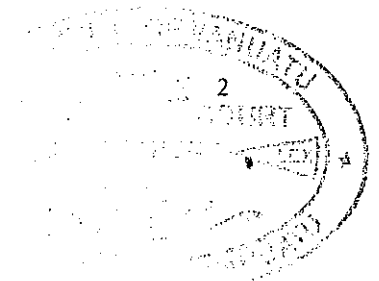
3. Prior to 2001 a company now known as Resorts Limited owned the Iririki Resort on the island and the Mainland Title. In 2001 it sold the Iririki Resort to Andrew Spinks but retained ownership of the Mainland Title. Included in the contract for sale was clause 4.4 which is at the heart of this proceeding. It is set out below:

Clause 4.4:

**4.4 Access**

*The Vendor is the registered proprietor of the Mainland Title as defined herein which Title is not included in the Total Assets sold to the Purchaser pursuant to this contract. Nevertheless, the Vendor acknowledges the critical importance to any operator of the Business of a right of carriage and access through the Mainland Title for the purpose of access by guests of the Business to and from Iririki Island and the delivery of supplies and other items used in the Business.*

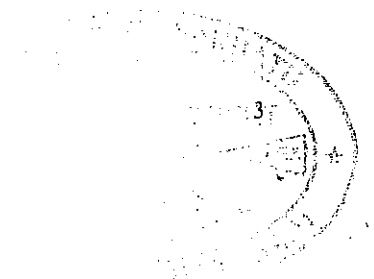
*The Vendor undertakes and agrees that it is an important pre-condition to the Purchaser's willingness to complete the purchase of the Business and the total Assets, that its continued rights of carriage and access over the Mainland Title are maintained, not withstanding any subsequent sale or development of the Mainland Title, at a minimum, so as to ensure:*



- a) *continued adequate access for buses and motor vehicles to drop off and pick up guests at and from what is currently known as the Iririki Wharf*
- b) *reasonable signage space available to the Purchaser as agreed*
- c) *continued adequate access to permit delivery to the Iririki Wharf of all supplies to the Business and including but not limited to all fuel and gas requirements of the Business*

*provided that all or any cost of utilities in provision of such access and space shall be met by the Purchaser on a pro rata basis in accordance with their general use.*

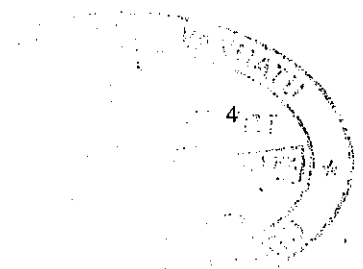
*The Vendor covenants and undertakes to accommodate and in due course once any development plans for the Mainland Title are finalised which provide for a fixed and permanent right of carriage for the Purchaser and if deemed necessary by the parties to better secure the position for both taking into account the intent of this Clause, document by way of easement such minimum requirements of the Purchaser and in furtherance thereof the Vendor acknowledges that the Purchaser may lodge a Caution over the Mainland Title to protect the benefit of such right of carriage over the Mainland Title and the rights granted to it under this Clause and the Vendor further undertakes to grant to the Purchaser a right-of-first*



*refusal in respect of any proposed sale of the Mainland Title, such that the Purchaser shall be entitled to match any offer made for the purchase of the Mainland Title and to proceed to the acquisition of the Mainland Title on terms no less favourable than those offered to the Vendor by any such party purchaser.*

*The responsibility and cost for the upkeep of the access area is entirely the Purchasers obligation save and except where the Vendor alters the agreed access route at which time the Vendor is responsible for ensuring prior to any development that the new access is both of a size for Direct Vehicle access and constructed to the same standard currently maintained at that time by the Purchasers.*

4. Title to the Iririki Island Resort was taken by the Claimant. Mr. Spinks, who is now deceased, was a principal of the Claimant. A caution was registered in Mr. Spink's personal name against the Mainland Title to protect the interest given by Clause 4.4.
5. In 2005 the Defendant purchased the Mainland Title. After the purchase was settled, Mr. Spink's caution was removed by the Director of Land Records pursuant to section 97 (3) of the Land Leases Act. The Defendant then became registered proprietor of the Mainland Title unencumbered by any relevant easement or interest in favour of the Claimant.
6. Subsequently, there have been protracted negotiations between the parties regarding access over the Mainland Title



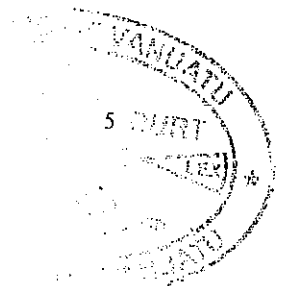
to the resort but these have not produced a resolution. The position has now been reached where the Defendant has prevented access across the Mainland Title and the Claimant's guests are accessing the ferry through the lobby of the adjoining Sebel Hotel, which has some common ownership relationship with the Claimant. However, the Claimant is on notice from the owners of the Sebel Hotel that any such access is on sufferance and will not be permitted to continue much longer as the Sebel Hotel is itself almost ready to receive guests.

### THE LAW

7. The proper approach to an application for interim orders in the nature of an injunction was laid down by the House of Lords in **American Cyanamid Co v Ethicon Limited** [1975] AC 396. There are two broad questions which provide the accepted framework:
- i) whether there is a serious question to be tried
  - ii) where the balance of convenience lies.

The balance of convenience can have a very wide ambit but includes factors such as whether damages would be a satisfactory remedy and the status quo. At the end however, the Court must consider in light of those factors where the overall justice of the case lies.

8. It is clear from the **American Cyanamid** case itself that establishing that there is a serious question to be tried is not the same as establishing that there is "*a probability*" "*a prima facie case*" or "*a strong prima facie case*". It is rather a threshold question about which the Court must first be



satisfied. Nevertheless, it is not sufficient for an applicant to merely submit that there is a tenable cause of action from a legal point of view and a conflict of evidence on the facts.

### DISCUSSION

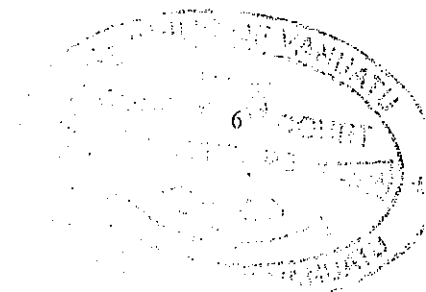
9. The first issue is whether there is a serious question to be tried. This requires examination of the nature of the claim and the evidence in support of it. The basis of the claim both as pleaded and as argued on this application is clear and discrete. It is founded upon section 17 (g) of the Land Leases Act, which provides:

#### **OVERRIDING INTERESTS**

17. *Unless the contrary is expressed in the register, the proprietor of a registered lease shall hold such lease subject to such of the following overriding liabilities, rights and interests as may, for the time being, subsist and affect the same, without their being noted on the register-.....*

- g) *the rights of a person in actual occupation of land save where enquiry is made of such person and the rights are not disclosed;*

10. Section 17 must be read in conjunction with sections 15 and 16, which are also set out. These sections are at the heart of the indefeasibility of registered title which is the primary feature and object of a Torrens system of land registration such as that established in Vanuatu by the Land Leases Act.



## **RIGHTS OF PROPRIETOR**

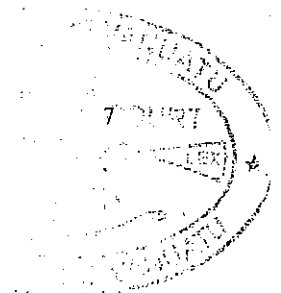
15. *The rights of a proprietor of a registered interest, whether acquired on first registration or subsequently for valuable consideration or by an order of the Court shall be rights not liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all rights, privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-*

- a) *to the encumbrances and to the conditions and restrictions shown in the register;*
- b) *unless the contrary is expressed in the register, to such of the liabilities, rights and interests as are declared by this Act not to require registration and are subsisting;*

*Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as trustee.*

## **VOLUNTARY TRANSFER**

16. *Every proprietor who has acquired a registered interest by transfer without valuable consideration, shall hold it subject to any unregistered rights or interests subject to which the transferor held it and subject also to the provisions of any law relating to bankruptcy or the winding up of companies, but save as aforesaid, such transfer shall in all respects have the same effect as a transfer for valuable consideration.*



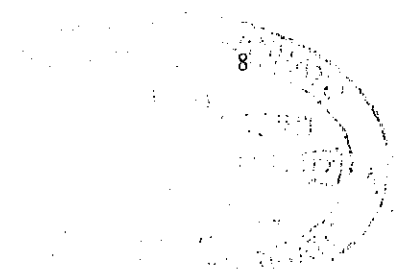
11. It is important to note that the Claimant does not plead or argue that the Defendant's title is subject to an unregistered interest in favour of the Claimant by virtue of fraud by the Defendant in the sense of knowledge of the Claimant's interest prior to purchase or registration. The Land Leases Act does not contain provisions excepting from indefeasibility the registered title of persons who acquired it by fraud in the sense of knowledge of a prior unregistered interest analogous to Sections 62 and 181 of the Land Transfer Act (New Zealand) or Sections 68 and 134 of the Transfer of Land Act (Western Australia).

12. Those latter provisions were discussed in two cases referred to in the argument, **Bunt v Hallinan** [1985] NZLR 450 and **Bahr and Another v Nicolay and others** (unreported High court of Australia – BC8802595 15 April 1988). In the Land Leases Act of Vanuatu, fraud and knowledge affecting the title of a registered proprietor are referred to only in Section 100 which gives the Court power to rectify the register. In this case there is no application under Section 100 for rectification of the register, a point specifically acknowledged by Mr. Ozols.

13. In my view, in order to rely upon section 17 (g) a person must show:

- a) that he has a right of occupation of the land;
- b) that he is actually occupying the land pursuant to that right

That is clear both from a reading of the words themselves and from the decision of the Court of Appeal in **William and Ors v William and AFC (Vanuatu) (Limited)** CAC 21 of





2004 4 November 2004. In that case the Court said (at page 14):

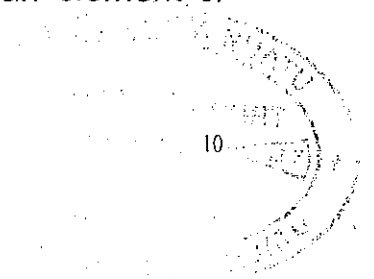
*"Section 17 (g) operates in respect of "rights", that is rights recognised by the law of Vanuatu. A person in actual occupation who is a trespasser will have no "rights" which are protected by the provision."*

It follows that the right relied upon must be a right of occupation rather than some other right in respect of the land.

14. Here the Claimant argues that it has a right of occupation because clause 4.4 permits it to "occupy" the land in the sense that it has been using it viz. as access between the road and the ferry for guests, employees and suppliers, by constructing a shelter for passengers, by erecting signs and by parking vehicles on the land.
15. Clause 4.4 describes the rights which it protects as *"rights of carriage and access over the Mainland Title"*. These are then more specifically described as *"at a minimum"* rights which will ensure:
  - a) *"continued adequate access for buses and motor vehicles to drop off and pick up guests at and from what is currently known as the Iririki Wharf.*
  - b) *Reasonable signage space available to the Purchaser as agreed*
  - c) *Continued adequate access to permit delivery to the Iririki Wharf of all supplies to the Business and including but not limited to all fuel and gas requirements of the Business".*

Further on in the clause, provision is made for a grant of a more formal document "*by way of easement*" which will provide for "*a fixed and permanent right of carriage for the purchaser*".

16. In my view there is a clear distinction between a right of occupation and a right of way or an easement in respect of land. A right of occupation is a right to physically reside on or enjoy the use of the land on a continuous basis. A right of way or an easement however, is a different thing. It is a right of passage through the land not a right to remain on it continuously and to do on it whatever one is lawfully able to do on land. An occupant can maintain an action for trespass against someone who disturbs that occupation. The grantee of a right of way or an easement cannot bring an action for trespass but only a claim in nuisance for substantial interference with its rights. This difference is an indication of the distinction which the law maintains between them.
17. Further, it is clear from section 17 itself that a distinction is drawn between rights of way and easements as set out in section 17 (a) and rights of persons in actual occupation as set out in section 17 (g). It is clear from section 17 (a) that rights of way and easements are only protected by section 17 if they existed at the time of first registration. It follows that they are not protected by section 17 if they were created afterwards, as these ones were.
18. My view on this point is a clear one. Clause 4.4 does not give a right of occupation to the Claimant, it gives a right of way or easement. Whether or not there is an element of



actual occupation by virtue of the erection of a shelter or the parking of vehicles, such actual occupation is either pursuant to a right of way or easement or is taking place outside the limits of clause 4.4 and therefore, not pursuant to any right.

19. The signage right might be in a different category if there was an independent right to erect signs. That would be a licence not capable of registration which might fall within section 15 (b) and possibly continue to affect the Mainland Title depending on whether or not section 72 (2) applied. However, it is clear that the right to signage space given in clause 4.4 is for the purposes of the right of way and ancillary to it, so part of it.
20. I therefore conclude that there is no serious question to be tried in this case.
21. However, in deference to the evidence and submissions and because of the possibility that the Claimant may wish to appeal this ruling, I will express briefly my views on the balance of convenience.
22. My view is that they fall heavily on the side of the Claimant. It's resort is on an island in the harbour and it cannot operate without proper access to Port Vila. In the absence of an injunction, the evidence discloses that its choices are practically limited to purchasing access from someone else at a very expensive price or disembarking its guests much further away from the island at the other end of the main harbour front or at the main wharf.

23. As I said during the course of the hearing, I consider that the insistence of the Defendant that the Claimant can continue to take its guests through the Sebel Hotel is misconceived. The ownership of the Sebel Hotel and the ownership of the Claimant are not the same, even if there is an element of common ownership. Even if the ownership was exactly the same they are different companies which at any time could be separately disposed of. Neither the Court nor the Claimant has any power to require the owners of the Sebel Hotel to give access to the Claimant's guests through the hotel's lobby. One can entirely understand the resistance of the owners of the Sebel Hotel to continuation of that course of action.
24. As far as the main wharf or harbour front near Rossi's are concerned, while both may be physically possible, they are both more exposed than the existing ferry terminal and would require a far lengthier voyage for guests. Having to use either for any length of time would materially damage the resort's business.
25. On the other hand, I accept that the granting of interim orders would cause financial loss to the Defendant. The land at the present time is bare land but the Defendant could develop it at any time. The existence of an injunction even if it only applied to part of the land, would in practical terms prevent the development of the whole land because the Defendant would not know how much land was permanently available to it for development until the substantive trial. Such delay in development would come at a cost.

26. However, the Claimant has given a full and proper undertaking as to damages and there is no suggestion that the Claimant would be unable to meet its undertaking if called upon. In other words, if an injunction was granted to the Claimant and it did not ultimately establish its claim, the Defendant could be reimbursed in money for any losses suffered by it but the same is by no means true in reverse.
27. Finally I wish to refer to the claim of counsel for the Defendant that the Claimant is separately disentitled to interim relief because it has not made full and frank disclosure or even has deliberately attempted to mislead the Court. The duty to make full and frank disclosure arises if an ex parte order is sought. That is not the case here.
28. The allegation that the Claimant (and necessarily its counsel) has attempted to deliberately mislead the Court is a very serious one and ought not to be made lightly. In this case, the Defendant's counsel asks the Court to reach that conclusion by inference because of the omission of a part of clause 4.4 from the statement of claim, the omission of it entirely from the sworn statements initially filed and related circumstances. I do not draw any such conclusion. One of the inferences which it would be necessary to draw in order to reach the conclusion that there had been a deliberate attempt to mislead, is that the Claimant and its counsel believed Defendant's counsel and the Court would not realise there had been such omissions, even though, it is evident from a careful reading of the claim itself that the whole of the clause was not reproduced.

29. It is a very serious thing to make such an allegation against a fellow officer of the Court. I reject it. In my view it has been made because counsel for the Defendant has become too close to the action, indeed, according to the sworn statements, even part of the action. It may be that in a case like this the roles of a solicitor and a barrister ought to be separated so that the necessary degree of objectivity is maintained by the person having the latter role.
30. The application for interim orders is refused. The proceeding will be adjourned to a conference at 3 pm on 13 July 2007.
31. Costs are reserved.

**Dated AT PORT VILA on 31 May 2007**

**BY THE COURT**

  
**C. N. TUOHY**  
Judge

