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

Civil Case No. 44 of 2007

BETWEEN: SIMEON ATHY
Claimant

AND: WATSON CHARLIE MALA
First Defendant

AND: THE MINISTER OF LANDS
Second Defendant

AND: THE DIRECTOR OF LAND RECORDS
Third Defendant

AND: TEOUMA HOLDINGS LIMITED
Fourth Defendant

Coram: ***Justice D. V. Fatiaki***

Counsels: *Mr. E. Nalyal for the Claimant*
Ms. Jennifer La'au for the First Defendant
Mr. A. Obed for the Second and Third Defendants
Mr. R. Sugden for the Fourth Defendant

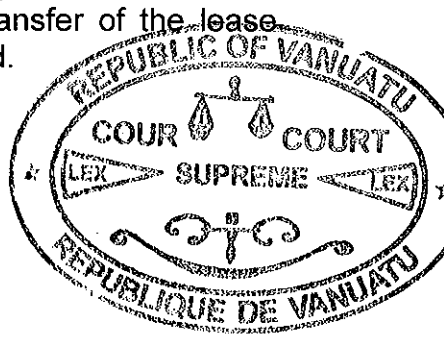
Date of Decision: *16 November 2010*

DECISION

In the substantive claim the Claimant challenges the validity of a leasehold title **No. 12/0411/003** which originally belonged to the First Defendant and was subsequently transferred to the Fourth Defendant Company. The claim is that the leasehold title is situated over land of which the custom ownership has, subsequent to the creation of the lease, been declared in favour of the Claimant's Tribe and the Claimant seeks an order cancelling the lease and its transfer, on the ground that the lease was prepared, consented to, registered and transferred as a result of fraud and mistake. The claim is denied by the First, Second and Third Defendants. The Fourth Defendant Company has yet to file its defence.

In the meantime the Claimant has filed an application for an injunction with a view to maintaining the status quo and preventing any further transfer of the lease and/or any developments being carried out on the subject land.

The following is a brief chronology of the proceedings so far:



15/03/2006 – S.8 Law Reform Lease registered in favour of First Defendant from Minister of Lands; (Lease No. 12/0411/003);

17/07/2006 – **Emmau/Takara Land Tribunal** determination in favour of Claimant's families concerning "*Takara*" land customary ownership and boundaries;

17/07/2006 – Notice of Appeal against Land Tribunal decision lodged.

02/03/2007 – **Lease No. 12/0411/003** transferred from First Defendant to Fourth Defendant Company;

11/04/2007 – Claim filed without naming Fourth Defendant Company;

02/09/2009 – Application to amend claim to include Fourth Defendant company with sworn statement in support;

23/12/2009 – Leave granted to amend claim to include Fourth Defendant company;

04/01/2010 – Amended claim filed;

11/02/2010 – Second and Third Defendant's joint defence filed;

12/02/2010 – First Defendant's defence filed;

23/02/2010 – Claimant filed injunction application with supporting sworn statement;

12/04/2010 – Fourth Defendant filed opposition to injunction application with no sworn statement in support;

22/04/2010 – Fourth Defendant Company changed its solicitors;

03/05/2010 – Claimant files undertaking as to damages;

04/05/2010 – Fourth Defendants' application for further and better particulars;

25/06/2010 – After several failed attempts, the injunction application was finally argued.

I am grateful to counsels for the Claimant and the Fourth Defendant Company for their helpful submissions on this opposed interlocutory application.

At the hearing of the application Claimant's counsel frankly admitted that the application was brought as a "*preventive measure*" to maintain the status quo pending the outcome of an appeal lodged against the Claimant's custom ownership declaration *inter alia* over the leased land. Counsel also accepted that the sworn statement filed in support of the application did **not** provide any

evidence to support or suggest that attempts were being made by the Fourth Defendant Company to sell or dispose of the disputed leasehold title. However counsel's urgent letter dated 11 May 2010 seeking a hearing of the application contains the following somewhat revealing statement:

> *"We advise that our clients' have advised us by telephone this morning that the lease, the subject of this proceeding is likely to be sold anytime by Teouma Holding Limited. If the company sold the lease, that would defeat out clients' interest and the purpose of this proceeding as our client do not have any protection, in law, at the moment."*

Be that as it may, counsel maintains however that as the Fourth Defendant's transfer is being impugned in the substantive claim that is sufficient to sustain the grant of the injunction sought. In this regard **paragraph 12** of the amended claim avers:

> *"The Fourth Defendant obtained the Lease transfer by fraud and/or mistake for the purpose of section 100 of the (Land Leases) Act*
>
> *Particulars*
>
> *a) The Fourth Defendant paid a bribe to the Minister of Land to give consent to the Lease transfer.*
>
> *b) The Fourth Defendant paid a bribe to the First Defendant to obtain the Leave in the first place."*

On any view, these are serious allegations against the First and Fourth Defendants and can only be properly and fully determined at a trial. Is that enough to support the grant of an injunction?

Defence counsels' written response is that:

> *"Particular 12 (b) is not a fact which if proved, constitutes fraud or mistake. There is an allegation that the respondent "bribed" the First Defendant to obtain his own lease.*
>
> *Firstly the word "bribe" is incorrect used in this context. Secondly fraud consists of receiving something to benefit oneself or someone other than the person being "defrauded".*
>
> *It cannot be fraud to give someone money to obtain his own lease," and*
>
> *"Further there is nothing in the sworn statement evidencing anything that could be construed as bribery or fraud. The application shows no arguable case against the Fourth Defendant," and finally*

In the sworn statements there is no interest that would be adversely affected by the Fourth Defendant being able to deal with the land whereas clearly the injunction would gravely affect the Fourth Defendant would gravely affect the fourth defendant."

In brief counsel submits that the Claimant's application does **not** disclose that there is an arguable question raised by the evidence in support of it and, even if the First Defendant's lease is successfully impugned, that does **not** affect the Fourth Defendant's transfer unless the evidence discloses that the Fourth Defendant was involved or concerned in the fraudulent obtaining or issuance of the first defendants' lease. In this regard counsel forcefully submits there is *"...not a skerrick of evidence to support the assertion* [in paragraph 12 (b) of the claim]."

Before leaving defence counsel's submission I make 2 observations. **Firstly**, the submissions on **particular 12 (b)** are somewhat pedantic and misconceived. It is **not** the Fourth Defendants' lease but rather the First Defendants' lease which was the lease obtained *"in the first place."* Whatsmore, if the First Defendants' lease is successfully impugned and the Claimant is able to establish **particular 12 (b)** then the Fourth Defendants' lease would be rectifiable in terms of section 100 (2) of the Land Leases Act [cap 163]. **Secondly** the suggestion that the balance of convenience and prejudice is entirely in the Fourth Defendants' favour blithely ignores the fact that the claim, at present, seeks rectification by cancelling not only the First Defendant's lease, but also, its subsequent transfer to the Fourth Defendant **i.e.** two registered transactions concerning a part of the land of which the Claimant is a declared customary owner and occupier of the leased land. Needless to say in the absence of an injunction the challenged lease could continue to be transferred and thereby pass through many more hands thus making the Claimant's task of recovering his customary land more difficult and costly, even, impossible.

Defence counsel also relied on the leading case of **American Cyanamid Co v. Ethicon** [1975] ALL ER 504 to submit that the arguable or triable question in the case must be supported by the evidence in a sworn statement and NOT merely raised by the Claimant s' pleadings. I cannot agree.

In **Iririki Island Holding Ltd v. Accession Ltd**. [2007] VUSC 74 Tuohy J had occasion to consider the **American Cyanamid** decision and said:

*"The proper approach to an application for an interim order 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.

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."*

In the present application although the sworn statement filed in support does not provide details or particulars of the "*bribe*" allegedly given by the Fourth Defendant Company to the Minister for Lands or to the First Defendant there can be no doubting the fraudulent nature and culpable meaning of the word whatever the actual form of the bribe might be. I note also that the Fourth Defendant has not filed a defence to the substantive claim **or** a sworn statement opposing the application.

In the present case there is **not** the slightest doubt in my mind that the relevant "*status quo*" is that the Claimant has been declared a customary owner of the land of which the Fourth Defendant's transfer forms a part. I am also satisfied that damages would **not** be an adequate remedy for the Claimant who has a traditional customary tribal and personal connection to the land. On the other hand the Fourth Defendant's interest in the land is purely commercial and economic and therefore in my view, damages would be an adequate remedy for any losses that might be caused to the Fourth Defendant by the injunction.

Furthermore in the **American Cyanamid** case which itself was a "*qui timet*" action against Ethicon for an injunction to restrain the threatened (not actual) infringement of the (applicant's) patent", Lord Dylock delivering the judgment of the House of Lords and rejecting a supposed rule that the Court is not entitled to take any account of the balance of convenience unless it has first been satisfied that if the case went to trial upon no other evidence than is before the Court at the hearing of the application the plaintiff would be entitled to judgment for a permanent injunction, said:

"Your lordship should in my view take this opportunity of declaring that there is no such rule. The use of expressions such as ..... 'a prime facie case', 'or a strong prima facie case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The Court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried.

It is no part of the Court's function at this stage..... to try to resolve conflicts of evidence on affidavits as to the facts on which the claim of either party may ultimately depend nor to decide difficult questions of law..... these are matters to be dealt with at the trial."

Is there then a serious question to be tried in the claim for rectification? To answer the question I have examined the Claimant's original and amended claims and the sworn statements of Simeon Athy and Chief Sam Marpakoa.

I note that the original claim against the first 3 named defendants is based upon a claim that the original lease to the First Defendant was granted by the Minister of Lands without consultation and without the consent or approval of the disputing custom land owners as is '*the usual practice*' and secondly, the land area within the lease title had been occupied by the Claimant s' family and others for more than 20 years and was being used for gardening and had mature fruit trees including coconut trees that had been planted on it. This it is claimed would be well known to the First Defendant and anyone else who cared to enquire. (See: **section 17(g)** of **the Land Lease Act** [cap 163].

The amended claim which brought the Fourth Defendant into the proceedings alleged that the Fourth Defendant had "*bribed*" both the First Defendant as well as the Minister of Lands, not only for the First Defendant to obtain the lease but also for the Minister to grant his consent to the transfer of the lease to the Fourth Defendant. There is also a claim that cautions that were lodged by the Claimant and a neighboring resort owner after the First Defendant's lease was granted, were removed under "*suspicion circumstances*" in order to facilitate the transfer of the lease to the Fourth Defendant.

From the foregoing I am satisfied that the claim raises several serious legal and factual questions worthy to be tried including whether or not the Minister of Lands had property and correctly exercised his powers under the **Law Reform Act**? **and** whether or not the grant of the lease to the First Defendant and its subsequent transfer to the Fourth Defendant is tainted by fraud and/or mistake.

I turn next to consider the '*balance of convenience*' and, as already stated, I am satisfied that it strongly favors the Claimant.

The application is accordingly granted in the terms sought, as follows:

1. Until further order of this Court, Teouma Holding Limited, its agents or representatives is restrained from dealing with **Lease Title No. 12/0411/003** in any way whatsoever, including transferring the Lease to a third party, subdividing the Lease Land or mortgaging the said Lease Land;

2. An order that the Director Of Lands be restrained from registering any dealing in relation to Lease Title **12/0411/003** until further order of this Court;

3. An order restraining the Fourth Defendant its servants and agents from carrying out any improvements or developments including clearing the land, erecting any house(s) or other structures, on **Lease Title 12/0411/003** until further order of the Court;

4. Costs against the Fourth Defendant to be taxed if not agreed.

5. For the sake of completeness I refuse the Fourth Defendant's application for further and better particulars on the basis that the application is more in the nature of interrogatories seeking evidence.

DATED at Port Vila, this 16th day of November, 2010.

BY THE COURT

D. V. FATIAKI
Judge.

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