

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

Civil Case No. 104 of 2012

BETWEEN: ROBERT SUGDEN
Claimant

AND: THE DIRECTOR OF LAND RECORDS
Defendant

AND: CHRISTIANE BRUNET
Interested Party

Coram: Justice D. V. Fatiaki

Counsels: Mr. R. Sugden for the Claimant
Mr. K. Nathan for the Defendant
Mr. E. Nalyal for the Interested Party

Date of Judgment: 4 July 2014

JUDGMENT

1. This application for judicial review was originally registered as Judicial Review No. 16 of 2012 but was later changed to Civil Case No. 104 of 2012 for reasons that remain unclear.
2. The claim for judicial review was filed on 25 June 2012 and concerns a decision of the Director of Lands cancelling a registered lease title No. 11/OC22/009 removing it from the register of land leases on 6 September 2011 (ie: 10 months earlier). The claimant also filed an application for extension of time to bring the claim for judicial review. Both the claim and the application are supported by sworn statements deposited by the claimant.
3. The claim is opposed in a defence filed on 8 November 2012 and supported by a sworn statement of the defendant filed on 5 February 2013.
4. Also closely associated with this claim are two (2) other civil actions pending before the Supreme Court, namely, Civil Case No. 168 of 2010 filed on 21 October 2011 in which Hudson & Co. is suing Ascension



Limited, Wellington Lodge Holdings, and the Director of Lands seeking amongst other relief:

"A Declaration that the cancellation of registered lease 11/OC22/009 by (the Director of Lands) on 6 September 2011 is invalid".

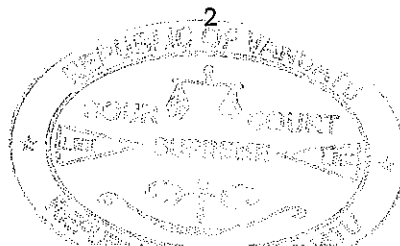
(*cf.* with the quashing orders sought under the present judicial review claim).

5. The second action Civil Case No. 230 of 2011 was commenced by Christiane Brunet on 9 December 2011 by way of an urgent application for an injunction which was granted by **Aru J.** restraining the Government of the Republic of Vanuatu:

"from dealing with lease title 11/OC22/009 and/or 11/OC22/054 comprising land situated next to the Grand Hotel and commonly known as Iririki Landing ("the leases") in any way whatsoever, including but not limited to, disposing of the lease or selling the leases to any party".

6. For a better understanding of the claim I gratefully adopt defence counsel's chronology of events with additions requested by counsels for the claimant and for the interested party and others that I consider necessary:

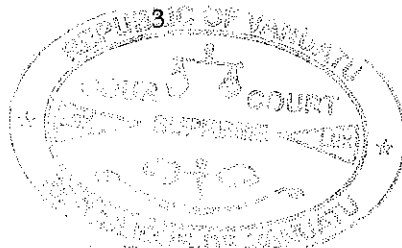
- 23 December 1986 – Commercial Lease Title **11/OC22/009** ("*the Lease*") was registered between L'Office De Gestion Foncière Urbaine De Port Vila as Lessor and Ballande Vanuatu as the Lessee;
- 29 June 1989 – Transfer of the Lease from Ballande Vanuatu to Iririki Island Resort was entered on the land leases register in respect of that lease;
- 20 June 2005 – Ascension Limited was incorporated;
- 3 January 2007 – Transfer of the Lease from Iririki Island Resort to Ascension Limited was entered on the land leases register;
- 1 August 2007 – Registration of a caution lodged by Wellington Lodge Holdings Limited ("*WLH*") against the Lease ("*the WLH caution*");
- 26 November 2007 – A mortgage was executed over the Lease in the sum of \$AUD292,588.58 with Ascension Limited as



"mortgagor" and WLH as the "mortgagee" ("the WLH mortgage");

- 21 December 2007 – Hudson and Co., Lawyers on behalf of WLH lodged an application for registration of a deed of mortgage for the Lease;
- 28 December 2007 – A caution was lodged against the Lease by Pierre and Christiane Brunet ("*the Brunet caution*") which was subsequently registered on 5 June 2009;
- 17 June 2008 – The Minister of Lands consented to the registration of a mortgage in favour of WLH on the Lease;
- 14 July 2008 – The WLH mortgage was registered on the Lease;
– The Director of Land Records registered the withdrawal of the WLH Caution.
- 2 May 2008 – A Caution was lodged by Jennifer Ruth Copperwaite ("*the Copperwaite caution*") against the Lease which was subsequently registered on 5 September 2008;
- 20 April 2010 – Ascension Limited was struck off the register of companies pursuant to section 335 of the Companies Act [CAP. 191];
- 21 June 2010 – Notice of the striking off was gazetted;
- 1 October 2010 – The claim in Civil Case No. 168 of 2010 was filed in the Supreme Court with Ascension Limited and WLH as defendants;
- 29 August 2011 – The defendant received a letter from "*De Roza Investment Group*" acting for Pierre and Christiane Brunet seeking *inter alia* cancellation of the Lease;
- 6 September 2011 – Cancellation of the Lease pursuant to section 7 of the Land Leases Act [CAP. 163] was registered;
- 20 October 2011 – The claimant obtained an injunction in Civil Case No. 168 of 2010 restraining the Director of Lands:

"... from registering any dealing that concerns, touches or affects the land comprised in leasehold title No. 11/OC22/009 except to remove the



cancellation registered on 6 September 2011 from the Register”;

- November 2011 – A new lease title No. 11/OC22/054 was issued in respect of the same land comprised in lease title No. 11/OC22/009 (“*the new lease title*”);
- 9 December 2011 – Christiane Brunet obtained an injunction in Civil Case No. 230 of 2011 restraining the Government of the Republic of Vanuatu from dealing with the land comprised in lease title Nos. 11/OC22/009 and 11/OC22/054;
- 19 April 2012 – A Deed of Assignment of the “*cause of action*” in Civil Case No. 168 of 2010 was executed between David Hudson of Hudson & Co. and RE Sugden as assignee;
- 5 June 2012 – With the consent of defence counsels present (excluding counsel for Ascension Limited), the court ordered in Civil Case No. 168 of 2010:

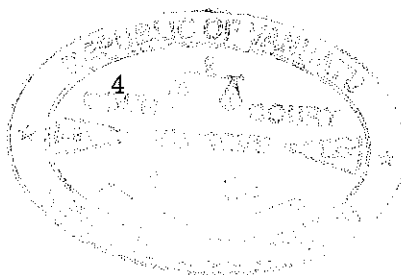
“... Ascension Limited is ordered restored to the register of companies”;

 - Ascension Limited was restored to the register of companies after being struck off for over 2 years;
- 25 June 2012 – Claimant filed Supreme Court claim in Judicial Review 16 of 2012 (subsequently renumbered Civil Case No. 104 of 2012);
- 14 February 2013 – Christiane Brunet applied to be joined as a party in Civil Case No. 104 of 2012;
- 19 September 2013 – Christiane Brunet’s joinder application was granted with the agreement of the claimant during the course of a Rule 17.8(3) hearing;

7. Rules 17.5 and 17.8 of the **Civil Procedure Rules** (“*CPR*”) provide:

“Time for filing claim

17.5 (1) *The claim must be made within 6 months of the enactment or the decision.*



- (2) *However, the court may extend the time for making a claim if it is satisfied that substantial justice requires it.*

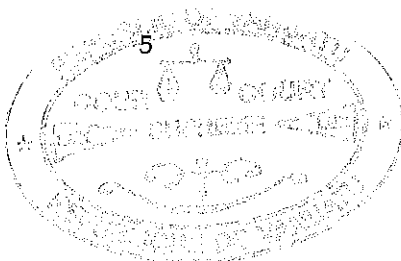
Court to be satisfied of claimant's case

- 17.8** (1) *As soon as practicable after the defence has been filed and served, the judge must call a conference.*
- (2) *At the conference, the judge must consider the matters in subrule (3).*
- (3) *The judge will not hear the claim unless he or she is satisfied that:*
- (a) *the claimant has an arguable case; and*
 - (b) *the claimant is directly affected by the enactment or decision; and*
 - (c) *there has been no undue delay in making the claim; and*
 - (d) *there is no other remedy that resolves the matter fully and directly.*
- (4) *To be satisfied, the judge may at the conference:*
- (a) *consider the papers filed in the proceeding; and*
 - (b) *hear argument from the parties.*
- (5) *If the judge is not satisfied about the matters in subrule (3), the judge must decline to hear the claim and strike it out."*

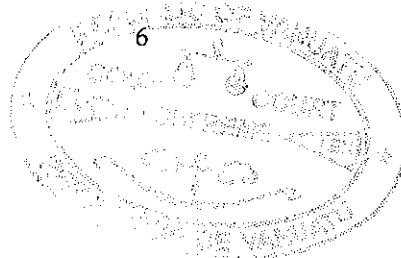
8. It may be immediately noted that the 6 month time limit in Rule 17.5 (1) does not preclude a judge from further considering delay at a later inter partes hearing under Rule 17.8(3). Furthermore the 4 matters in Rule 17.8(3) upon which a judge must be satisfied by the claimant who bears the burden, are conjunctive ("*and*"), so that, the failure to satisfy the judge on any one of the enumerated matters is sufficient to trigger the mandatory consequence in Rule 17.8(5).

9. As indicated to counsels at the last conference on 19 September 2013, I propose for convenience, to deal in this judgment with the 4 issues identified in the defendant's submission as follows:

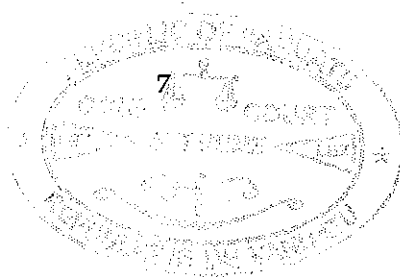
- (1) Whether the claimant has "*locus standi*" to file a Judicial Review claim against the defendant?
- (2) Whether the claimant is "*time-barred*" from filing the claim?



- (3) Whether the effect of striking off Ascension Limited from the register of companies resulted in an automatic cancellation of the lease which enables the defendant to exercise its powers under Section 7 of the Land Leases Act to cancel the lease's entry? and
- (4) Whether the holder of lease title 11/OC22/054 (the new lease title) has priority over the holder of lease title 11/OC22/009 (the old lease title)?
10. As to Issues (1) and (2) above, defence counsel conceded that it was "... *not pursuing the limitation issue ... and only maintaining the locus point*". I turn then to the "*locus*" issue which encompasses matters (a) and (b) which the Court must consider under rule 17.8(3) (above), namely, that the claimant is "*directly affected by the decision*" (not just affected) being challenged and the "*claimant has an arguable case*".
11. In this regard defence counsel submits that the land in dispute being a leasehold title, the claimant must establish a "*registerable interest*" in the lease title before he can claim any "*locus*" or assert an "*arguable case*" [see: Tawi v. Republic of Vanuatu (2012) VUCA 27]. Whatsmore the claimant, is a mere creditor of Ascension Limited and therefore cannot be said by any stretch, to be "*directly affected*" by the defendant's decision to cancel the lease title which belongs to Ascension Limited the registered proprietor.
12. The claimant in response submits that lease title No. 11/OC22/009 is the sole remaining asset of Ascension Limited against which company his former law firm (Hudson & Co.) has issued proceedings in Civil Case No. 168 of 2010 to recover a substantial sum of unpaid legal fees and costs (VT19,341,804) and which "*cause of action*" was subsequently assigned to him personally by Deed dated 19 April 2012.
13. Furthermore, in mid-2007 Hudson & Co. entered into a retainer with Wellington Lodge Holdings Pty Ltd. ("*WLH*") a registered mortgagee of the lease title and an acknowledged creditor of Ascension Limited. Under the mortgage WLH holds a power of attorney from Ascension Limited which enabled it to pursue a then existing defence and counterclaim on behalf of Ascension Limited in Civil Case No. 70 of 2007.
14. The WLH mortgage it is also asserted by the claimant, was stamped to secure the sum of AUD394,100.00 which includes an amount of AUD101,511.42 for Hudson & Co.'s unpaid legal fees owed by Ascension Limited.



15. If I may also say so, the claimant's assertion in his sworn statement to the effect that WLH's mortgage was: "... also to secure payment of the claimant's costs and that the mortgage was registered on 14 July 2008", is unfounded and incorrect.
16. The relevant Deed of Mortgage dated 26 November 2007 clearly recites in Clause 1 that the mortgage between Ascension Limited and WLH is given: "... in respect of money due and payable by Global Digital Transfers Inc ("DGT") ... (and secures) ... the amount of Australian Dollar Two Hundred and Ninety Two Thousand, Five Hundred and Eighty Eight and Fifty Eight cents (\$AUD292,588.58) ... due and payable by ("DGT") to WLH as at 2 February 2007 for consulting services provided by WLH".
17. Nowhere in the mortgage is there mention of a similar indebtedness between Ascension Limited and Hudson & Co. being secured by the mortgage nor is there any correspondence disclosed between them to indicate that such was the intention of Ascension Limited at the time of giving the mortgage or at any subsequent time. In short, this was a third party mortgage given by Ascension Limited to secure a debt owed by an associated company which was "due and payable" to WHL (see also: the definition of "The Debtor" in the mortgage document).
18. WLH's claim for consultation services was initially protected by a caution lodged against lease title 11/OC22/009 by Pacific Lawyers on 1 August 2007 which identified the nature of WLH's interest in the following relevant terms:
- (ii) *The claim or interest is composed of an interest in the said leased land under a Guarantee given by the registered proprietor (Ascension Limited) charging the land as security for the Guarantee and agreeing to lodge a mortgage if asked to do so for the purposes of Sections 91(1)(a) of the Land Leases Act [CAP. 163];*
- (iii) *Notice is further extended to the Department of Lands, Land Survey and Land Records ... that this caution remains until the registered proprietor (Ascension Limited) agree to lodge a mortgage if asked to do so for the purposes of Section 91(1)(a) of the Land Leases Act".*
19. On 14 July 2008 WLH's caution was removed when its mortgage was registered.

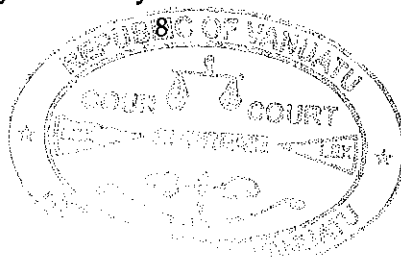


20. For completeness by Deed of Assignment dated 19 April 2012 Hudson & Co. assigned its "cause of action" in Civil Case No. 168 of 2010 to the claimant personally.
21. In that somewhat convoluted way the claimant asserts that he is "directly affected" by the defendant's decision to cancel the lease title No. 11/OC22/009 belonging to Ascension Limited.
22. I accept that the claimant could arguably be said to be interested in the cancellation of the lease title in so far as it effectively removed the sole remaining valuable asset against which any judgment debt established in Civil Case No. 168 of 2010 could be executed. But is that enough to say the claimant is "directly affected" by the cancellation as required by matter (b) of Rule 17.8(3)?
23. The decision of the Court of Appeal in the Tawi case earlier referred to is instructive where the Court of Appeal in rejecting the argument that a money or debt claim was an "interest in land" for the purposes of Section 93(1) of the Land Leases Act dealing with the lodgment of a caution said, (at para 16):

"... the genesis of the second respondent's claim in the Magistrate's Court is a straight forward money or debt claim. It was not a claim by the second respondent in respect of an "interest" as defined by the Act. At the time the caution was lodged there was no connection between the money which was alleged to be owing and a particular piece of land. That situation did not alter when Judgment was entered. The necessary connection still did not exist."

and later, in rejecting the argument that the issuance of an enforcement warrant against the debtor's land raised a sufficient interest to support the caution, the Court of Appeal said (at paras. 21 to 27):

- "21. They submit that once a warrant is issued identifying a land title and authorizing its sale then the warrant creates an interest in land in favour of the creditor and the attachment of the debt to the land by the warrant amounts to a cautionable interest under Section 93(1) a).*
- 22. Secondly, they submit that the definition of "interest" in relation to land is not exhaustive as it uses the word "inclusive" therefore it may include a warrant which clearly identifies the land in question and attaches the debt to the land which would amount to an interest capable of supporting a caution.*
- 23. Part 14 of the Civil Procedure Rules deals with the enforcement of Judgments and orders. Enforcement warrants issued under this part be they for money orders or for seizure and sale of real*



property are a means by which Judgments are enforced so that parties in whose favour a Judgment is delivered can enjoy the fruits of their Judgment.

24. *Enforcement warrants do not create any rights but empower enforcement officers to take certain steps to enforce or execute Judgments. It is the culmination of the Civil Procedure process and needs to be understood in the context of the Civil Procedure Rules as a whole.*
25. *Under the Land Leases Act an "interest" in relation to land is a defined term which includes a lease, sublease, mortgage, easement restrictive agreement and profit. Although the definition is not exhaustive there can be no denying that the identified interests have a direct and immediate relation to land.*
26. *In Ratua this Court made it very clear that Section 93 (1) (a) must be read as a whole with the rest of section 93 (1) and not in isolation when it said:-*

"This makes it clear that the interest which is claimed must be one which is transferable and registrable under the Act."

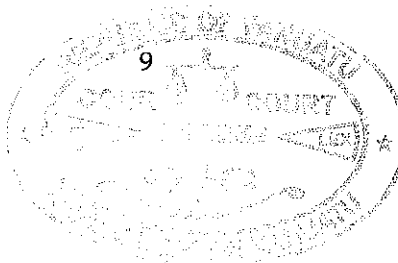
27. *Accordingly we are not satisfied that an enforcement warrant creates an "interest in land" sufficient to support a caution under section 93 (1) (a) of the Land Leases Act.*

24. In my respectful view by analogy, the observations of the Court of Appeal are entirely apposite and a complete answer to the claimant's claim to being "affected" by the Director's decision cancelling lease title No. 11/OC22/009.

25. Having said that, I accept that the present judicial review claim concerns the cancellation of lease title No. 11/OC22/009. I also accept the fact that Ascension Limited has been restored to the register of companies by a consent order dated 5th June 2012.

26. In this latter regard the Court of Appeal recently had occasion to consider the meaning and effect of an order restoring a company to the register of companies after its registration had been cancelled in Huang Kiao Ling v. Leong [2013] VUCA 15. The Court after referring to the provisions of Section 334, 335 and 336 of the Companies Act said (at paras. 11 to 15):

"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.
-
13. ... (not relevant)
14. We have no doubt that the provision in s 335 (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."
27. In light of the above the order restoring Ascension Limited to the register of companies triggered the automatic consequence of Section 335(4) in that the company "... is deemed to have had the pre striking-off assets that it had before it was struck off" namely, lease title No. 11/OC22/009.
28. In the circumstances, the utility of the present claim might be considered academic.
29. Be that as it may defence counsel submits it is Ascension Limited that is "directly affected" by the cancellation decision not the claimant whose interest in obtaining the re-instatement of the cancelled lease is even more remote and indirect than WLH which has a mortgage registered over the cancelled lease title.
30. The indirectness of the claimant's interest in the Director's decision would be somewhat dissipated in my view, if he had clear written instructions to act for and on behalf of Ascension Limited and/or WLH to seek the reinstatement of lease title No. 11/OC22/009. The absence of such instructions which it is the claimant's duty to obtain and disclose, speaks volumes of that remoteness. In any event that is not what is asserted in this claim which is brought in the claimant's personal name.
31. I do not doubt that the claimant has an arguable claim for unpaid fees and costs against both Ascension Limited and WLH and, even though the judicial review claim against the Director of Lands might be "arguable" on the grounds advanced, I do not accept that the claimant is "directly affected"



by the Director's decision cancelling lease title No. 11/OC22/009 on 6 September 2011. This is sufficient to dispose of this claim.

32. If I am wrong however, in so finding that the claimant is not "directly affected" by the defendant's decision, then, I turn to consider matter (c) of Rule 17.8(3) namely, whether there has been "no undue delay" in making the claim for judicial review.
33. It is common ground that the Director's decision to cancel the lease occurred on 6 September 2011 and the claim for judicial review was filed on 26 June 2012 well outside the 6 months time limit allowed under Rule 17.5(1).
34. I am also mindful that the claimant is a senior legal practitioner in Vanuatu and would have been fully aware of the requirements of the Civil Procedure Rules 17.5(1) and 17.8(3) (d) that apply to claims for judicial review.
35. The claimant's evidence in support of the application to extend the time is deposed as follows:

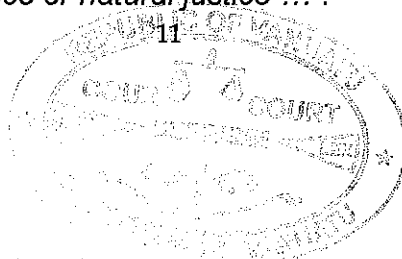
"2. *I only became aware that 11/OC22/009 had been struck off the register of land leases during a telephone conversation with a real estate agent, in early October (no year disclosed) although the Department of Lands had been dealing with me extensively since 2006 as the lawyer of Ascension Limited in relation to that lease and yet I had received no warning.*

3. *I made inquiries of the State Law Office (when? Is not disclosed) and was advised by a (unnamed) lawyer that the lease had been struck off because Ascension Limited had been struck off the register of companies.*

6. *I then applied in late December 2011 to amend the claim in CC168 of 2010 to join the Commissioner of VFSC to obtain restoration of the Company but the first conference listing that I could obtain was 5 June, 2012 when the order to restore the company was made and the company restored".*

In short, the claimant learnt of the cancellation of lease title No. 11/OC22/009 in "early October" (2010 or 2011 is unclear) but even if it was October 2011, the claimant still delayed for a further 8 months before filing the application for judicial review.

36. The claimant submits that "substantial justice" requires time to be extended because the Director's decision cancelling lease title No. 11/OC22/009 is: "manifestly beyond power and made without affording parties who would be materially affected, notice or natural justice ...".

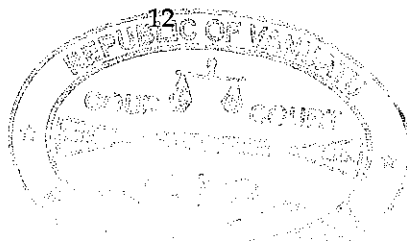


37. I do not accept that the Court at a Rule 17.8 hearing, is constrained by Rule 17.5(2) to consider only the delay that occurred beyond the 6 months within which the claim for judicial review is to be made. Furthermore once the 6 months time limit has expired, the ability of a person to claim judicial review is conditional on the exercise of the court's discretion.
38. The Director's power to cancel the registration of an instrument under the Land Leases Act is contained in two sections namely Section 7, and Section 50. In this instance cancellation was effected pursuant to section 7 which reads:
- "The Director may cancel any entry in the register which he is satisfied has ceased to have effect".*
39. Nowhere in the section is there a requirement that notice be given by the Director to anyone of his intention to cancel an entry that *"has ceased to have effect"* nor, if I may say so, can there be any expectation of a notification in respect of such an entry. Much less, can a mere creditor of the affected registered proprietor expect to be notified of the intended cancellation.
40. Having said that it behoves the Director when exercising his powers under section 7 especially where the entry sought to be cancelled, will result in the extinguishing of a leasehold title, to inform at least the registered proprietor of the affected leasehold before cancelling the lease.
41. The circumstances that satisfied the Director to cancel lease title No. 11/OC22/009 are deposed as follows:

"On 12 August 2011, the department received a letter and several attachments from the Vanuatu Financial Services Commission. The letter advised us that the company referred to as Ascension Limited had been struck off. Annexed hereto and marked "JMP 8" is a true copy of the letter and its attachments.

On 29 August 2011, the department received a letter from De Roza Investment Group acting for Pierre and Christiane Brunet. Annexed hereto and marked "JMP 9" is a true copy of the advice of registration.

The department having been made aware that Ascension Limited was no longer a registered legal entity proceeded to cancel its lease on 6 September 2011. Annexed hereto and marked "JMP 11" is a true copy advice of registration of the cancellation of the lease."



42. Section 335 and 336 of the Companies Act [CAP. 191] deal with the striking off of a company and its effect in the following terms:

"335. Registrar may strike defunct company off register

- (1) *Where the registrar of companies of his own knowledge, or upon information supplied by an officer or member of a company or any other person, has reasonable cause to believe that a company is not carrying on business or in operation, he may publish in the Gazette and send to the company by post, a notice that at the expiration of 3 months from the date of that notice 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.*
- (2) *If, in any case where a company is being wound-up, the registrar has reasonable cause to believe either that no liquidator is acting, or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator have not been made for a period of 6 consecutive months, the registrar shall publish in the Gazette and send to the company or the liquidator, if any, a like notice as is provided in subsection (1).*
- (3) *At the expiration of the time mentioned in the notice the registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in the Gazette, and on the publication in the Gazette of this notice the company shall be dissolved:*

Provided that –

- (a) *the liability, if any, of every director, managing officer and member of the company shall continue and may be enforced as if the company had not been dissolved; and*
 - (b) *nothing in this subsection shall affect the power of the court to wind up a company the name of which has been struck off the register.*
- (4) *If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the court on an application made by the company or member or creditor before the expiration of 20 years from the publication in the Gazette of the notice aforesaid may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and upon an office copy of the order 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.

- (5) *A notice or letter to be sent under this section to a company may be addressed to the company at its registered office or, if no office has been registered, to its last known place of business, if any, or to the care of some officer of the company or, if there is no officer of the company whose name and address are known to the registrar, may be sent to the person or each of the persons who subscribed the memorandum of association of the company addressed to him at the address mentioned in the subscription to the memorandum.*
- (6) *A notice to be sent under this section to a liquidator may be addressed to the liquidator at his last known place of business, and a letter or notice to be sent under this section to a company may be addressed to the company at its registered office, or, if no office has been registered, to the care of some officer of the company, or, if there is no officer of the company whose name and address are known to the registrar of companies, may be sent to each of the persons who subscribed the memorandum, addressed to him at the address mentioned in the memorandum.*
- (7) *No liability shall attach for any act performed or thing done, or for the omission of any act or thing which should have been performed or done, by the registrar of companies under this section.*
- (8) *The costs incurred by the registrar in the exercise of his powers under this section shall be payable by the company and recoverable from it.*

336. Property of dissolved company to be forfeited to Republic

- (1) *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."*

43. It is clear from the above that the Registrar of Companies has power to cancel the registration of a defunct company after giving the company notice of his intention to do so after 3 months has elapsed. He may publish the notice in the gazette as was done in this instance, and the effect of doing so under section 13 of the Interpretation Act [CAP. 132] is that the notice "shall be judicially noticed" for all intents and under Section 335 (3)



"... on the publication in the gazette (of the notice) the company shall be dissolved".

44. I accept that the basis for the Director's exercise of his power under Section 7 is that the registered proprietor of the leasehold title namely, Ascension Limited, had itself been struck off the register of companies and the necessary notice gazette. Moreover in terms of Section 336(1), "*... all property ... (including leasehold property of the struck-off company ...) shall be deemed to be forfeited and shall accordingly belong to the Republic*".
45. Given the ameliorating effect of subsection (4) of section 335 and the "20 years" duration of the right of an aggrieved member or creditor to seek the restoration of a struck-off company, there is even more reason for the Director to give notice to the struck-off company before exercising his power under section 7 of the Land Leases Act in reliance upon the mere striking off of a company from the register of companies. Unfortunately that did not occur in this case.
46. Be that as it may in Avock v. Vanuatu [2002] VUCA 44 the Court of Appeal in dismissing the appeal against a refusal to extend time in that case relevantly observed (under the former rules which also fixed a 6 month time limit for an application for judicial review):

"When there is an application for leave which is at least 4 months out of time (and may be even longer) there is a heavy onus on the person to explain why they have not commenced the proceedings in the time provided. Obtaining finality is always an important ingredient in matters which can lead to judicial review".

47. In similar vein in Kalsakau v. Wells [2006] VUSC 79 Tuohy J. in dismissing the application for judicial review that had been brought about 4 months outside the 6 months time limit, observed (at para. 21):

"It is plain that under Rule 17.8(3)(c) the Court has to look at the delay since the decision not just since the Rule 17.5 time limit expired. That follows because Rule 17.8 applies to all claims both within and outside the time limit".

(see also: the observations of the Court of Appeal in UNELCO v. Republic of Vanuatu [2012] VUCA 2 at 63 – 65).

48. Defence counsel's submission is that Rule 17.5(2) is not satisfied because the claimant lacks standing to file the claim in the first place as he is not "*directly affected*" in that he has no registerable interest whatsoever in lease title No. 11/OC22/009.

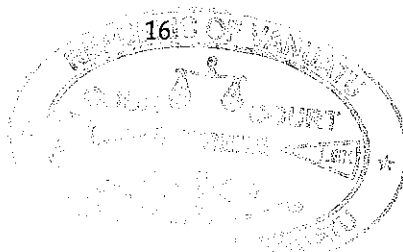


49. Whatsmore counsel argues that the existing claim for legal fees and costs in Civil Case No. 168 of 2010 against Ascension Limited and WLH provides the correct, complete and most direct "remedy" to obtain a judgment against the companies for the unpaid fees and costs. Such a claim it is argued in terms of Rule 17.8(3)(d): "... resolves the (claim for unpaid fees) *fully and directly*". The Companies Act [CAP. 191] also provides another "remedy" and avenue for the claimant to obtain payment of the outstanding professional fees and costs. The availability of these "other (more direct) remedies" is also a matter for the Court to consider in this Rule 17.8(3) ruling.
50. The question of "undue delay" is also complicated by the existence of a new lease title No. 11/OC22/054 over the same parcel of land comprised in Lease Title No. 11/OC22/009 issued in November 2011, and of a countervailing claim by Christiane Brunet in Civil Case No. 230 of 2011 wherein she seeks the registration of a transfer to her of Lease Title No. 11/OC22/054 over the same land comprised in lease title No. 11/OC22/009 (*"the Brunet claim"*).
51. In this regard too, the Court of Appeal relevantly observed in the Ling v. Leong judgment (*supra*) where there were competing leasehold titles issued over the same piece of land following the striking off and restoration of the registered proprietor (*at paras. 26 to 28*):

"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."

52. And later (at paras. 32 to 34):

"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. 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.

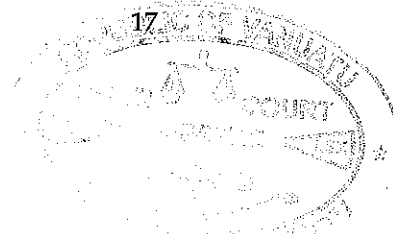
34. Any other system would mean a return to a situation akin to the English deeds system of Victorian times, where it was necessary to carry out multiple checks before any settlement. The Torrens system was designed to bring the delay, expense, and uncertainty of that process to an end. When a title 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."

53. Plainly the above observations may have some relevance to the arguability of the Brunet claim in Civil Case No. 230 of 2011 but does not directly concern the Court at this juncture.

54. Be that as it may the Brunet claim is based on a Deed of Agreement dated 21 December 2007 between Mervyn Copperwaite and Ascension Limited (*"the Debtors"*) and Pierre and Christiane Brunet (*"the Creditor"*). The Deed acknowledges an indebtedness by the Debtors to the Creditors in the sum of VT37,269,586 and records the agreement of Ascension Limited "... to grant the Creditors security over (lease title 11/OC22/009) to secure the repayment of the debt".

55. More particularly, **Clause 3** of the Deed provides:

"In consideration of the Creditors withholding from pursuing enforcement proceedings against the Debtors in respect to the recovery of the Debt, Ascension agrees to grant to the Creditors a mortgage over the lease which right and security the Creditors shall be entitled to protect by the lodgment of a caution over the lease asserting an interest as equitable mortgagee over the lease, and shall be entitled to recover the Debt out of the proceeds of sale of the Lease, as a preferred creditor of Ascension, at such point in time as Ascension complete a sale of the lease".



56. On 28 December 2007 Pierre and Christiane Brunet lodged a caution against lease title No. 11/OC22/009 long before the striking off of Ascension Limited and the cancellation of its leasehold title. It was also well before Civil Case No. 168 of 2010 was commenced.

57. The Brunet claim was further reinforced on 9 December 2011 by the grant of an injunction in Civil Case No. 230 of 2011 restraining the Government of the Republic of Vanuatu:

"... from dealing with lease titles 11/OC22/009 and/or 11/OC22/054 comprising land situated next to the Grand Hotel and commonly known as Irririki landing ("the Leases") in any way whatsoever, including but not limited to, disposing of the lease, or selling the leases to any party ... or registering any new lease over the said land".

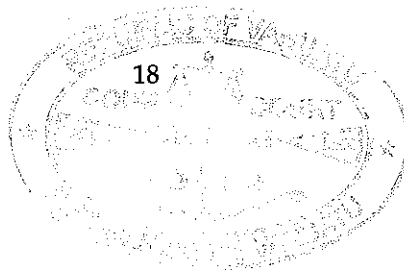
58. For completeness at the Rule 17.8(3) hearing on 19 September 2013 with the agreement of the claimant, the Court allowed the application of Christiane Brunet to be joined as a party in the present action.

59. Counsel for Brunet in opposing the claim generally supports the submissions of the Director of Lands. Specifically with reference to the claim in Civil Case No. 168 of 2010 which is foundational to the claimant's "interest" in this claim for judicial review, counsel for Brunet submits:

"12. There are issues as to the costs order in favour of the claimant in CC168 of 2010. Those issues are set out below.

13. CC168 of 2010 has proceeded without any defence by Ascension, as Mr. Copperwaite left Vanuatu in 2008. Ascension does not have a proper registered office, and has not operated since 2008. Proceedings in Civil Case 70 of 2007 in which the claimant's costs were built up, were evidently run without instructions. Copperwaite had left the country by the time of the bulk of the litigation was taking place including two unsuccessful appeals, and the person allegedly holding a power of attorney from Ascension for the purposes of those proceedings had died.

14. It is questionable whether some of the costs awarded in CC168 of 2010 were for tasks carried out on the instructions of Ascension or Mr. Copperwaite. What is happening here is the claimant is running cases and claiming costs of doing so when the party allegedly owing him costs and being pursued cannot defend itself.



15. *The costs in both CC70 of 2007 and CC168 of 2010 must be scrutinized or taxed and this exercise has not been carried out as there has been no defendant defending the claim.*


[see: in regard to Civil Case no. 70 of 2007 the judgments in:

- (1) Iririki Island Holdings Limited v. Ascension Ltd. (2007) VUSC 57 a ruling of Tuohy J;
- (2) Iririki Island Holdings Limited v. Ascension Ltd. (2007) VUSC 74 a further injunction ruling of Tuohy J.;
- (3) Iririki Island Holdings v. Ascension Limited (2007) VUCA 13 being an appeal from (2) above; and
- (4) Iririki Island Holdings Limited v. Ascension Ltd. (2009) VUSC 131 a decision of Clapham J. after a 3 day hearing in September/October 2009]

60. From the foregoing it is clear in my mind that Christiane Brunet is, to adopt the wording of Rule 17.8(3)(b), more "*directly affected*" than the claimant by the cancellation of lease title No. 11/OC22/009 albeit less directly than WLH and Ascension Limited.
61. Assuming therefore that the claimant can establish that he is "*directly affected*" by the cancellation of Leasehold title No. 11/OC22/009, I am nevertheless unable to say that there has been "*no undue delay*" in bringing this claim or that "*there is no other remedy that resolves the matter fully and directly*". On that score too, this claim must be rejected.
62. In accordance with the dictates of Rule 17.8(5), I must "*decline to hear the claim and strike it out*". The defendant only is awarded costs on a standard basis to be taxed if not agreed.

DATED at Port Vila, this 4th day of July, 2014.

BY THE COURT


D. V. FATIAKI
Judge.

