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

Civil Case No. 105 of 2013

BETWEEN: ROBERT POTTS
Claimant

AND: TRUSTEES INTERNATIONAL LIMITED
First Defendant

AND: BARRET & PARTNERS
Second Defendants

Coram: ***Justice Chetwynd***

Parties: ***Mr. Sugden for the Claimant***
Mr. Hall and Ms Thyna for the First and Second Defendants

Hearing ***8th June 2015***

Decision ***10th June 2015***

JUDGMENT

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1. This is an application for summary judgment. In this jurisdiction the principles are well settled when dealing with an application where the claimant is of the view, "*that the defendant does not have any real prospect of success*" [1]. They were succinctly set out in the judgment of Sey J in ANZ Bank (Vanuatu) Ltd v Traverso [2].

> *"12. The principles relevant to an application for summary judgment are clearly stated in Rule 9.6 (7) of the Civil Procedure Rules No. 49 of 2002 which provides as follows:*
> *"(7) If the Court is satisfied that:*
> *(a) the defendant has no real prospect of defending the claimant's claim or part of the claim; and*
> *(b) there is no need for a trial of the claim or part of the claim,*
> *the court may.*
> *(c) give judgment for the claimant for the claim or part of the claim;*
> *And*
> *(d) make any other orders the court thinks appropriate. ""*

Her Ladyship then went on to say:-

[1] Civil Procedure Rules Rule 9.6
[2] ANZ Bank (Vanuatu) Ltd v Traverso [2012] VUSC 222; Civil Case 129 of 2012 (2 November 2012)

"13. It is now judicially settled that the summary judgment procedure is designed to enable a Claimant obtain swift judgment in respect of his claim against a Defendant who has no real prospect of defending the Claimant's claim or part of it. By its characteristic features, summary judgment is generally viewed as literally shutting the door of justice in the face of a Defendant in that it permits a judgment to be given without trial. It is this stringent nature of summary judgment that makes it imperative for the Courts to approach this remedy with the greatest caution in order to prevent turning it into a dangerous weapon of injustice."

2. The Claimant in this matter sets out his claim in the Amended Statement of Claim filed on 14th November 2014. In brief and basic terms the claim relates to a trust. The trust arose in this way. There were four persons who were the registered proprietors of leasehold land being two adjoining areas of land with title numbers 12/0844/058 ("058") and 12/0844/059 ("059").(It is not said where these pieces of land were but there is no apparent dispute they were on the island of Efate in Vanuatu close to Port Vila). The Claimant and the four others referred to above (following the designation in the pleadings this group of five people will be called "the partners") agreed that the whole of the land would be developed and then individual plots or lots put into separate ownership. The advice from the Second Defendants ("B&P") was that this could best be achieved via a discretionary trust. The partners agreed to this suggestion.

3. The trust to be created would allow the two titles to be amalgamated into one strata title subdivision with 13 individual allotments. The trust was to be the registered proprietor of the title for the amalgamated whole and the partners were to be the beneficial owners of individual allotments. The First Defendant ("TIL") was to be the Trustee. B&P was a firm of accountants and they offered the services of trust companies one of which was TIL. There does not seem to be any dispute, "all of the shares in the Defendants *[meaning TIL]* were owned by a nominee or nominees for the partners for the time being of BDO Barrett and Partners" [3]. [It is noted that on the Court copy of that sworn statement referenced above the *jurat* does not indicate when or where or before whom the statement was sworn. This point was not taken by either the claimant or the defendants.]

4. A partnership agreement was drawn up (originally by B&P) but unfortunately by the time these proceedings came into being there were four possibly five versions of the agreement. According to B&P and TIL the agreement, "....defines the beneficial interest (sic) in the assets of the Trust" [4]. A Trust Deed was also drawn up which created the Angel Fish Cove Trust.

5. It should be noted that the two original titles were in different ownership. The registered proprietors of 058 were one Gregory Hanckel together with Anna Hanckel,

[3] See sworn statement of Lindsay David Barrett sworn on 30th June 2014 (paragraph 4)
[4] See Email dated July 12th 2011 (1:41 PM) sent to the Claimant by B & P (Mr Adrian Sinclair)

Milne Simpson and Sonja Sparrow. The registered proprietors of 059 were Gregory Hanckel and Anna Hanckel.

6. In every good story there is a rogue. This case is no different. The rogue is said to be Gregory Hanckel ("Hanckel"). As noted above, he is one of the five partners. There does not seem to be any dispute that the Claimant used Hanckel as his conduit of communication to B&P and TIL. It seems quite clear that as between the Claimant and Hanckel (and indeed between the Claimant and the other three partners as well) there was agreement as to what would happen to the 13 new strata lots but the exact terms of the agreements were not passed on to the defendants. In particular Lot 11 of the development was, as between the partners, agreed to be the Claimant's. In later iterations of the Partnership Agreement he was the beneficial owner of 100% of that lot. The defendants say they were not aware of that agreement because Hanckel had not passed that essential piece of information on to them. As a result Lot 11 ended up being mortgaged. The mortgage was security for a loan to Hanckel which had been taken out much earlier in time.

7. Although Hanckel is the designated rogue in this story there is no evidence on file at this time to suggest he deliberately mislead anyone. Similarly there is no evidence Hanckel benefitted financially from any of the arrangements involving the land and there is no evidence as to what happened to him or his interests in the land. There was a reference during submissions to Hanckel being last known of in Thailand and that he was or now is otherwise untraceable.

8. In order to see how the Claimant's property became mortgaged it is necessary to go into the fiscal arrangements in slightly more detail. It is accepted by all concerned that originally the agreement between the partners involved the Claimant paying a sum of money and in return he would have a property built on one plot and would also become the owner of another plot, both of which would be carved out of 058. The Claimant says he then reached a separate agreement with Hanckel where he would also become the owner of a lot carved out of 059. That is the information Hanckel is said not to have passed on and the result was the mortgage covered all the new lots, including Lot 11, which originally comprised 059. The instructions that the mortgage was to cover all the lots in the land previously 059 are said to have come from Hanckel.

9. In any event whether Hanckel is dishonest rogue or convenient scapegoat the Claimant's interest in Lot 11 has been greatly diluted by the mortgage which was Hanckel's liability in the first place. The Amended Claim seeks an order that the defendants take all necessary steps at their own expense to have Lot 11 released as security for the mortgage. The Claimant says there was a breach of trust by the trustees and that is why TIL is liable. He also claims that TIL, "acted as employee of B&P and therefore B&P are vicariously liable for TIL's breaches of trust". There is also a claim relating to the sale of one of the lots from 058. The defendants say they were willing to do all that was necessary to enable the lot to be sold. However, TIL say they are entitled to be indemnified out of the trust assets in respect of claims made against them as

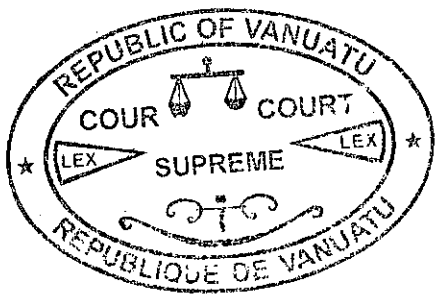
trustees of those assets. They claimed a lien over all the trust assets and would not advance the sale until some arrangements had been made to secure that lien. The sale fell through and the Claimant claims he has thereby suffered loss.

10. The Claimant cannot succeed with any part of his claim unless he can show there has been a breach of trust. That includes that part of the claim which arises from the sale falling through as a result of the dispute about the lien for costs. The Defendants claim an indemnity as set out in the Angel Fish Cove Trust Deed and at law. Unfortunately for them there is ample case law which casts doubt on that proposition. In Leedham v Chawer [5] it was said there is no lien for costs over trust property where the costs were incurred by reason of a breach of trust. In Mucklow v Fuller [6], the court held that the indemnity clause usually inserted in settlements and wills does not protect a trustee against a breach of trust committed by himself. In Halsbury's Laws 4th Edition Vol 48 at paragraph 958 there are a number of cases listed to support the notion the ordinary right of a trustee to his legal costs does not extend to proceedings instituted to remedy or otherwise rendered necessary by, a breach of his duty as a trustee. Or as expressed in the negative in Bennett v Wyndaham [7] a trustee can recover costs where the injury in respect of which they were recovered was not caused by his neglect or default.

11. The Claimant must then establish a breach of trust. On his behalf it is said he can do that because the duties accepted by the trustees in any trust, are onerous. It has been stated in numerous cases and it is generally accepted, a trustee must execute the trust with reasonable diligence and conduct its affairs in the same manner as an ordinary prudent business man would conduct his own affairs. The Claimant argues the standard required of the trustees in this case is higher. It is right to suggest that the evolution of trusts in modern times has resulted in a higher duty of care in some cases. As pointed out by the Claimant, in Bartlett v Barclays Bank Trust Co Ltd (No 1)[8] it was agreed that a higher duty of care is due from a trust corporation or similar body which carries on a specialised business of trust management. If such a trustee neglects to exercise the special care and skill it professes to have and a loss is caused to the trust fund as a result, the trustee can be held liable. It is also right that such a higher duty of care must be looked at in conjunction with the usual obligations of a trustee. In several cases [9] it has been indicated that a trustee acts properly if he does so with reference to the facts and circumstances which exist at the time and which are known or ought to have been known.

12. The Claimant argues in this case that TIL and B&P should have addressed enquiries to each and every one of the partners. It is accepted they did not do so. Instead they relied on information coming from Hanckel alone. The defendants say they were entitled to do so because none of the other partners raised any objection to their

[5] Leedham v Chawer (1858) 4 K&J 458
[6] Mucklow v Fuller (1821) JaC 198
[7] Bennett v Wyndham (1862) 4 DeGF& J 259
[8] Bartlett v Barclays Bank Trust Co Ltd (No 1) [1980]Ch 515
[9] AG v Lady Downing (1767) Wilm 1; Clarke v Trelawney(1890) 63 LT 296



dealing with Hanckel and indeed point out he even held powers of attorney from several of the other partners. It is also apparently accepted that the Claimant had no contact with either TIL or B&P from sometime in 2009 to mid 2011, approximately 2 years. On the evidence before the court so far, during that period the Claimant dealt exclusively with Hanckel. Is it right for the defendants to say, in effect, you cannot blame us for what you did not do ?

13. Taking into account these matters it is easy to be driven to the conclusion that this case succeeds or falls on the relatively narrow issue or question of what facts and circumstances existed at the time and which were known or ought to have been known by all the parties but in particular TIL. If, in this application, I were able to say I am satisfied that the law is such and that the facts of the case indicate the defendants should not have relied solely on what they were told by Hanckel and that they should have made further enquiries of all the partners I could find for the Claimant. However, I cannot say that I am so satisfied at this stage. There is an abundance of evidence but very little of it has been tested in cross examination. At the moment it consists of he said she said variety of evidence. Bearing in mind that I would have to be satisfied on the balance of probabilities, given the nature of the evidence it is impossible to say I am satisfied to that degree. There is a substantial and significant difference in looking at answers to evidence in a sworn statement where those answers are themselves set out in a sworn statement in response, to hearing answers in cross examination on that same evidence.

14. In addition there are other issues which are raised but there is simply not enough evidence to reach a conclusion on them. The Claimant submits that the Angel Fish Cove Trust Deed does not govern the trust. He says a different trust was created through the dealings between all the parties. He argues there are issues with the construction of the deed which prevents it from operating in the manner advanced by the defendants or even operating at all. On paper there appears to be strong arguments to support those contentions. However, the evidence is again rather one sided which has not been tested in cross examination. Given the Claimant's approach to B&P in July 2011 (his Email to them of 5th July 2011) he was clearly expecting to be the beneficiary in some kind of trust and so the question must arise of what trust was he thinking of. Arguments aside about whether the Angel Fish Cove Trust Deed could in law set up the trust as envisaged and propounded by the defendants, did the claimant really believe at the time that what was presented to him in the trust deed was not what he expected.

15. I cannot say at this time that I am satisfied the defendants have no real prospect of success and that there is no need for a trial of either part or all of the claim. The application for summary judgment must be refused. So far as costs of the application are concerned, they are reserved.

16. As for progress in this matter, some consideration must be given by the Claimant to the claim against B&P. Is it really a claim for based on vicarious breach of trust or is it a claim in negligence against professional advisers to the Trustees ? It is appreciated the latter may not, if successful, result in the same remedy now sought. However, if the pleadings are thought to need amendment an application should be made as soon as

possible. If there is an amendment the defendants will need time to respond. The Claimant should also consider filing a sworn statement setting out in detail the events from 2008 and the dealings as between himself, Hanckel, the other partners and the defendants. The defendants should consider the issue of the trust deed. Do they accept the difficulties of construction put forward by the Claimant? The parties should also agree a bundle of documents that reflects the chronology involved in this matter. If there are any issues relating to disclosure they should be resolved now. The parties should provide details of the evidence they will be relying on including any documentary evidence not in the agreed bundle and the names of the witnesses they will be calling. The parties should then endeavour to agree some at least of the facts. Both parties should indicate whether any expert evidence may be required. At that stage a pre-trial conference should be held and the requirements of Rule 6.6 satisfied.

17. I do not propose to make any orders now. The parties should be given time to consider their positions. Applications may be forthcoming. If not I would be willing to set another conference date in August if the parties think that will assist. If that idea appeals to the parties they should inform the court and some dates will be suggested.

DATED at Port Vila this 10th day of June 2015.

BY THE COURT

CHETWYND J

REPUBLIC OF VANUATU COUR COURT SUPREME REPUBLIQUE DE VANUATU