

BETWEEN: JOSEPH JOEL
Claimant

AND: STEPHEN JOEL BUSAI & FAMILY & OTHERS
Defendants

Hearing: Wednesday December 7th 2016 at 3 pm
Judgment: Tuesday 20th December 2016 at 9 am.
Before: Justice JP Geoghegan
Appearances: Colin Leo with Mr Jimmy for the Claimant
Less Napuati for the Defendants
Ms Bani (SLO) for the Counter Claimants

JUDGMENT

1. These proceedings involve a claim and counter claim in respect of leasehold title 11/OX21/068 ("lease 068"). The dispute is essentially one between family members.
2. This judgment is to determine an application by the claimant for summary judgment in respect of his claim and an order striking out the defendants counter claim. It is also to determine an application by the State for an order striking out the counter claim.
3. The application by the State for an order striking out the counter claim was filed after this hearing had been directed, however counsel are agreed that the application may be dealt with as part of this judgment notwithstanding. While there has been no response filed to the application, I do not consider that to be necessary for reasons which will become apparent in this judgment.

Background

4. These proceedings commenced with an application by the claimant for an order evicting the defendants from lease 068. An urgent application for an eviction order had been made on behalf of the claimant on June 2015. For reasons which do not need to be referred to here, that application was dismissed by Harrop J on June 12th 2015. A further amended application was filed in August 2015 but was never served on the defendants. Interim relief was not granted and, after the claim was renewed and duly served a statement of defence was filed.
5. The dispute between the parties revolves around the fact that lease 068 was owned by the claimant and Mr Joel Busai. Until August 28th 2013 they were registered as the lessees of the lease. Mr Joel Busai is the natural father of the defendant Stephen Joel Busai and the adoptive father of the claimant Joseph Joel. The lease was registered in the names of Mr Joel and Mr Busai on October 6th, 1995. It is common ground that since at least that time the claimant and the defendants have been living on the land as a family community.
6. Mr Joel Busai died on July 31st 2013. The claimant then registered a transmission transferring the deceased's interest in the lease title to the claimant as the surviving proprietor. The transmission was registered on August 28th 2013. This has met with the disapproval of the defendants who in addition to their statement of defence which claims that the defendants' contributed to the purchase of the lease title, claim also that through their deceased father they have an interest in the lease. They claim that their deceased father signed the lease in his capacity as representative of the family and that accordingly Mr Joel should never have been registered as not the sole proprietor under section 92 of the Land Leases Act.
7. The defendants also filed a counter claim. In their counter claim they claim that Mr Joel, the Director of Lands and the State unlawfully transferred lease title 068 to Mr Joel. They refer to there being irregularities in the form of transmission registered and alleged that the registration of the transmission was effected by mistake or fraud when signed off by the Director of Lands. The defendants seek orders that the registration of Mr Joel as sole proprietor

of the lease title be declared null and void and that Stephen Joel Busai be registered as one of the lessees.

8. Although section 100 of the Land Leases Act is not referred to specifically in the pleadings filed it seems clear that the claim is effectively one pursuant to section 100. The essence of the defendants' claim is that they made contributions to the purchase of the lease and then understood that those contributions would result in their having an interest to the lease. Their position is essentially that the claimant has been fraudulent in a way which has deprived the defendants of a legitimate interest in the lease.
9. That there has been a longstanding dispute in respect of the matter is easily established by the evidence. In a statement sworn in May 2015, the claimant deposed:-
- "7) Prior to Joel Busai's death, Joel and I agree to sell of the property and share the proceeds from the sale between us.*
 - 8) Pursuant to clause 5 of the agreement and in consideration of my surrendering my interest in the property, the defendants were to pay to me and my wife a sum representing:*
 - i) 100% of the value of the buildings on the land belonging to me; and*
 - ii) 60% of the unimproved value of land."*
10. The claimant annexed an agreement which is dated November 3rd 2009 and is expressed to be between the claimant and his wife, the deceased and various other persons including some of the defendants. The Director of Lands is also recorded as a party to the agreement. The agreement records the following:-
- "i) This agreement has been reached as a result of mediation.*
 - ii) The parties agree that the property comprised in lease title No. 11/OX21/068 which is the subject of dispute should be valued by an independent valuer, selected and approved by both parties.*
 - iii) The cost of such valuation shall be shared on a 50/50 basis by Joseph Joel Bouillet [the claimant in these proceedings] and*

Veronique Lessy (the claimants) and Joel Busai and Steven Busai, Steven Busai, Bubu Busai, laoko Busai, Niscol Job and family and Nelson Nase, Norah Nase, Mackline Nase and Joseph and family members (the First, Second and Third Defendants).

- iv) All parties to agree to abide by the result of such valuation.*
- v) Following valuation, the following sum shall be paid by the first, second and third defendants to the claimants:
 - a sum representing 100% of the value of the buildings on the land belonging to Joseph Joe Bouillet, and....*
 - a sum representing 60% of the unimproved value of the land.**
- vi) In consideration of the above, the claimants agree to surrender the lease title number 11/0X21/068.*
- vii) Such costs in relation to the said surrender being stamp duty and registration fees being payable by the transferee, being the first, second and third defendants.*
- viii) The claimants agree that payment of the sums described above represent settlement of all claims against the defendant in this matter."*

11. The context in which that mediation was held is not explained in the sworn statement but it is clearly apparent from that document that there was a dispute regarding the land and a mediated resolution of that dispute. Sadly, for reasons which are unclear at this time, the parties have not abided by the mediation agreement resulting in ongoing tensions and these proceedings.

12. The evidence filed on behalf of the defendants is that various contributions have been made including the payment of fees for the registration of the lease and that the defendants have thought that in making those payments they were acquiring an interest in the lease. Their clear position is that they had never anticipated a situation where the claimant would be able to claim ownership of the lease title in its entirety upon the death of Mr Busai.

13. There is no dispute that the defendant Stephen Joel Busai has applied for and obtained letters of administration in respect of his father's estate.
14. In a sworn statement dated July 19th 2016, the claimant deposed that he had made three separate applications to acquire the leasehold title, one of his own, one by his wife and one by his son. His evidence was that the Government responded to those applications by agreeing to his wife acquiring the lease, however to their surprise the Minister of Lands insisted that Mr Joel Busai be registered on the title as well. That assertion however conflicts with statements by the claimant in a sworn statement dated May 2015 that he and the deceased jointly paid an annual rental of Vt 18,240 towards the purchase of lease title 068.
15. The position regarding the acquisition of the deceased's interest in the title is accordingly somewhat murky and although Mr Leo is technically correct that the fact that the deceased and the claimant were registered as joint proprietors entitled the claimant to be registered as the sole proprietor it actually ignores the more fundamental question of how that came to be the case.

Discussion

16. Pursuant to rule 9.6 of the Civil Procedure Rules the claimant may apply to the Court for a summary judgment in circumstances where he or she believes that the defendant does not have any real prospect of defending the claimant's claim.
17. Pursuant to rule 9.6 (7):
"If the Court is satisfied that:-
 - a) *The defendant has not 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 that 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 that the Court thinks appropriate."*

18. In the circumstances of this particular case I cannot be satisfied that the defendants have no real prospect of defending the claimant's claim when one looks at the issues in their broader context. There are very real issues around the acquisition of the deceased's interest in the property by the claimant and it would be not be appropriate in those circumstances to enter summary judgment and I decline to do so.

Application by the State

19. As is recognized by Ms Bani, the application by the State was filed primarily because of the defendant's failure to comply with section 6 of the State Proceedings Act which provides:-

"6. Notification of intention to institute proceedings.

(1) No proceedings against the government, other than an urgent proceeding, is to be instituted under section 3 unless the party intending to do so first gives written notice to the State Law Office of such intention.

(2) The notice must:-

a) Include reasonable particulars of the factual circumstances upon which the proposed proceedings will be based; and

b) Be given not less than 14 days no more than six months prior to the institution of proceedings."

20. Section 6 does not contain any provisions as to what is to occur in the event of a non-compliance.

21. While no evidence Has been filed on this point, Mr Napuati provided the Court with a copy of a letter dated May 31st 2016 addressed to the Director of Lands advising that Mr Napuati had been instructed that lease title 068 had been unlawfully transferred to the claimant and advising of an intention to commence proceedings for the cancellation of the lease. Arguably the letter does not comply with section 6 (2) (a) but it most certainly does not comply with section 6 as such notice is required to be given to the State Law Office.

22. I consider that the purpose of section 6 is to ensure that the State Law Office which represents the State in respect of litigation issued against it, is aware of any impending proceedings so that it can provide appropriate advice to the relevant government agency involved. It is also designed to ensure that there is a reduced possibility of a misunderstanding where a government agency may consider that proceedings issued upon it have been served upon the State Law Office thereby creating a position where the government agency may not take action in its own defence.
23. Bearing that in mind, while the defendants have not complied with section 6 in this case the Director of Lands and the State had not been prejudiced in their ability to defend the proceedings and are now fully aware of the claim. While it would be open to the Court to dismiss the counter claim as against the Director of Lands and the State on the grounds of non-compliance with section 6 that risks an injustice to the parties which is not warranted by the breach complained of. If the Court were to dismiss the counter claim against the Director of Lands and the State with leave reserved to refile it after section 6 had been complied with that would simply result in further cost and delay for no useful purpose. I consider that in the circumstances an award of costs would be sufficient to underline the need for the offending party to comply with section 6 in the future without prejudicing the rights of any of the parties to the proceedings.
24. For these reasons I intend to dismiss the application by the State but to impose an award of costs against the defendants to emphasize the need for compliance. Ms Bani had indicated that Vt 10,000 would be an appropriate sum and Mr Napuati has accepted this.


Conclusion

25. For the reasons set out in this judgment I accordingly make the following orders:-
- 1) I dismiss the claimant's applications for summary judgment and an order striking out the defendant's counter claim.
 - 2) I dismiss the application by the State to dismiss the defendant's counter claim.

- 3) The defendants are to pay the sum of Vt 10,000 in costs to the State for non-compliance with section 6 of the State Proceedings Act and that sum is to be paid to the State no later than January 30th 2017.
 - 4) The Director of Lands and the State are to file any statement of defence and sworn statement in support of the statement of defence no later than January 30th 2017 at 4 pm.
 - 5) The proceedings are adjourned to a pre-trial conference on Friday March 3rd at 9.30 am for further directions.
26. It is clear from the proceedings that the parties, as far back as November 2009 reached a mediated agreement regarding the purchase of the land by the defendants. It seems to me that that may still provide an appropriate basis for an agreement which would resolve the dispute between the parties. I would accordingly urge the parties to consider that course as opposed to the course of continued litigation which will involve inevitable delay, cost and distress to all parties involve.

Dated at Port Vila, this 20th day of December, 2016

BY THE COURT



JP GEOGHEGAN
Judge