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

CIVIL CASE No 105 of 2013

BETWEEN: ROBERT POTTS
Claimant

AND: TRUSTEES INTERNATIONAL Ltd
First Defendant

AND: BARRETT & PARTNERS
Second Defendant

Hearing: *22nd August 2017*
Before: *Justice Chetwynd*
Counsel: *Mr Sugden for the Claimant*
Mr Hall SC for the Defendants

Judgment

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1. This is a claim involving the development of land on the outskirts of Port Vila as is set out in the Further Amended Statement of Claim filed on 5th July 2016. At the crux of the claim is said to be a trust called Angelfish Cove Trust, the trustee of which is the First Defendant ("TIL").The Second Defendant ("B&P") is a firm of accountants and it offers the services of trust companies, one of which was or is TIL. The circumstances leading up to the Claim have their genesis in 2008 and 2009.

2. The Claimant ("Mr Potts") first became involved in the development at Angelfish Cove in 2008. He became aware that a Mr and Mrs Hanckel together with a Mr Simpson and a Ms Sparrow were developing land in Vanuatu comprising title number 12/0844/058 ("058"). They were going to subdivide the land and built individual properties on it. He agreed to buy a villa from them.

3. He then learnt that Mr & Mrs Hanckel were intending to acquire the adjoining leasehold title 12/0844/059 ("059"). Mr Potts agreed to pay a one third share of the costs of acquiring and developing 059. The Hanckels, Mr Simpson, Ms Sparrow and Mr Potts then decided to create one strata title out of the two titles. This was based on advice from B&P and other professionals.

4. There were discussions about the best process for ensuring the successful completion of their development plans. There is an Email dated 26th January 2009 from an Australian lawyer named John Mulally. It refers to a meeting on 23rd January 2009 at the offices of B&P between him, Lynn Faber, Mr Hanckel and Mr Simpson. Lynn Faber was an employee of B&P. It is not entirely clear from the evidence exactly who instructed Mr Mulally or how he became involved. The Email is addressed to Adrian and Lyn. There does not appear to be any dispute that Lynn is Lynn Faber and Adrian is Adrian Sinclair, a partner in B&P.

5. The Email lists 7 matters which were discussed at the meeting. The first confirmed that 058 was held by Mr Hanckel, Mrs Hanckel, Mr Simpson and Ms Sparrow. The second described how 059 was held by Mr Hanckel and Mr Potts. No 3 set out the intention to create one strata title out of 058 and 059. No 4 then details how, "*It is intended to set up a Trust to be the lessee under the new lease; I understand the above parties will be beneficiaries under the trust and will discuss this direct with you.*" Item No 5 in the Email describes the intention that Mr & Mrs Hanckel would be entitled to one of the new strata lots, lot 1; Mr Simpson and Ms Sparrow to lot 2 and Mr Potts lot 3.

6. Item No 6 says that it is,"*...intended that the Trust will retain ownership* (of the strata lots*) in order to avoid stamp duty and registration fees".*

7. Item No 7 needs to be set out in full:

> *It will be necessary for the beneficiaries to have an agreement dealing with the relevant party's right;*
> *(a) to dwell at the relevant strata lot;*
> *(b) to call for the relevant strata lot to be vested in that party's name or be sold to a third party at that party's cost;*
> *(c) to receive the net proceeds when the relevant strata lot is sold;*
> *(d) to have the Trustee mortgage the relevant strata lot and receive the loan proceeds;*
> *(i) at the relevant party's cost;*
> *(ii) provided the relevant party indemnifies the Trust against liability under that mortgage;*
>
> *(e) to share in the sale proceeds from the sale of other lots and the obligation of the parties to contribute to expenses – this will require care in establishing the parties' shares because of their uneven ownership across what will be the entire project site."*

8. Although Mr Potts was not at the meeting on 23rd January 2009 and although he was not CC'd into the Email correspondence he does not deny that the arrangements outlined in the Email were what he anticipated or that they were an acceptable arrangement to him. He also accepts that he left a great deal of the communication between the beneficiaries and B&P to Mr Hanckel.

9. B&P, through Ms Lynn Faber, appear to have responded by Email to Mr Mulally on 27th January CC'd to Mr Hanckel and Mr Simpson.

> *"Dear John,*
>
> *We believe a partnership Agreement should be prepared and this should be provided to the Trustees to hold in the Trust file"*

There does not appear to be any dispute that a Partnership Agreement was not prepared until sometime in October 2010.

10. Matters came to a head in 2011. That is when the documentation leading to registration of the strata title seems to have been completed. There had been some changes in the make-up of the beneficiaries between 2011 and the Email from John

Mulally. Mr and Mrs Hanckel had separated and Mrs Hanckel was said to no longer have any beneficial or other interest in any of the lots. Ms Carollynne Thompson (Mr Hanckels mother) was now one of the beneficiaries. There had also been some negotiation between Mr Potts and Mr Hanckel about the "ownership" of plots on what had been title 058. It is not entirely clear when these negotiations were concluded but the evidence plainly indicates that by February or March 2011 at the latest, negotiations had been concluded and "ownership" of all the plots had been agreed as between Mr Hanckel, Ms Carollynne Thompson, Mr Potts, Ms Sparrow and Mr Simpson.

11. The claim effectively crystallised in early 2011 when a mortgage was registered over plots 8 to 13 of the new strata title. The mortgage had originally been held over title 058 when the Registered Proprietors of that title were Mr Hanckel, Mrs Hanckel, Ms Sparrow and Mr Simpson. The old lease 059 was not encumbered by any mortgage or other security. Lots 8 to 13 were the only ones on the land comprising title 058. When the strata title was created the leases numbered 058 and 059 had to be surrendered in order to allow the new single strata title to be created. That meant of course that NBV's mortgage over 058 had to be discharged *before* the lease was surrendered and, simultaneously, a new mortgage taken over certain of the lots making up the new strata title. The mortgagee was the National Bank of Vanuatu ("NBV"). The claim specifically arose because Mr Hanckel had agreed the transfer lot 11 to Mr Potts and the latter had expected the lot to be free of any mortgage or security in favour of NBV.

12. It is relevant to note Mr Hanckel had requested B&P (by Email dated 23rd September 2010) to "*liaise with NBV*" as he was finding negotiations with them to be "*a constant battle*". A letter of offer was issued by NBV in December 2010. The borrowers were named as Mr and Mrs Hanckel and the security was to be a "*New Third Party Registered Mortgage over lots 8-13 on S/P0058*". In addition the security was to consist of "*The existing Third Party Unlimited Guarantee by Sonja Sparrow and Milne Simpson*" and a "*Limited Guarantee by Trustees International Limited for the liability*".

13. It is abundantly clear that TIL and B&P were involved in negotiations, planning and implementation of the development known as Angelfish Cove. They were actively involved in the process of the formation of the new strata title and the mortgage arrangements with NBV. The documentary evidence of that is overwhelming.

14. In their defence both TIL and B&P point to the nature of a discretionary trust and to their lack of exact knowledge as to the arrangements and agreements between the various parties involved in the development. They also suggest that NBV would or could not have taken any mortgage over property which was not part of the original title 058.

15. It is easier to deal with the last point first. As has been pointed out, original title 059 was free from mortgage. B&P (and therefore TIL) were well aware that Mr Hanckel was to have 100% interest in two lots on 059, lot 5 and lot 7. As it was primarily Mr and Mrs Hanckel who were the borrowers NBV could have been offered those two lots as security instead of lot 11. There is no evidence to suggest that this was proposed or considered by the defendants. There is no evidence as to whether NBV would have accepted the two lots from 059 as security. The likely reason why alternative arrangements were not apparently explored is that there was to be a sale of two lots

on the 059 and a mortgage over any part of 059 would have complicated, even prevented the sales going ahead. However, the argument that it was only lots on 058 which could possibly be given as security is nonsense.

16. As to the nature of a discretionary trust, I have to accept, as argued by the Claimant, that what was created by way of a trust, if indeed a trust was created, was not a discretionary trust in its purest form. That is, a trust where the trustees have absolute discretion when dealing with beneficial interests. It appears to me that the interests of the various parties had sufficiently been identified, acknowledged and fixed by B&P and TIL (the Trustees) to take whatever kind of trust that may have been created out of the species of trust known as discretionary trusts. It is suggested by the defendants that there is a difference between partnership interests and beneficial interests under the trust. It is said the partnership interests were fixed but not the beneficial interests. That is why, it is said, a partnership agreement was suggested in the first place.

17. I do not understand what distinction the defendants are trying to establish between partnership interests and beneficial interests. I am sure that had the "partners" been asked whether they understood their beneficial interest in the development to be different from their partnership interests, whether the beneficial interests could be any less than what comprised their partnership interests, they would have answered no.

18. In any event, I do not believe the exact nature of the arrangements as trustee and beneficiary between the claimant and the defendants is relevant in deciding liability in this cases. This case is about a breach of trust. There is no doubt TIL assumed the role of Trustee and B&P controlled the trust corporation. As I said in my decision on summary judgment in this case dated 10th June 2015 it is the defendants' actions in their different but concurrent roles which is at the heart of this matter. Whilst I accept that a lay trustee's liability for errors etc can be somewhat limited, it has long been the law that a trust corporation is treated differently than a lay trustee. As Brightman J said in *Bartlett v Barclays Trust Co (No.1)* [1980] 1Ch 515;

> *"A trust corporation holds itself out in its advertising literature as being above ordinary mortals"*

In short, a higher standard of competence, care and professional acumen is expected from professional trustees. They owe a higher duty of care to their actual and potential beneficiaries than does a lay trustee.

19. In the circumstances therefore this case turns on the question of what it was the defendants knew concerning the arrangements between the various parties involved in the Angelfish Cove development. In particular, it turns on the date that the partnership agreement signed by the various parties came the knowledge of B&P.

20. There is clear evidence the defendants were aware that the claimant had an interest in some of the lots that made up the strata title. That was made known to them as early as the Email from John Mulally in January 2009 (see the comments beginning at paragraph 4 above). Despite that clear evidence the defendants were saying in 2012 the claimant was only a recent party to the development project. That can be seen from the Email to the Claimant's lawyer on 25th July 2012;

"Please note it was very rare for your client to communicate with us at all. Greg was very clearly the spokesperson for all of them and had a Power of Attorney in respect of the others involved. Rob Pott's name was not on title 058 or 059 that were surrendered. Rob was brought into the equation when he was allocated 5 lots under the Partnership Agreement."

It must also be pointed out there was never any suggestion Mr Hanckel held a power of attorney for the claimant.

21. Apart from that, it is quite probable that initially the defendants were unaware of the claimant's interest in lot 11 and that they believed his interests were only in lots within the area of the old title 059. However they did know the mortgagor wanted to be told exactly what interest each individual beneficiary said they had in each lot and that appropriate consents were to be given in respect of those lots if necessary. We know this for certain because the defendants Emailed Mr Hanckel and asked him to obtain that information[1]. On his reply, and as a result of subsequent communications, an amended partnership agreement was drawn up by B&P and sent to Mr Hanckel. That was on or about 22nd October 2010. It is noted that even on the amended agreement as drawn up by B&P the claimant was said to have interests in 4 lots not 5 as referred to in the Email partly set out above in paragraph 20. The figure 5 was correct when reference is made to the amended agreement which was further amended by the parties and returned to B&P. I will adopt the defendants' description of this agreement as version "c". The question is, when did the defendants become aware the claimant had beneficial or partnership interests in 5 lots rather than 4 ?

22. The defendants say they only became aware of the major differences in the version "c" on 27th May 2011. That is when they say they first became aware that the claimant had "acquired" lot 11. That averment is difficult to reconcile with some of the documentary evidence. The evidence for the claimant is a copy of version "c" was sent to B&P as an attachment to an Email. The evidence points to this as being an Email sent to B&P on 22nd March 2011 by Mr Hanckel. B&P say that they have no trace of the version "c" being sent to them attached to an Email. They can find a copy of every other Email sent and received during the period in question but not that document. There is no doubt there were copies of agreements circulating each differing in one material respect or another and that the two copies provided by B&P (the initial agreement and the amended one sent on 22nd October) did not show the claimant as having an interest in lot 11. However there is equally no doubt that certainly by 26th May 2011 B& P had received a copy of the agreement signed by Mrs Thompson (Carollynne) because they sent a copy to lawyers in New Zealand who were acting for Ms Sparrow and Mr Simpson. There is also a suggestion by B&P that the hard copy of version "c" was hand delivered to their office by Mrs Thompson on or about 17th May. I much prefer the evidence from the claimant and I find that B&P received a copy of the further amended agreement i.e. version "c", by way of a scanned copy attached to an Email dated 22nd March 2011. This followed an Email from Mr Hanckel sent (according to the copies in evidence) on 22nd March 2011 at 8:22 am. That Email has Mr Hanckel saying he will arrange for signed copies of the agreement to be sent, *"by the end of the day"*. There was also a reference to Mrs Hanckel confirming she no longer wished to be involved in Angelfish Cove Trust.

[1] See the Email dated 29/9/10 from Mark Stafford to Mr Hanckel.

23. If the defendants did not receive copies of these important documents as promised then why did they allow the completion and registration of the mortgage to proceed ? B&P knew that these were important matters that needed to be resolved, they had effectively told Mr Hanckel that in September the previous year. B&P in their own right and B&P in their role of controlling of TIL must have anticipated the possible consequences of proceeding when much of the essential information the bank had requested was missing. They had an obligation to ensure the interests of the partners or beneficiaries, call them what you will, were protected. In order to do that they were obliged to hear from the partners or beneficiaries with confirmation of what each thought he or she was entitled to. It wasn't enough to rely on what Mr Hanckel told them. This is what was set out in the Email from John Mulally in 2009 (see paragraph 7 above). As Mr Mulally said in that Email "*establishing the parties' shares will require care because of their uneven ownership across what will be the entire project site.*"

24. I find that the defendants did not exercise sufficient care in establishing what the claimant's exact share in the entire project site was before completing the mortgage to NBV. By allowing lot 11 to be part of the security they deprived the claimant of the full value of his interest in that lot. This was a clear breach of trust.

25. It is agreed that Lot 11 was valued at AUD 185,000.00 on 4th December 2013. That was the date when NBV obtained judgment by consent for a mortgagee sale. That is the measure of loss suffered by the claimant. There was some argument about the defendants being entitled to rely on an indemnity provision contained in the Angelfish Cove Trust deed but I dealt with that issue in my decision dated 10th June 2015 dealing with the claimant's application for summary judgment. I can only refer the parties to paragraph 10 of that decision (which was not appealed or challenged in any respect). As I also said in that decision, if I was satisfied on the balance of probabilities that the defendant's should not have relied solely on what they were being told by Mr Hanckel and that they should have made further enquiries of all the partners then I could find for the claimant. As I have set out above I have heard and seen all the evidence and I am not so satisfied. Judgment will be entered in favour of the claimant against the defendants jointly and severally in the sum of AUD 185,000.00, payable forthwith.

26. The claimant is also entitled to his costs and such costs will be taxed on a standard basis if not agreed.

Dated this 26th January 2018 at Port Vila

BY THE COURT

David Chetwynd
Judge

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COUR SUPREME COURT
LEX LEX
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