

IN THE HIGH COURT OF SOLOMON ISLANDS
(Chetwynd J)

Civil Claim No. 258 of 2007

Alex Bartlett **Claimant**

And

Hai Way International Company Ltd **First Defendant**

And

Lee Kwok Kuen & Company Ltd **Second Defendant/Applicant**

Dr Philip Tagini for Applicant Second Defendant

James Apaniai for the Claimant

No appearance for the First Defendant

Date of Hearing: 9th March 2010

Date of Judgment: 15th March 2010

Judgment

This is an application by the second defendant, Lee Kwok Kuen & Company Ltd, to have the claim struck out. The application was lodged on 26th August 2009 and for various, although largely unclear reasons, was only heard on 9th March, some six months later. I am not necessarily blaming the parties for the delay, it seems that there are difficulties within the High Court Registry too which mean that such a time lag between the filing of preliminary or interlocutory applications and the actual disposal of them is common place.

In any event the application was based on four grounds but at the hearing the applicant indicated that it would only be relying on two, namely that the proceedings were an abuse of the process of the court and or the claimant had failed to take steps to ensure the proceedings continued, in other words, delay.

The Claim by Alex Bartlett involves land on the outskirts of Honiara, in the KGVI area. It was/is owned by the first defendant Hai Way International Company Ltd (wrongly named in the original Writ of Summons as Highway International Limited). It was originally one parcel, 191-007-58 which was in 2001 subdivided into 192-007-192 and 192-007-193. The claim

involves 192-007-192 although 192-007-193 is of some peripheral relevance. The original plot had an area of 17.6946 ha. 192-007-192 is said, in various registration papers I have seen, to be 4.0385 ha in area.

In 2002 192-007-192 was surrendered by Hai Way International Company Ltd to the Commissioner of Lands by a deed dated 25/1/2002. No consideration passed. There then followed a grant of the fixed term estate by the Commissioner of Lands to the claimant Alex Bartlett. The consideration for such grant was said to have been \$5,000.

The Advice of Registered Dealing (exhibit AL 5 to the sworn statement of Antonio Lee dated 28th July 2009), incorrectly records this process as a surrender by Hai Way International Company Ltd to the Commissioner of Lands and then a grant by Hai Way International Company Ltd to Alex Bartlett.

A year later on 4th February 2003 a director of the first defendant, one Kuo Fung Chi, wrote to the Commissioner of Lands alleging "Unacceptable Survey Subdivision and Illegal Land Process Dealings"¹ This was, eventually, followed by the lodgment of a caveat² dated 13th October 2003 but registered much later on 18th March 2004. A second letter was written to the Commissioner of Lands on 13th November 2003³ which eventually elicited a response dated 8th January 2004.

On 24th November 2005 Hai Way International Company Ltd entered into a contract⁴ with Hai Way International Company Ltd for the sale of parcel 192-007-193. The copies of the contract I have seen are of poor quality with some portions missing but I do not think there is any dispute that there is a clause 12 to that contract which says, "The Vendor is attempting to regain title to the fixed term estate in Parcel No. 192-007-192. The parties agree that the Vendor will sell that parcel to the Purchase for \$300,000.00 as soon as the title has been regained. Once Vendor has title it will obtain the Commissioner of Lands consent to the transfer and the parties will prepare and sign a transfer document and the Purchaser will pay the sum of \$300,00.00 to the Vendor".

There is no evidence exhibited in the application of the formal transfer and registration of 192-007-193 in the second defendants (Lee Kwok Kuen & Company Ltd) name but I do not believe there is any dispute that the fixed term estate in 192-007-193 is now registered in the name of Lee Kwok Kuen & Company Ltd. I am not aware from anything the parties have said or from any of the papers lodged that there is any adverse claim against 192-007-193.

On 28/2/2007 a memorandum of Understanding was signed by Hai Way International Company Ltd and Alex Bartlett⁵. I need not go into all the details of that document but I think it fair to say that, in summary, it indicates that Alex Bartlett acknowledges that something was not quite right with the transfer of 192-007-192 to him in February 2002 and that he would use his best endeavors to work with the Register of Titles to rectify the title. Hai Way International Company Ltd agreed "In principle" to partition the land and "allot" a portion to Alex Bartlett which portion was to be identified by later negotiation.

¹ See Exhibit AL 6 to the sworn statement of Antonio Lee dated 28/7/09

² Pursuant to Part XXII Land And Titles Act [Cap133]

³ See Exhibit AL 9 to the sworn statement of Antonio Lee dated 28/7/09

⁴ See Exhibit AL 11 to the sworn statement of Antonio Lee dated 28/7/09

⁵ See Exhibit AL 13 to the sworn statement of Antonio Lee dated 28/7/09

Alex Bartlett then surrendered his title to 192-007-192 to the Commissioner of Lands by deed dated 7/3/2007 and the Commissioner of Lands by deed dated 16/3/2007 granted the fixed term estate in 192-007-192 to Hai Way International Company Ltd. All this is evident from the Advice of Registered Dealing exhibited ⁶. The position as shown by the Register and therefore at law at that time was that Hai Way International Company Ltd held the fixed term estate of 192-007-192 and Lee Kwok Kuen & Company Ltd held the fixed term estate of 192-007-193.

On 20th April 2007 Mrs Kuo Fung Chi wrote to the claimant Alex Bartlett. There is no direct evidence to say that she attached to her letter another letter from the "4 Shareholders" of Hai Way International Company Ltd but it seems logical that she did. Her letter is "AL 16" and the "4 Shareholders" letter is "AL 14". Those letters informed Alex Bartlett the claimant that further partitioning of 192-007-192 (as envisaged in the document of 28/2/2007) was not going to happen. On 11th May 2007 Alex Bartlett lodged a caveat against 192-007-192 and that was registered on 16th May 2007 ⁷.

On 19th June a Notice of Dealing was issued by the Deputy Registrar of Titles and sent to the Claimant ⁸ and copied to the Commissioner of Lands and Lee Kwok Kuen & Company Ltd. That gave notice that Lee Kwok Kuen & Company Ltd had, on 11th June 2007, lodged an application for the transfer of the fixed term estate in 192-007-192. The notice also advised Alex Bartlett that he should lodge a certified copy of "pending proceedings in the High Court" else the transfer would be registered and the caveat lodged on 16th May 2007 would lapse.

Here we have the nub of the matter. The claimant Alex Bartlett has started proceedings to protect what he considers to be his interest in 192-007-192. He believes he has a valid agreement relating to 192-007-192 (the Memorandum of Understanding of 28/2/2007). He lodged a caveat to protect his perceived interest. The lodging of a caveat is a perfectly acceptable way of trying to protect his interest. As a result of the caveat being lodged the Deputy Registrar of Titles must notify him of any dealings in 192-007-192 and that is exactly what he does by issuing the Notice of Dealing. That notice tells Alex Bartlett what he should do to maintain the caveat. This is the process set out quite clearly in Part XXII of the Land and Titles Act. The Claimant has no choice but to issue proceedings in the High Court.

Having reached that stage the question (in this application) is whether the proceedings which have been issued are an abuse of the process of the court. It is difficult to imagine proceedings being so labeled if they are instigated because that is the only way to prevent a caveat lodged with the Deputy Registrar of Titles from lapsing. Whilst it is only right and proper for the court to look at the nature, even the detail, of the proceedings lodged as long as there is some nexus between the subject matter of the proceedings and the caveat I am of the view that it would be impossible to say such proceedings are an abuse of the court process. It does not matter whether the Claimants case is strong or weak. All he has to establish is that his statement of claim discloses some cause of action or raises some question fit to be decided by the court ⁹.

It is quite right, as the second defendant applicant says in his application (at paragraph 31), that the caveat has had the consequences listed and that the proceedings have had the

⁶ See Exhibit AL 15 to the sworn statement of Antonio Lee dated 28/7/09

⁷ See Exhibit AL 17 to the sworn statement of Antonio Lee dated 28/7/09

⁸ See Exhibit AL 21 to the sworn statement of Antonio Lee dated 28/7/09

⁹ Per *Kabui J Reef Pacific Trading Limited and Others -v- Kama* High Court Civil case 56 of 1999

effect of maintaining the caveat but that does not in itself make the proceedings an abuse of the process of the court.

It may be said that it is difficult to reconcile the letters from the Deputy Registrar of Titles. His letter of 19th June 2007 (accompanying the Notice of Dealing)¹⁰ is clear. However his letter of 9/8/2007¹¹ seems to say that a certified copy of pending proceedings had *not* been filed. This, of course, is not the same as the Deputy Registrar of Titles saying proceedings had not been commenced because clearly they had. The Writ of Summons was filed on 18th July, 2007. What the Deputy Registrar of Titles is saying is that a certified copy had not been lodged as required. If that were the case then the transfer to Lee Kwok Kuen & Company Ltd should have been registered and the caveat would have lapsed. A year later the Deputy Registrar of Titles writes saying the caveat is still effective¹². It is clear from s223(20) of the Land and Titles Act that the Registrar of Titles can revive a lapsed caveat so perhaps that is what he did. If he did then he is right in saying as he did in the letter of 9/9/2008 from the Deputy Registrar of Titles, that it can only then be removed at the end of court proceedings.

In the circumstances I do not accept that the Claimant's filing of the Writ of Summons thereby preserving the caveat is an abuse of the process of the court.

As for delay, this case *is* getting stale. However there has been, for whatever reasons, delay on all sides. I do not think that all the delay can be attributed to the claimant Alex Bartlett or that the delay itself has been an abuse of the process of the court.

I refuse the application to strike out or dismiss the claim. I decline to make the consequential orders requested. As for costs, I think that the proper order for the costs of this application is that they be costs in the cause.

I must now mention another matter. There is reference in the papers that I considered for this application to another case. That is civil case No. 450 of 2007. That is a case involving the same parties and the same issues albeit the parties have different roles. There has been no substantive step in those proceedings for two years. As a result no further steps can be taken in that case without the leave of the court. The proceedings can also be struck out under Rule 9.72 of the Civil Procedure Rules. I will not take that step today but neither will I consolidate the two matters. What I will do is ensure as best I can that the two case files are kept together. Case No. 450 of 2007 can then be disposed of at the conclusion of these proceedings.

I am mindful of the delay in disposing of this case and so in 258 of 2007 I make the order that the case be listed for directions. I see from the lists that all the counsel involved in this case are involved in other cases on the Motion Day taking place on 18th March 2010. I order that the directions hearing be listed for 18th March 2010 at 9:30 am. It maybe that counsel can agree directions but if not, and I appreciate there will not be much time between the reading of this judgment and Motion Day, directions will be made in any event.

Chetwynd J

¹⁰ See Exhibit AL 21 to the sworn statement of Antonio Lee dated 28/7/09

¹¹ See Exhibit AL 23 to the sworn statement of Antonio Lee dated 28/7/09

¹² See Exhibit AL 29 to the sworn statement of Antonio Lee dated 28/7/09