

N7635

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

WS NO 1220 OF 2017

EVANGELICAL LUTHERAN CHURCH OF PAPUA NEW GUINEA
Plaintiff

V

GUNAR GEE
First Defendant

S W REALTY LIMITED
Second Defendant

FRANK WAMAHEMBE MARU & MARINA MARU
Third Defendant

BENJAMIN SAMSON, ACTING REGISTRAR OF TITLES
Fourth Defendant

HARRIET KOKIVA, ACTING REGISTRAR OF COMPANIES
Fifth Defendant

THE INDEPENDENT STATE OF PAPUA NEW GUINEA
Sixth Defendant

Madang: Cannings J
2018: 10 November, 8 December,
2019: 11 January

LAND – government land – State Leases – indefeasibility of title – meaning of “fraud” in Land Registration Act, Section 33(1)(a) – whether actual fraud must be proven – whether proof of constructive fraud is sufficient.

COMPANIES – removal (deregistration) of company from company register – powers and functions of Registrar of Companies as

representative of defunct company: Companies Act, Section 372 – property of company removed from register vests in Registrar: Companies Act, Section 373.

TRUSTS – constructive trusts – whether property of defunct company held in trust for another corporation.

REMEDIES – appropriate relief re title in a case of fraud – whether title should be declared null and void – whether property of defunct company held in constructive trust – whether property vested in Registrar of Companies – whether to order Registrar to transfer defunct company’s interest in property to another corporation.

The plaintiff claimed that it had a beneficial interest in a State Lease over a residential property by virtue of a constructive trust between it and another company that had been the registered proprietor of the State Lease. The other company was removed from the register of companies and became defunct in 1996. The plaintiff claimed that when the other company became defunct its property vested in the Registrar of Companies under Section 373 of the *Companies Act*, who was obliged in accordance with the constructive trust to transfer it to the plaintiff. Instead, the other company’s interest in the State Lease was transferred to the third defendants, who became the registered proprietors. The plaintiff claimed that the third defendants, assisted by the deliberate or negligent acts or omissions of other defendants, had acquired the State Lease in a case of fraud. The plaintiff sought declarations and orders that the transfer to the third defendants was null and void and that the State Lease vests in the Registrar of Companies who is required to transfer it to the plaintiff. Damages and other consequential relief were also sought. Only one of the defendants (not the third defendants) made submissions at the trial. It was argued that the plaintiff lacked standing so the proceedings should be summarily dismissed; and as to the merits, that there was no evidence of fraud, and the third defendants should remain as registered proprietors, and all the plaintiff’s claims for relief should be refused.

Held:

- (1) The plaintiff had a sufficient and real interest in the subject of the proceedings. The proceedings were not summarily dismissed.
- (2) The plaintiff proved constructive fraud, as the State Lease was

transferred to the third defendants by a defunct company, in circumstances that were peculiar, irregular and suspicious.

- (3) The defunct company, prior to its removal from the register of companies, held its interest in the State Lease in constructive trust for the plaintiff, and if it still existed would be equitably bound to transfer that interest to the plaintiff.
- (4) The State Lease did *not* vest in the Registrar of Companies under Section 373 of the *Companies Act* when the company became defunct.
- (5) However, the Registrar of Companies was authorised and obliged by Section 372 of the *Companies Act* to take steps to effect a transfer of the State Lease to the plaintiff.
- (6) The transfer of the State Lease to the third defendants was declared null and void and quashed. The Registrar of Companies was ordered, pursuant to Section 372 of the *Companies Act*, to do all things necessary to transfer the State Lease to the plaintiff. Other relief including damages sought by the plaintiff was refused.

Cases cited

The following cases are cited in the judgment:

David Mota v Albert Camillus (2017) N6810
Dumal Dibiaso ILG v Kola Kuma (2005) SC805
Elizabeth Kanari v Augustine Wiakar (2009) N3589
Emas Estate Development Pty Ltd v John Mea & Ors [1993] PNGLR 215
Eric Kiso v Bennie Otoa & Ken Wutnalom (2013) SC1222
Hi Tech Industries Ltd v PNG Institute of International Affairs Inc (2012) N4585
Hi-Lift Company Pty Ltd v Miri Setae [2000] PNGLR 80
Institute of International Affairs Inc v High Tech Industries Ltd (2014) SC1577
Iavela v Samson (2018) N7212
Kapiura Trading Ltd v Bullen (2012) N4903
Koitachi Ltd v Walter Schnaubelt (2007) SC870
Kol Toki v Moeka Morea (2016) SC1588
Lae Bottling Industries Ltd v Lae Rental Homes Ltd (2011) SC1120
Lae Rental Homes Ltd v Viviso Seravo (2003) N2483

Mark Lakani v Gabe Ikupu (2015) N6067
Mosoro v Kingswell Ltd (2011) N4450
Mudge v Secretary for Lands [1985] PNGLR 387
NCDIC v Crusoe Pty Ltd [1993] PNGLR 139
Open Bay Timber Ltd v Minister for Lands & Physical Planning (2013) N5109
PNG Bible Church Inc v Paul Wagun (2013) N5297
PNG Deep Sea Fishing Ltd v Luke Critten (2010) SC1126
Ramu Nickel Ltd v Temu (2007) N3252
Rosemary John v James Nomenda (2010) N3851
Ruth Don v Public Curator (2017) N6869
Steamships Trading Company Ltd v Garamut Enterprises Ltd (2000) N1959
Tagan v Nawara (2015) SC1443
Tau Gumu v PNGBC (2002) N2251
Vaki Vailala v National Housing Corporation (2017) N6598
Vitus Kais v Sali Tagau (2016) N6159
West New Britain Provincial Government v Kimas (2009) N3834
Yakananda Business Group Inc v Minister for Lands (2001) N2159

STATEMENT OF CLAIM

This was an application for declarations and orders regarding a State Lease.

Counsel

S Gor & J Kihanges, for the Plaintiff
Y Wadau, for the First Defendant
S Maliaki, for the Fourth & Sixth Defendants

11th January, 2019

1. **CANNINGS J:** This case is about a residential property in Alamanda Street, Kalibobo in the town of Madang. The formal description of the property is Section 34, Allotment 17, Madang Town, Madang District. The third defendants, Frank Wamahembe Maru and Marina Maru, are the registered proprietors of the State Lease over the property, by virtue of a transfer registered on 23 August 2017.
2. The plaintiff is the Evangelical Lutheran Church of Papua New Guinea (“the Church”), a corporation established by the *Evangelical Lutheran*

Church of Papua New Guinea Act 1992.

THE PLAINTIFF'S CLAIMS

3. The Church maintains that it should be the registered proprietor of the State Lease over the property.

4. The Church claims that it had a beneficial interest in the State Lease by virtue of a constructive trust between it and another company that was previously the registered proprietor of the State Lease: Lutheran Church (Madang) Ltd. That company acquired the State Lease through a transfer registered on 7 August 1978. But the company was removed from the register of companies and became defunct on 11 March 1996. It was never restored to the register. It was still defunct when on 23 August 2017 it transferred the State Lease to Mr and Mrs Maru.

5. The Church claims that when Lutheran Church (Madang) Ltd became defunct, its property, including the State Lease, vested in the Registrar of Companies under Section 373 of the *Companies Act* and could only be disposed of by the Registrar of Companies under the *Companies Act* in accordance with the constructive trust in favour of the Church.

6. Instead, Lutheran Church (Madang) Ltd's interest in the State Lease was transferred to Mr and Mrs Maru who became the registered proprietors, the Church alleges, in a case of fraud. The Church claims that the fraudulent transfer to Mr and Mrs Maru was enabled by the deliberate or negligent acts or omissions of other defendants:

- Gunar Gee, the first defendant, who held himself out as property manager of Lutheran Church (Madang) Ltd, and negotiated the sale of the property to Mr and Mrs Maru;
- S W Realty Ltd, the second defendant, a real estate company that was also involved in the sale of the property to Mr and Mrs Maru;
- Benjamin Samson, Acting Registrar of Titles, the fourth defendant, who registered the transfer of the State Lease to Mr and Mrs Maru;
- Harriet Kokiva, Acting Registrar of Companies, the fifth

defendant, in whom, the plaintiff claims, the State Lease should have been vested when Lutheran Church (Madang) Ltd became defunct.

7. The Church seeks declarations and orders to the effect that:

- the transfer to the third defendants is null and void;
- the State Lease was held by Lutheran Church (Madang) Ltd in constructive trust for the Church;
- the State Lease vests in the Registrar of Companies who is required to transfer it to the Church.

8. The Church also seeks damages and other consequential relief. But the primary relief it seeks is an order that the State Lease be transferred to it.

THE DEFENDANTS' RESPONSES

9. The Church filed the writ by which these proceedings were instituted (and the statement of claim endorsed on it), and served it on all defendants in November 2017. Only the first defendant (Mr Gee), the second defendant (S W Realty Ltd) and the third defendants (Mr and Mrs Maru) filed a notice of intention to defend. Only the third defendants filed a defence. The only evidence at the trial was given by the Church. Though counsel for the fourth defendant (the Registrar of Titles) and the sixth defendant (the State), Ms Maliaki, appeared at the evidence stage of the trial, only the first defendant's counsel, Mr Wadau, made submissions at the trial.

10. Mr Wadau submitted that the Church lacks standing to bring the proceedings, which should be summarily dismissed. Mr Wadau submitted that, if that submission is rejected, the Church's claim to the State Lease should still be refused as the Church had no role in management or control of Lutheran Church (Madang) Ltd, which is an entirely separate entity. When Lutheran Church (Madang) Ltd became defunct its property vested in the Registrar of Companies. If anyone had good reason to be concerned about the transfer of the State Lease to Mr and Mrs Maru it would be the Registrar of Companies, not the Church. But the Registrar has displayed no interest in the proceedings and no interest in the property. And there is no evidence of any fraud. So the status quo should continue: the State Lease should remain with Mr and Mrs Maru and all the Church's claims for

damages should be refused.

ISSUES

11. The following issues arise:

1. Should the proceedings be summarily dismissed?
2. Did Mr and Mrs Maru become registered proprietors in a case of fraud?
3. Did Lutheran Church (Madang) Ltd hold the State Lease in constructive trust for the Church?
4. Did the State Lease vest in the Registrar of Companies when Lutheran Church (Madang) Ltd became defunct?
5. Is the Registrar of Companies authorised or obliged to take any steps regarding the State Lease?
6. What declarations and orders should the Court make?

1 SHOULD THE PROCEEDINGS BE SUMMARILY DISMISSED?

12. No. The Church has a legitimate interest in pursuing a claim to the property the subject of these proceedings in view of the evidence that it and its functionaries were instrumental in incorporation in 1977 of Lutheran Church (Madang) Ltd. That company remained the registered proprietor of the State Lease, despite being defunct since 11 March 1996, until the transfer to Mr and Mrs Maru on 23 August 2017. The Church has a sufficient and real interest in the subject of these proceedings. No good case has been made for summary dismissal.

2 DID MR AND MRS MARU BECOME REGISTERED PROPRIETORS IN A CASE OF FRAUD?

13. Under Papua New Guinea's Torrens Title system of land registration for alienated government land, registration of a lease vests an indefeasible (unforfeitable) title in the registered proprietor subject only to the exceptions in Section 33(1) of the *Land Registration Act*. Most significantly Section

33(1)(a): “in the case of fraud” (*Mudge v Secretary for Lands* [1985] PNGLR 387).

14. As to what “fraud” means, and whether it is confined to actual fraud or extends to constructive fraud, the preponderance of judicial opinion is that it can be either. There is now a strong line of Supreme Court authority in support of the constructive fraud approach: *Emas Estate Development Pty Ltd v John Mea* [1993] PNGLR 215, *PNG Deep Sea Fishing Ltd v Luke Critten* (2010) SC1126, *Lae Bottling Industries Ltd v Lae Rental Homes Ltd* (2011) SC1120 and *Kol Toki v Moeka Morea* (2016) SC1588.

15. That line of authority is, in my view, binding on the National Court, more so than cases such as *Koitachi Ltd v Walter Schnaubelt* (2007) SC870 and *Eric Kiso v Bennie Otoa & Ken Wutnalom* (2013) SC1222, in which the Supreme Court has indicated that proof of actual fraud is necessary.

16. The constructive fraud approach has been applied in many National Court cases; for example: *Steamships Trading Company Ltd v Garamut Enterprises Ltd* (2000) N1959, *Hi-Lift Company Pty Ltd v Miri Setae* [2000] PNGLR 80, *Yakananda Business Group Inc v Minister for Lands* (2001) N2159, *Lae Rental Homes Ltd v Viviso Seravo* (2003) N2483, *Ramu Nickel Ltd v Temu* (2007) N3252, *Elizabeth Kanari v Augustine Wiakar* (2009) N3589, *West New Britain Provincial Government v Kimas* (2009) N3834, *Rosemary John v James Nomenda* (2010) N3851, *Mosoro v Kingswell Ltd* (2011) N4450, *Kapiura Trading Ltd v Bullen* (2012) N4903, *Open Bay Timber Ltd v Minister for Lands & Physical Planning* (2013) N5109, *Vitus Kais v Sali Tagau* (2016) N6159, *Vaki Vailala v National Housing Corporation* (2017) N6598, *David Mota v Albert Camillus* (2017) N6810, *Ruth Don v Public Curator* (2017) N6869

17. There are still some Judges who cling to the notion that proof of actual fraud is necessary. Makail J in *Tagan v Nawara* (2015) SC1443 and Gavara-Nanu J in *Iavela v Samson* (2018) N7212 fall into that category. However I respectfully disagree with their Honours’ approach, which in my view is outdated and inappropriate to the circumstances of Papua New Guinea.

I will apply the constructive fraud approach. The question is whether the transfer of the State Lease to Mr and Mrs Maru was a case of constructive fraud.

18. Mr Wadau, for Mr Gee, submitted that there was no fraud involved as,

though it was deregistered in 1996, Lutheran Church (Madang) Ltd still legitimately carried on business and Mr Gee, an employee of the company, still properly conducted business on its behalf. Mr Wadau provided no authority for these startling submissions. I see no sense in them and I reject them outright.

19. I have concluded, after assessment of the evidence and submissions of counsel, that the question of whether this was a case of constructive fraud must be determined in the affirmative for the following reasons.

- the transfer to Mr and Mrs Maru, as joint tenants, was registered based on a contract of sale between Lutheran Church (Madang) Ltd, as vendor, and Mr Maru (but, curiously, not Mrs Maru), as purchaser, dated 28 June 2017, and an instrument of transfer, dated "... June 2017", which for some reason was stamped "EXEMPT/NIL" from stamp duty, the purchase price being K600,000.00;
- the sale was negotiated by Mr Gee who held himself out in various documents during 2017 using a letterhead of Lutheran Church (Madang) Ltd as that company's "Properties/Project Manager";
- the date of the contract of sale and the date of registration of the transfer were more than 21 years after Lutheran Church (Madang) Ltd was de-registered;
- Lutheran Church (Madang) Ltd had not in the intervening period been restored to the register of companies;
- there was no transfer of the State Lease (other than the contentious transfer to Mr and Mrs Maru) to any person after the transfer to Lutheran Church (Madang) Ltd on 7 August 1978;
- the only person who potentially had proper and lawful authority to transfer the State Lease to Mr and Mrs Maru was the Registrar of Companies;
- there is no evidence that the Registrar of Companies had any role in the transfer to Mr and Mrs Maru;

20. The only reasonable conclusion to draw from these peculiar, irregular and suspicious circumstances is that the transfer of the State Lease to Mr and Mrs Maru was unlawful and so unsatisfactory and irregular as to be tantamount to fraud. The transfer is properly regarded as permeated by constructive fraud. This is a “case of fraud” for the purposes of Section 33(1)(a) of the *Land Registration Act*.

3 DID LUTHERAN CHURCH (MADANG) LTD HOLD THE STATE LEASE IN CONSTRUCTIVE TRUST FOR THE CHURCH?

21. As the Supreme Court explained in the leading case *Dumal Dibiaso ILG v Kola Kuma* (2005) SC805, a trust is a special arrangement or association based on a confidence that arises between one person (the trustee) for the benefit of another (the beneficiary or *cestui que trust*). A trust can be in the form of an instrument: an express trust. Or a trust can arise by operation of law: a constructive trust. The circumstances in which a constructive trust arises were explained by the Court by adopting the classic definition from *Black’s Law Dictionary*, in these terms:

Where the circumstances of a transaction are such that the person who takes the legal estate in property cannot also enjoy the beneficial interest without necessarily violating some established principles of equity, the court will raise a constructive trust, and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties who in equity are entitled to the beneficial enjoyment.

22. The Church argues that all the property of Lutheran Church (Madang) Ltd, including the property at the centre of this case, was held in constructive trust for the benefit of the Church. The opposing argument put by Mr Wadau on behalf of Mr Gee is that no constructive trust existed at any time. Mr Wadau points out that Lutheran Church (Madang) Ltd was at all times a separate and distinct legal entity from the Church; the Church was never a shareholder and had no power to appoint or nominate any directors; and under the company’s memorandum of association its objects were “to support and promote in Papua New Guinea and *in particular, in Madang Province* ... the works, beliefs and articles of faith of the Evangelical Church of Papua New Guinea”, which reinforced its roles and functions as confined to Madang Province.

23. I reject the submissions of Mr Wadau. The proper inference to be drawn from the objects of establishment of Lutheran Church (Madang) Ltd is quite the opposite of that contended for by Mr Wadau. Though it had a separate legal status, Lutheran Church (Madang) Ltd was established and obliged as a matter of law and equity to conduct its affairs and business in such a way as to support and promote the works, beliefs and articles of faith of the Church. It was established to serve the Church and its members in Madang Province and act in the interests of the Church and its members in Madang Province. There is ample evidence to prove that Lutheran Church (Madang) Ltd was incorporated in 1977 by the Church. The only reasonable inference to be drawn from the special relationship between Lutheran Church (Madang) Ltd and the Church is that all property in which Lutheran Church (Madang) Ltd had a legal interest was held in constructive trust for the Church.

24. I find that Lutheran Church (Madang) Ltd, at all times it was registered proprietor of the State Lease over Section 34, Allotment 17, Madang Town, Madang District, held it in constructive trust for the Church.

4 DID THE STATE LEASE VEST IN THE REGISTRAR OF COMPANIES WHEN LUTHERAN CHURCH (MADANG) LTD BECAME DEFUNCT?

25. The Church argues that it did, and that this occurred by operation of Section 373 (*property of company removed from the register*) of the *Companies Act*, in particular Sub-section (1).

26. Section 373 states:

- (1) *Property of a company that, immediately before the removal of a company from the register, had not been distributed or disclaimed, vests in the Registrar with effect from the removal of the company from the register.*
- (2) *For the purposes of this Act, property of a company includes leasehold property and all other rights vested in or held on trust for the company, but does not include property held by the company on trust for any other person, or any money to which Section 364 applies.*
- (3) *Where property vested in the Registrar was held by the*

company on trust, the Registrar may—

- (a) continue to act as trustee; or*
 - (b) apply to the Court for the appointment of a new trustee.*
- (4) On proof to the satisfaction of the Registrar that there is vested in him by virtue of Subsection (1) any estate or interest in property, whether solely or together with any other person, of a beneficial nature and not merely held in trust, the Registrar may sell or otherwise dispose of, or deal with, the estate or interest or any part of it as he thinks fit.*
- (5) The Registrar may sell or otherwise dispose of, or deal with, property referred to in Subsection (1), either solely or in concurrence with any other person, by public auction, public tender or private contract and in such manner, for such consideration and on such terms and conditions as the Registrar thinks proper, with power to rescind any contract and resell or otherwise dispose of or deal with the property as the Registrar thinks expedient, and may make, execute, sign and give such contracts, instruments and documents as the Registrar thinks necessary.*
- (6) The Registrar shall be remunerated by such commission, whether by way of percentage or otherwise, as may be prescribed in respect of the exercise of any powers conferred on him under this section.*
- (7) The directors of the company immediately before the removal of the company from the register shall keep the company books and records, including accounting records for three years after the removal from the register, but this does not apply to any books and records, including accounting records required to be kept by a receiver or liquidator under this Act.*
- (8) Where property is vested in the Registrar under this section, a person who would have been entitled to receive all or part of the property, or payment from the proceeds of its realisation, if it had been in the hands of the company immediately before the removal of the company from the register, or any other person claiming through that person, may, within six years of the*

removal of the company from the register, or such longer period as allowed by the Court, apply to the Court for an order—

- (a) vesting all or part of the property in that person; or*
 - (b) for payment to that person by the Registrar of an amount, not to include interest or damages, for the person's interest or estate in the property, but the amount shall not be greater than a proportional amount, in accordance with the person's interest or estate in the property, received by the Registrar under Subsection (4) or (5) less any commission payable under Subsection (6) and any other expenses.*
- (9) On an application made under Subsection (8) the Court may—*
- (a) decide any question concerning the value of the property, the entitlement of any applicant to the property or to the payment of an amount, and the apportionment of the property or compensation among two or more applicants; or*
 - (b) order that the hearing of two or more applications be consolidated; or*
 - (c) order that an application be treated as an application on behalf of all persons, or all members of a class of persons, with an interest in the property; or*
 - (d) make any ancillary orders.*
- (10) All moneys that vest in the Registrar under this section, or that are the proceeds of realisation of property that so vests, less the costs and expenses of and incidental to the exercise of the power and in making payments authorised by this section, shall be paid into an account established by the Registrar for the purpose of holding moneys received by the Registrar under this section, and shall be forfeited to the Registrar 12 months after the date on which the moneys were paid into the account.*
- (11) Compensation ordered to be paid under Subsection (8) shall be paid out of the account referred to in Subsection (10) without further appropriation.*

27. In contending that the State Lease vested in the Registrar of

Companies, with effect from the date of removal of Lutheran Church (Madang) Ltd from the register, the Church relies on dicta of Hartshorn J in *Hi Tech Industries Ltd v PNG Institute of International Affairs Inc* (2012) N4585.

28. It is at this point that I have encountered difficulty digesting the Church's argument. Hartshorn J's decision does not, in my view, support the argument of the Church. His Honour held that if a defunct company is the registered proprietor of a State Lease and holds that interest on constructive trust for another person, that interest is *not* under Section 373(1) vested in the Registrar of Companies from the date of removal of the company from the register of companies. And the Registrar is *not* authorised by Section 373(4) to sell or otherwise dispose of that interest as he thinks fit.

29. Hartshorn J explained that the property of a defunct company that is vested in the Registrar does *not*, by virtue of Section 373(2), include property held by the defunct company on trust for another person, including where it is held on constructive trust. His Honour stated:

Pursuant to s 373(1) Companies Act, the property of a company vests in the Registrar with effect from the removal of the company from the register of companies. Section 373(2) provides that the property of the company does not include property held by the company on trust for any other person. Section 373(3) provides that where property vested in the Registrar was held by the company on trust the Registrar may continue to act as trustee or apply to the Court for the appointment of a new trustee. Section 373(4) provides that the Registrar may sell or dispose or deal with any estate or interest in property of the company but not if that estate or interest is "merely held in trust".

As "property of the company" in s 373(2) does not include property held by the company on trust for any other person, and the property held by Longreach [the defunct company] for Hitech [the beneficiary] was "merely held in trust" for another person, the Registrar was not entitled to, and did not have the requisite authority to sell, dispose or otherwise deal with the property. The decision of the Registrar to purport to sell the property to the Institute pursuant to sections 372 and 373 Companies Act was a breach of sections 373 and 374. For the above reasons I am satisfied that the decision of the Registrar to purport to sell the property to the Institute was wrong.

30. Hartshorn J's interpretation of Section 373 was held, on appeal, to be correct in *Institute of International Affairs Inc v High Tech Industries Ltd* (2014) SC1577 (though his Honour's final decision was overturned, the Supreme Court ruled that on this point of law his Honour did not err). I adopt Hartshorn J's reasoning and find that, because Lutheran Church (Madang) Ltd held the State Lease on constructive trust for the Church, the State Lease did *not* vest in the Registrar of Companies when Lutheran Church (Madang) Ltd became defunct.

5 IS THE REGISTRAR OF COMPANIES AUTHORISED OR OBLIGED TO TAKE ANY STEPS REGARDING THE STATE LEASE?

31. Though the State Lease did not vest in the Registrar, I find that the Registrar was nevertheless authorised, and obliged, by Section 372 (*Registrar as representative of defunct company*) of the *Companies Act* to step into the shoes of Lutheran Church (Madang) Ltd when it became defunct, as its representative, and do what was necessary to be done pursuant to the constructive trust.

32. Section 372 states:

(1) *Where, after a company has been removed from the register, it is proved to the satisfaction of the Registrar—*

(a) *that the company, if it still existed, would be legally or equitably bound to carry out, complete, or give effect to some dealing, transaction or matter; and*

(b) *that, in order to carry out, complete or give effect to the dealing, transaction, or matter, some purely administrative act, not being of a discretionary kind, should have been done by or on behalf of the company, or if the company still existed should be done by or on behalf of the company,*

the Registrar may, as representing the company or its liquidator under the provisions of this section, do or cause to be done any such act.

(2) *The Registrar may execute or sign any relevant instrument or document adding a memorandum stating that he has done so*

under this section, and the execution or signature has the same force, validity and effect as if the company, if it still existed, had duly executed the instrument or document.

33. A Section 372 situation arose in *PNG Bible Church Inc v Paul Wagon* (2013) N5297. The defunct company was a foreign company known as Evangelical Bible Mission, which was removed from the register of companies in 1965. It was restored to the register in 2009 in a move found by Poole J to be clearly unlawful. His Honour found that the defunct company held a number of properties in constructive trust for the plaintiff, PNG Bible Church Inc, which were (due to Section 373(2)) *not* vested in the Registrar of Companies, but which the Registrar was nevertheless obliged to deal with under Section 372. His Honour explained:

Section 372 of the Companies Act makes the Registrar the representative of a defunct company and s 373 vests property of a defunct company in the Registrar but with the exception (see s 373(2)) that, while the property may include leasehold property, it “does not include property held by the company on trust for any other person.”

In the light of the evidence, I find that, since at least the Evangelical Bible Mission held the property on trust for the plaintiff, it does not vest in the Registrar because of section 373(2).

Nonetheless, the Registrar still may act in this matter [under s 372] ...

In the circumstances of this case I find:

- 1. The Evangelical Bible Mission, if it still existed, would be bound in equity to complete the transaction or matter as trustee of transferring the titles to the property to the Plaintiff, as the beneficiary absolutely entitled.*
- 2. The Registrar has power to carry out the transfer (which was not a discretionary matter, for the defunct company was obliged to make the transfers when called on to do so) which the company should have done by executing any relevant instruments to give effect to the transfer.*

34. I respectfully adopt the approach of Poole J in *PNG Bible Church*. I apply Section 372 to the present case, and find:

- that Lutheran Church (Madang) Ltd, if it still existed, would be equitably bound, according to the terms of the constructive trust with the Church, to give effect to the matter of the State Lease by transferring it to the Church; and
- that, in order to give effect to that matter, some purely administrative act, not being of a discretionary kind, if the company still existed should be done by the company, viz effecting the transfer of the State Lease to the Church.

35. Therefore the Registrar of Companies may, representing the company pursuant to Section 372(1), effect the transfer of the State Lease to the Church.

36. The Registrar may, under Section 372(2), execute or sign any relevant instrument adding a memorandum stating that he has done so under Section 372.

37. I consider that, having found that the Registrar is authorised to effect a transfer of the State Lease to the Church, that the Registrar should be ordered (so as to give effect to the constructive trust) to effect that transfer.

6 WHAT DECLARATIONS AND ORDERS SHOULD THE COURT MAKE?

38. In view of the finding of constructive fraud involved in the 2017 transfer of the State Lease, it is open to the Court to take the very significant step of nullifying the title of the registered proprietors, Mr and Mrs Maru.

39. Such a step is not to be taken lightly as there is the possibility that they were bona fide purchasers of the property, for value, without notice of the defect in title (arising from the fact that the vendor was a defunct company). However, after filing a defence, they took no further part in this case. They did not take the opportunity to appear at the trial and no evidence was presented or argument made on their behalf. So there is no evidence that they acted genuinely or were innocent participants in the fraud.

40. There is ample precedent for setting aside registration of a transaction that has been affected by fraud in the four Supreme Court decisions cited earlier (*Emas Estate, PNG Deep Sea Fishing, Lae Bottling Industries, Toki*) and in the numerous National Court decisions that have applied the constructive fraud approach. Having considered all the circumstances of the case and the submissions of counsel, I consider that it is the interests of justice that the title of Mr and Mrs Maru be nullified. In making that decision I am guided by Section 155(4) of the *Constitution*, which states:

Both the Supreme Court and the National Court have an inherent power to make, in such circumstances as seem to them proper, orders in the nature of prerogative writs and such other orders as are necessary to do justice in the circumstances of a particular case. [Emphasis added.]

41. I consider that it is also necessary to do justice in the circumstances of this particular case to make declarations and orders to give effect to the findings of the Court and in particular to order the Registrar of Companies to effect the transfer of the State Lease to the Church. The Church's claim for damages has not been clearly articulated in the statement of claim and will be refused.

42. As for costs, an order in favour of the successful party, the Church, would in normal circumstances be made. However, in the unusual circumstances of this case (multiple defendants with only three participating, but not fully, at the trial, and with the successful party being a substantial corporation with the ability to absorb costs, and a costs order could well prove to be a distraction and prolong the litigation and be difficult to enforce) it is appropriate that the parties bear their own costs.

DECLARATIONS AND ORDERS

- (1) It is declared that the transfer to the third defendants of the State Lease over Section 34, Allotment 17, Madang Town, Madang District on or about 23 August 2017 is null and void and is quashed.
- (2) It is ordered that the fourth defendant shall, within 21 days after the date of service of this order, do all things necessary to restore Lutheran Church (Madang) Ltd as registered proprietor of the State Lease over Section 34, Allotment 17, Madang Town, Madang District.

- (3) It is declared that Lutheran Church (Madang) Ltd, prior to its removal from the register of companies, held its interest as registered proprietor of the State Lease over Section 34, Allotment 17, Madang Town, Madang District in constructive trust for the plaintiff, and that Lutheran Church (Madang) Ltd, if it still existed, would be equitably bound to transfer that interest to the plaintiff.
- (4) It is ordered that the fifth defendant shall, in accordance with these declarations and orders and pursuant to Section 372 of the *Companies Act*, within 21 days after the date of restoration of Lutheran Church (Madang) Ltd as registered proprietor of the State Lease over Section 34, Allotment 17, Madang Town, Madang District, do all things necessary to transfer for nominal consideration the interest of Lutheran Church (Madang) Ltd as registered proprietor of the State Lease over Section 34, Allotment 17, Madang Town, Madang District to the plaintiff.
- (5) Other relief including damages sought in the statement of claim is refused.
- (6) Subject to any specific costs orders made in the course of the proceedings, the parties shall bear their own costs of the proceedings.

Judgment accordingly.

Fiocco & Nutley Lawyers: *Lawyers for the Plaintiff*
Young Wadau Lawyers: *Lawyers for the First Defendant*
Solicitor-General: *Lawyer for the Fourth & Sixth Defendants*