SC2687

PAPUA NEW GUINEA
[SUPREME COURT OF JUSTICE]

SCA NO. 30 OF 2020 (IECMS)

BETWEEN:
HONOURABLE JIM SIMATAB, MINISTER FOR PAPUA NEW GUINEA CORRECTIONAL SERVICES
First Appellant

AND:
MICHAEL WAIPO, COMMISSIONER OF CORRECTIONAL SERVICES
Second Appellant

AND:
THE INDEPENDENT STATE OF PAPUA NEW GUINEA
Third Appellant

AND:
KA PROPERTIES (PNG) LIMITED
Respondent

WAIGANI: KANDAKASI DCJ, MURRAY J, LIOSI J
27 SEPTEMBER 2021; 22 DECEMBER 2023

CONTRACT – Contract for sale of land – Essential terms – Fundamental term – Agreement to sell the subject land by vendor and purchaser agreeing to pay the agreed price disclose – No agreement on engagement and payment of agents fees, early possession and terms of that – Whether these terms of possession implied – Payment of deposit, settlement of contract, vendors obligation to give owners copy of title and vendor to pay agreed contract price normal terms and can be implied – Vendor insisting on payment of purchase price and failing to give owners copy of title and duly prepared and signed transfer instrument despite purchaser paying the agreed purchase price in full twice – Contract completed - Going to the National Court and securing declaration of termination of contract for sale, vacant possession and order for payments of rentals unfair and amount to unjust enrichment – Judgment and orders of the National Court quashed and orders to enforce contract for sale granted.

EQUITY - He who goes to Court must do so with clean hands – Contract for sale of land - Vendor insisting on payment of purchase price and failing to give owners copy of title and duly prepared and signed transfer instrument despite purchaser paying in full the agreed contract price twice – Vendor demanding and receiving more than the initially agreed contract price and failing to give owners copy of title and signed transfer instrument – Vendor went to court with unclean hands – Reliefs granted by the National Court amounted to authorising unjust enrichment – Judgment and orders of the National Court quashed and orders to enforce contract for sale granted.

Cases cited:

Curtain Brothers (Queensland) Pty Ltd and Kinhill Kramer Pty Ltd v The State [1993] PNGLR 285
Fly River Provincial Government v Pioneer Health Services Ltd (2003) SC705
Hillas (W.N.) and Co Ltd v Arcos Ltd [1932] UKHL 2; (1932) 38 Com. Cas 23
Jixing Industries Ltd v Aitape Metropolitan Forest Investment Ltd (2013) SC1294
Koang No 47 Ltd v Monodo Merchants Ltd (2001) SC675
Madang Development Corporation Ltd v Rabtrad Madang Ltd & 2 Ors (2006) N3091
Manau v Telikom (PNG) Limited (2011) SC1146
Nivani Ltd v China Jiangsu International (PNG) Ltd (2007) N3147
Papua Club Inc v Nasaum Holdings Ltd (2004) N2603
Papua New Banking Corporation v Amevo [1998] PNGLR 240
Papua New Guinea Banking Corporation (PNGBC) v Tole (2002) SC694
Sykes v Fine Fare (1967) 1 Lloyd's LLR 53
Tian Chen Ltd v The Tower Ltd (No 2) (2003) N2319
Upper Hunter County District Council v Australian Chilling and Freezing Co. Ltd [1968] HCA 8; (1968) 118 CLR 429
York Air Conditioning and Refrigeration (A/asia) Pty Ltd v Commonwealth [1949] HCA 23; (1949) 80 CLR 11

Counsel:

Mr. R. Uware for the appellants
Ms. E. Parua for the respondent

1. **KANDAKASI DCJ:** At the completion of our hearing of the appeal, on 22nd November 2021, the Court with the consent of the parties gave them ample opportunity to continue their out of court settlement negotiations and have this matter settled. That was on their indication that, they had been

negotiating and were not able to reach a final position. They also agreed that, should they fail to fully resolve the matter; they would then ask the Court to deliver its decision on the appeal. By the end of 2022, the parties had not reverted to the Court. By around the end of March 2023, it was made clear to the Court that the parties failed to settle the matter. At that point, it was clear that the Court had to consider the arguments that were presented before it and come to a decision. This the Court has done, though unfortunately with some delay, for which we do apologise.

2. Her Honour, Murray J, has produced a draft of her decision on 10th December 2023. I have had the benefit of considering her Honour's draft decision. I agree with her Honour that, the appeal should be allowed with the orders she proposes should be made for the reasons her Honour gives in her considered judgment. I make a few additional comments.

3. It is well settled law that the Court's role and function in contract matters is to uphold the free agreement of the parties. The Court therefore exists, not to destroy or rewrite the free agreements of the parties, but to give meaning and effect to them. I first stated the law in one of my earliest decisions. That was in the matter of *Tian Chen Ltd v. The Tower Ltd (No 2)* (2003) N2319. There, I quoted and considered the authoritative and persuasive statements of the law in *Chitty on Contracts 24th Edition* at pages 700-701, the decision of the House of Lords in *Hillas (W.N.) and Co. Ltd v. Arcos Ltd* [1932] UKHL 2; (1932) 38 Com. Cas 23, per Lord Tomlin with whom Lords Warrington and Macmillan agreed at page 29 and the Australian High Court's decision in *York Air Conditioning and Refrigeration (A/asia) Pty Ltd v. Commonwealth* [1949] HCA 23; (1949) 80 CLR. 11, per Williams J and the decision of Barwick C.J, in the Australian High Court case of *Upper Hunter County District Council v Australian Chilling and Freezing Co.* Ltd [1968] HCA 8; (1968) 118 CLR. 429, at 437 as well as Lord Denning MR's statement in *Sykes v. Fine Fare* (1967) 1 Lloyd's LLR 53 (English Court of Appeal. Having done so, I summed up the position in the following terms:

> "It is clear from these authorities that, it is the duty of the Court to uphold the agreement of the parties regardless of whatever difficulties there might be in the construction of their contract. In the exercise of that duty, the Courts must endeavour to uphold the agreement of the parties, particularly in commercial arrangements. This is because the Courts are not there to destroy the agreement of parties but to uphold them. This should readily be the case where the parties have not only agreed but have gone further into implementing their agreement resulting in expenses being incurred by either or both of the parties. In so doing, the Courts can and have ignored words or clause that are meaningless or superfluous (*Nicolene v.*

Simmonds (1953) 1 QB 543) and supply terms or words as appear reasonable and necessary in the circumstances to give effect to the parties agreement." (Underlining supplied)

4. My decision in the above matter was adopted and applied by many Supreme and National Court judgements. The earliest Supreme Court decision is the one in *Fly River Provincial Government v. Pioneer Health Services Ltd* (2003) SC705, per Amet CJ, Sawong and Kandakasi JJ (as we then were). There, the Court in its unanimous decision adopted and applied the principles in these terms especially where the parties have part performed their contract:

> "There appears to be some uncertainty in these clauses. Nevertheless, we do not consider them serious enough to render the entire contract void. The parties have part performed the contract and could have continued to do so if it were not for the FPG's inability to pay. Given that, this Court is duty bound to give effect to the words used by the parties to the agreement in the context of their agreement so as to give effect to their agreement."
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> (Underlining supplied)

5. Later, in *Jixing Industries Ltd v Aitape Metropolitan Forest Investment Ltd* (2013) SC1294, per Gavara-Nanu J, Davani J & Makail J, my decision in the *Tian Chen Ltd v The Tower Ltd (No 2)* case was referred to by counsel appearing before it. The Supreme Court came to a decision like the one in the *Tian Chen Ltd* case as well as the one in *Fly River Provincial Government v. Pioneer Health Services* (supra). The case concerned a construction of the parties' written memorandum of agreement. The latest decision of the Supreme Court going by the same principle, on point is the one in *Bluewater International Ltd v. Mumu* (2019) SC1798, per Kandakasi DCJ, Pitpit J & Dingake J. That was in the context of an arbitration clause in the parties' contract.

6. In a contract for the sale of land or real property, the most fundamental term of such a contract lies in the vendor agreeing to part with the property the subject of the contract. That is usually in exchange for the agreed contract or purchase price for the property. The purchaser in turn agrees to forego the money agreed to be the contract or purchase price. Technically this is called the passing of valuable consideration from one party to the other for a legally binding and enforceable contract.

7. In the present case, there is no dispute as to this fundamental term of the contract existing. The Appellants agreed to purchase from the Respondent a property, described as Allotment 1, Section 427, Port Moresby, Hohola,

National Capital District, being the whole of the property contained in the State Lease Volume 76, Folio 200 (the property), the subject of this proceeding, by agreeing to part with the initial agreed purchase price of K4, 750,000.00 and the respondent agreed to part with the property in exchange for the K4, 750,000.00. This fundamental term of the contract was fulfilled when the Appellants paid the agreed purchase price in two agreed instalments.

8. The rest of the terms as to how and when the purchase price was to be paid and the completion of the various required documentation were the means by which, the fundamental term of the contract was to be fully fulfilled, and the intention of the parties fully realised. In most contracts of this type, parties often provide for a deposit of the purchase price and other steps the parties need to take to ensure the contract of sale is duly and properly completed. These are usually considered as standard terms of a contract for sale of land. Where that is lacking, the Court can easily imply such terms as are necessary to give effect to the parties' agreement.[1] Proceeding on that basis, I am of the view that, there was an implied term of the contract that upon the Appellant fully paying up the agreed purchase price, the relevant and necessary documentation formalising the transfer of the property to the Appellants would be completed by the Respondent and delivered to the Appellant. Indeed, in its subsequent conversation with the Appellant regarding an alleged shortfall and alleged unpaid rentals, the Respondent confirmed it would complete and provide the relevant documents, if the Appellant agreed to pay an additional K1,033,432.89, purportedly also for unpaid rentals. Despite the Appellant paying these additional amounts in full, the Respondent still failed to complete the transfer and other documentation.

9. Not only that, the Respondent also tried to introduce a new term of the contract unilaterally. That concerned its agent, Century 21 Real Estates' (Century 21) fees of K141,075.00. Where a contract of sale of property as in this case is sourced and concluded through a real estate agent, the parties' contract would specifically make provision for that with the rate, or the amounts agreed to be the fees to be paid and which of the parties will be responsible for the payment. In fact, this would be clearly spelt out in a contract for sale of land, if a purchaser is to meet such additional fees, costs, or expenses. The contract would specifically make that clear by making expressed provision for it. Such a term cannot be implied because the appointment of agents and their fees and who would be responsible for their fees are not settled and or uniform and applicable across the board in all such contracts. In the present case, there was no clear and expressed agreement of the parties that the Appellants would be

[1] See for example of cases on point: *Tjandranegara v BSP Financial Group Ltd* (2021) N9353 at [45]; *Kimbe International Primary School v. Narpal* [1987] PNGLR 442, per King AJ and *Pundari v. Niolam Security Ltd* (2011) SC1123, per Davani J (as she then was), Cannings and Yagi J.J

responsible for Century 21's fees. Instead, the initial agreed purchase price was expressed in "net" terms. In the circumstances, I am of the view that the Respondent was unfairly and unreasonably imposing a term of the contract unilaterally upon the Appellants.

10. Having delayed the completion of the contract after the Appellant fully paid the agreed contract or purchase price, the Respondent insisted on the Appellants meeting the claim of its real estate agent's fees and demanded a payment of its claimed rental arrears as well. These claims totalled, K1,033,432.89. Notwithstanding the fact that it had fully paid up the purchase price, the Appellants nonetheless, agreed to and did in fact meet that additional demand.

11. The above additional payment, which was inclusive of alleged rental arrears, represents another additional term the Respondent as the vendor successfully imposed unilaterally on the Appellants. Again, if a purchaser was to have early possession of the property, there would be a special provision covering such early occupation. The rents payable and other terms and conditions on which that was to happen would be spelt out specifically in the contract for sale. Again, although this is not unusual, it is not the case for all contracts for sale of property. It varies from case to case. Hence, it would have to be by specific agreement of the parties. As such, it cannot be implied.

12. Despite these additional payments, the Respondent still failed to complete the documentation required to complete the contract for the sale of the property to the Appellants. Instead, interestingly, the Respondent went to Court by proceedings referenced WS 1173 of 2016, seeking various reliefs against the Appellants. The National Court through Hartshorn J., granted the reliefs in the following terms:

> "(1) Judgment is entered for the plaintiff against the defendants.
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> (2) It is declared that:
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> (a) The plaintiff is the registered proprietor of the property described as Allotment 1, Section 427, Port Moresby, Hohola, National Capital District, being the whole of the property contained in the State Lease Volume 76, Folio 200.
> (b) The plaintiff has assumed all debts and liabilities associated with the property from the previous registered proprietor, Zen No 33 Limited, and Kramer Ausenko (PNG) Limited.
> (c) The agreement dated 4th October 2004 has been terminated.

(d) The amount of K4,608,925 paid by the third defendant to Zen No 33 Limited under the agreement was forfeited to Kramer Ausenko (PNG) Limited.

(3) It is ordered that:

(a) Papua New Guinea Correctional Service (PNGCS), and the third defendant pay to the plaintiff the balance outstanding rental amount of K6,078,472 as of 31st July 2016 plus all subsequent rentals accruing.
(b) The first, second and third defendants ensure that PNGCS delivers vacant possession of this property within thirty (30) days of this order.
(c) If the defendants fail to ensure that PNGCS delivers vacant possession of this property within thirty (30) days of this order, leave is granted to the plaintiff to issue a writ of possession.
(d) The defendants shall pay interest pursuant to the Judicial Proceedings (Interest on Debts and Damages) Act Ch. 52 on the rental amount of K6, 078, 472 as at 31st July 2016, plus on all rentals subsequent accruing.
(e) The defendants shall pay the plaintiff's costs of and incidental to these proceedings."

13. I repeat, this was after the Appellants had fully paid for the property twice. The first payment was the payment of the initial agreed purchase price by way of the agreed 2 instalments. The second payment was made on demand outside the contract in the sum of K1,033,432.89. To my mind this was nothing short of unjust enrichment by the Respondent. Having so gained financially, it had the audacity to go to the National Court seeking the reliefs it sought against the Appellants and secure the above orders. Clearly, the Respondent in my view, went to Court with unclean hands.

14. What happened here is most bizarre. Usually, a small percentage of the purchase price, say about 10 %, is required to be paid upfront before settlement by way of a deposit. The balance of the purchase price would not be demanded nor paid in full prior to the date appointed for the settlement of the contract for sale. At settlement, the vendor would come ready to hand over the owner's copy of the relevant State Lease and a transfer instrument prepared and signed by the vendor. On the part of a purchaser, it would come with bank cheques in

accordance with a prior agreed settlement statement to hand over to the vendor in exchange. Without observing, requiring and or ensuring the parties followed the normal process, the Respondent insisted on payment of the purchase price twice as elaborated and noted above.

15. It is well settled law that, fairness and equity dictated that a person who goes to court must do so with clean hands. In my decision in the Supreme Court in the matter of *Koang No 47 Ltd v. Mondo Merchants Ltd* (2001) SC675, I stated and applied the principle in question in the following terms:

> "There are further reasons to reject Koangs arguments and claim. Firstly, after having failed to take any steps to protect its own and that of its shareholders interest … it caused Melpa to breach its contract with Mondo, which was validly entered into and was enforceable at the time of Koang's successful interference to advance its own interest after sleeping on it for some time. If it were not for Koang's interference, the contract between Mondo and Melpa could not have been breached and necessitate the action for specific performance, which was correctly granted. Before equity can do what, the law cannot do, there is the well-settled principle in equity that that '*he who comes to equity must come with clean hand'*. Koang and its shareholders have gone before the National Court and now this Court in equity without clean hands. They caused Melpa to breach its contract with Mondo and were than effectively asking the National Court and this Court on appeal to sanction it to benefit from its unlawful and inequitable conduct. Such conduct is unacceptable and cannot be permitted."
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> (Underlining supplied)

16. In the present case, and in short, the parties entered a legally binding contract for the Appellants to purchase and for the Respondent to sell the property the subject of the proceedings to the Appellants. The Appellants fully paid the agreed contract price and more of public funds. While the Respondent got what it bargained for, the Appellants did not get what they bargained for. Instead, they substantially paid more and on top of that, suffer the National Court judgment and orders, subject only to this appeal. Clearly, the National Court process has been used to unjustly enrich the Respondent who has gone to the Court with unclean hands. In the circumstances, the correct, just, and fair remedy lies in this Court upholding the appeal, supply the missing terms of the contract for sale between the parties and make orders in the terms proposed by her Honour Murray J.

17. **MURRAY J**: This appeal arises from the judgment and order of His Honour Justice Hartshorn in National Court proceeding KA Properties (PNG)

Limited *v. The Independent State of Papua New Guinea & 2 Ors* - WS 1173 of 2016 made on 16 April 2020.

Background

18. We ascertain the relevant facts from the Respondent's affidavit at pages 31-195 of the appeal book, the Appellants' affidavit at pages 393-333 of the appeal book and from the National Court Judgement the subject of this appeal dated 17th April 2020.

19. The appeal concerns a property described as Allotment 1, Section 427, Port Moresby, Hohola, National Capital District being all the property contained in this State Lease, Volume 76, Folio 200, formerly known as Kramer Building, which now houses the Correctional Service Headquarters located near Holiday Inn (the property). The property was owned at the relevant times by Zen No. 33 Limited (Zen), the Respondent in these proceedings.

20. In May 2002, the PNG Correctional Services (PNGCS) and Zen entered into a lease agreement for lease of part of the property for a period of two years (First Lease). On 26th September 2022, whilst PNGCS was still leasing and was occupying part of the property, Zen engaged Siule Real Estate trading as Century 21 Siule Real Estate (Century 21) as its agent to find a buyer for the Kramer Builder. The PNGCS expressed an interest in purchasing the property and negotiations started.

21. On 13 May 2004, seven days before the expiry of the First Lease, the PNGCS and Zen entered into a new lease agreement for the property, (the "Second Lease") for a period of one year. That Lease was to expire on 12 May 2005. During the currency of the Second Lease, on 6 October 2004, the PNGCS and Zen entered a contract for sale and purchase of property for the sum of K4, 750,000.00 (Contract for Sale). The purchase price was to be paid in 2 instillments.

22. On 28 October 2004, the State paid the first of the two instalments K2,000,000.00 (First Payment). Then On 11 May 2005, the State paid Zen, a further K2,750,000.00, as the second instalment (Second Payment) of the purchase price as provided for in the Contract for Sale. That brought the total amount of money paid by the Appellants to Zen, to K4,750.000.00.

23. The Second Payment was made to Century 21, the agent of the Respondent, on the Respondent's instructions who deducted its commission in the sum of K141,075.00 and forwarded the balance to Zen. That caused the Respondent to claim and eventually that the balance of the purchase price

amounting to K141,075.00 remained outstanding, as well as other fees and outlays.

24. On 7 December 2005, Zen merged with Kramer Consultants and Kramer Group Limited, with Kramer Group Limited being the surviving company. Thereafter, various correspondences exchanged between the Respondent and its lawyers with the Appellants as to the terms of the Contract for Sale and on the issue of the agents' fees which were deducted resulting in a shortfall of the purchase price.

25. On 4 August 2006, the Chief Executive of the Kramer Group wrote to the Minister for Finance and National Planning, Mr John Hickey, confirming their discussions, and further agreeing for the State to pay the sum of K1,033,432.89 to the Kramer Group, and that upon receipt of the payment, Kramer Group would hand over Title of the subject land and use its best endeavours to finalise and settle the transfer of the State Lease. Consequently, the initial Contract for Sale and Purchase Agreement was varied in accordance with the letter of the State Solicitor dated 29 April 2005, changing the initial contract price of K4,750,00.00 to include K1,033,432.89 (the Variation).

26. Between 4 August 2006, and 21 January 2007, nor further correspondences were exchanged between the parties. On 22 January 2007, the Appellants paid Zen, the sum of K1,033,432,89 in accordance with the agreement of the parties contained in the letter of Kramer Group Ltd to the Minister of Finance and National Planning dated 4 August 2006.

27. On 27th November 2014, the Respondent issued a Notice to Complete which stipulated that, the Contract for Sale and purchase of the property dated 06th October 2004, could not be completed because of the following:

(1) Firstly, of the agreed purchase price of K4,750,000.00, K141,075.00 was deducted by Century 21 as its commission resulting in a short payment by the Appellants of that amount.

(2) Secondly, the Appellants owed it rentals of a total amount of K6,648,397.25 for the period from 13th May 2005 to 27th November 2014.

28. In the said notice, the Respondent demanded both the shortfall of K141,075.00 and outstanding rentals of K6,648,397.25 be paid in full by 19th December 2014. But on 19th December 2014, the Respondent terminated the Contract for Sale and forfeited the payments already made by the Appellants for the property.

29. On 15th September 2016, the Respondents issued National Court proceedings WS No 1173 of 2016, against the Appellants. On 17th April 2018, the Appellants filed their Defence claiming, inter alia the following:

(a) Denial of knowledge of the transfer of the property to the Respondent by Zen in 2016.

(b) That the transfer from Zen to KA took place after Appellants had fully paid for the property on the 22 January 2007.

(c) Zen had failed to transfer the Property to the Appellants after it was fully paid the purchase price of K5,783.432.89.

(d) Zen took no issue with the delay in payments of the purchase price, as well as the additional payment of K1,033432.89 on 22 January 2007.

(e) The Appellants were not parties to the agreement between Zen and Century 21 purporting to be the appointed agent for sale of property dated 26 September 2002.

(f) The amount of K141,075,000.00 was deducted by Century 21, Zen's agent, and was not prevented from doing so by Zen.

(g) The notice to complete states that the Appellants owed Zen the sum of K141,075.00, and for this reason that Title was not transferred to the Appellants.

(h) The amount of K141, 075.00 was included as part of the additional purchase price of K1,033,432.89 that was paid to the Kramer group on 22 January 2007.

(i) Since the purchase price was already paid by the Appellants, the notice to complete was void.

(j) The purchase price was paid in full by 20th June 2005.

(k) the Notice to Complete was served nine (9) years after the purchase by the Appellants.

(l) Rentals for the year 2005 were fully paid, and since it had paid for the property, the Appellants were under no obligation to pay any rentals to the Respondent.

(m) The lease agreement between Zen and the Appellants ceased in May 2005.

(n) The termination of the Contract for Sale is of no effect and therefore the forfeiture of the sum of K5,783,182.89 was unlawful.

(o) There are no provisions in the contract signed between the parties providing for the forfeiture of the purchase price and or to have been treated as rental.

30. The matter progress to a trial on 11th March 2019. The National Court delivered its final decision on 17th April 2020. The decision went in favour of the Respondent. The terms of the various orders or reliefs granted by the National Court are reproduced at [11] above in the Deputy Chief Justice's judgement.

31. Aggrieved by the decision of the National Court, the Appellants filed this Appeal and obtained an interim stay of the National Court orders.

32. The appeal lies without leave.

Grounds of appeal

33. The Appellants raise 9 grounds of appeal which are summarised as follows:

(1) Ground 1 – appeal against the National Court's finding that the Contract for Sale of property dated 6 October 2004 was not completed in that, the full purchase price of K2,750,000.00 was not paid.

(2) Ground 2 – appeal against the Court's finding that, the Contract for Sale of property dated 6 October 2004 was unclear as to who was responsible for other costs and charges not included in the purchase price of K4,750,000.00

(3) Ground 3 – appeal against the finding that it was the Appellants' obligation to pay for the agent's fees.

(4) Ground 4 – appeal against the Court's findings that the Appellants, as purchasers did not execute and lodge necessary documents for the transfer of the property.

(5) Ground 5 – appeal against the Court's findings that the Contract for the Sale and purchase of the property of the 6 October 2004 was unclear and ambiguous, and therefore erroneously implied terms into the contract which is not its role.

(6) Ground 6 – appeal against the finding that the Appellants were responsible to pay for the Vendor's Agent's commissions and fees, when it was not privy to the agreement titled, Appointment of Agent for Sale of Property dated 26 September, 2002, between Zen and Century 21, appointing Century 21 as its agent.

(7) Grounds 7 – appeal against the decision of the Court's finding that the appellants were tenants at will despite the State paying the Respondent firstly, the full purchase price as per the Contract of Sale dated 6th October 2004 and secondly the additional sum of K1,033,432.89 towards the purchase price of the property.

(8) Grounds 8 - appeal against the decision of the Court's finding that the agreement of the 6 October, 2004, was terminated after the Appellants failed to comply with the notice to complete issued 9 years after the:

(a) Purchase took place;

(b) Further payments were made by the Appellants after 2005 and

(c) Before the Notice to Complete was issued, making the termination wrong.

(9) Ground 9 - appeal against the decision of the National Court as to the treatment of the purchase price as rentals.

What are the issues for determination?

34. The Respondent's claim in the National Court is firstly for several declaratory orders. In essence a declaratory order that it is still the registered proprietor of the property. The basis for this claim is the argument that, the Contract for Sale and Purchase of the property that was entered into on 6th October 2004 between Zen and the Appellants was terminated on 19th December

2014 after the Appellants failed to complete the purchase in accordance with a Notice to Complete that was issued on 27th November 2014 which demanded of the Appellants, firstly, the payment of K141,075.00 which it claims is a short fall on the Appellants' part and secondly, the payment of K6,648,397.25 which it claims is outstanding rentals for the period from 13th May 2005 to 27th November 2014. The Respondent's claim is also for outstanding rentals from 13th May 2005 to 31st July 2016.

35. The Appellants contested the claims on the following basis: Firstly, they paid the full agreed purchase price of K4,750,000.00 in 2 instalments as agreed. The second payment which completed the purchase was on 28th June 2005. They were entitled to the property then. The shortfall of K141,075.00 came about as a result of Century 21 deducting that amount as its fee or commission for being the Respondent's Agent pursuant to the Appointment of Agent for Sale of Property dated 26 September 2002, between Zen and Century 21. They did not engage Century 21 and therefore not responsible for the payment of the Agent's fee/commission. Hence no short fall on their part. It was also their argument that, even though the short fall was not their responsibility, they had with good intentions to progress the sale and purchase to completion, paid on 22nd January 2007, an additional amount of K1,033,432.89 which covered the short fall of K141,075.00 and alleged outstanding rentals. If the sale was not completed on 28th June 2005, it was completed on 22nd January 2007. They became entitled to the property the second time by then.

36. In the light of those arguments, it is my view that there is only one major issue and that is, whether the contract of sale and purchase dated 06th October 2004, which was later varied was completed. Looking at the grounds of appeal, they are individually and collectively interconnected to this identified question. An answer to this question would resolve all the other grounds which are in my view consequential and further determine ultimately whether the trial Judge's decision should be overturned.

Did the National Court err in its finding that the State did not complete the purchase of the property?

37. The Appellants argue firstly that, the trial Judge made an error in finding that the sale of the property was incomplete as the Appellants had not paid the agreed purchase price of the property when it was clear that the full payment was made by way of two instalments, K2, 000, 000.00 million on 28 October 2004 being First Payment and a subsequent the payment of K2, 750, 000.00 on the 28 June 2005, being the Second Payment, the total of these two payments totalled K4,750.000.00.

38. The Appellants also argue that the sale agreement of 6 October 2004 governed the actions of the Appellants and the Respondents in the transaction. The agreement is contained at page 140 of the Appeal Book. The terms of the agreement in material respects are short and are contained in a single document in the following terms:

> "WHEREAS
>
> A. Zen No. 33 Ltd is the registered owner of land and improvements located at Allotment one, section 472, Hohola, NCD and has agreed to sell the property to the State.
>
> B. The state has agreed to purchase the property from Zen at the value of K 4,750,000.00
>
> The parties agree as follows:-
>
> 1. That the total net purchase price of the property (inclusive of improvement) is K4,750,000.00.
>
> 2. That settlement of the purchase price would be paid in two (2) instalments.
>
> 3. The first instalment will be K2,000,000.00 and is to be paid not later than the end of October 2004.
>
> 4. The balance of K2,750,000.00 will be paid by the end of January 2005 or thereafter."

39. The Appellants further argue that the parties had a binding contract dated 6 October, and it was a valid Contract for Sale.

40. The Appellants also submitted, that the National Court gave little or no consideration to the Appellants' submission that when the Second Payment of K2,750,000.00 was paid, the State had discharged its obligations under the contract.

41. In implying additional terms into the contract, the court had usurped the role of the parties by imposing an additional term of the contract to include the obligation to pay K141,075.00 being agent's fees, into the contract.

42. The Appellants argued that the requirement for payment of agency fees was the subject of a separate agreement between the Respondent and Century 21. The Appellants were not parties to that agreement.

43. In response, the Respondent argues that the trial Judge did not go wrong by finding that the sale of the property was incomplete. It argues that this ground of appeal was misinterpreted, because, the National Court's finding that the sale of the property was incomplete was not based on the Appellants failure to pay the full purchase price, instead it was incomplete on the basis of the lack of full performance of the obligations by both parties to enable the registration of the transfer of the title to the property.

44. The Respondents argue that, for this reason, despite the Appellants believing that they were in possession of the property and that it had fully paid the purchase price, they did not have in their possession the necessary documentation to be lodged for them to become the registered proprietor.

45. It submitted that the court's finding of an incomplete contract was based on the lack of any documentation executed by the Respondent to transfer the property to the Appellants, and the Appellants did not have in their possession such documentation to transfer ownership to it. An apparent lack of capacity attributed to both parties in the agreement.

46. For this reason, the Respondent concluded there was no error by the trial judge as this ground of appeal was misinterpreted.

47. I find the argument by the Respondent misleading. The decision of the court at page 477 the appeal book states:

> "23. In the absence of a clause specifically defining when a sale of property is completed, to my mind, it is when all obligations of the parties had been performed, to enable the purchaser to lodge the necessary documentation for him to become the registered proprietor. In this instance, the state through PNGCS already have possession and it believed it had paid the full purchase price. The State however, did not have in its possession the documentation necessary to be lodged for it to become the registered proprietor. No documentation had been executed by ZEN No. 33 Pty Ltd, transferring the property to the State and the State was not in possession of such documentation.
>
> 24. So if the State's position is adopted, there had not been completion. From the position of Zen No. 33 Pty Ltd, there had not been completion because the full purchase price had not been paid. Consequently, I find

that there had not been completion of the sale of the property to the State.

(Underlining mine)

48. Effectively, the National Court made two findings to conclude that the sale was not completed. The first is that Appellants did not have the necessary documents from Zen, transferring the property to them and the second is that Zen did not receive full payment for the property. Both these shortcomings are attributed to the Appellants.

49. To determine if the Contract for Sale was completed, it is necessary to first determine whether the learned trial Judge was correct in the exercise of his discretion in making the 2 findings which ultimately resulted in the finding that the Sale was not completed. That in turn caused the Court to further find that, the Respondent was entitled to terminate the Contract which then led to the further orders made by the Court in favour of the Respondent which included an order for the forfeiture of all money already paid by the Appellants for the property and an order for outstanding rentals.

50. Before I proceed to consider the 2 findings by the learned trial Judge that led to the conclusion that the Sale and Purchase of the property was not completed, it is necessary to know what the phrase Completion of Sale means.

51. In the case of *Madang Development Corporation Ltd v Rabtrad Madang Ltd & 2 Ors* (2006) N3091, the Court, adopted the meaning from the text on *The Law on Vendor and Purchaser* by RM. Stonhams which defined Completion of Sale in the following terms:

> "1613. The meaning of "completion of the sale" in a contract for sale of land may vary with the context of the Contract itself; but usually as regards contracts for sale of land, completion of sale means the final settlement of the business, including the complete conveyance of the property and the giving of possession and the payment of the purchase money."
>
> (Underlining mine)

52. By this definition, what is considered a completion for sale can also depend on the context of the contract itself which may or may not include a completion of sale clause. In this case, the contract for sale and purchase of the property is a one-page document which I have set out above at [35].

53. I now turn to a consideration of the first finding by the National Court that the Appellants did not have in their possession the documentation necessary to

be lodged for it to become the registered proprietor. With respect to that finding, it is not difficult to see why the Appellants did not have the necessary documents from Zen. The evidence shows that the Respondent, at the relevant time, had not executed any documents and further refused to execute and hand over any documents to the Appellants because it claimed there was a short fall in the purchase price. In the circumstances, it makes no sense to hold that against the Appellants as one of the reasons why the Sale was not completed. It is beyond the control of the Appellants. Thus, with respect, I consider the finding by the learned trial Judge that the Sale could not be completed because the Appellants did not have the documents from Zen is flawed.

54. The second finding by the learned trial Judge as to why he concluded that the Sale was not completed, raises the question of whether there was a short fall of payment of the purchase price by the Appellants.

55. In considering that question, it is necessary to look at the finding of the National Court which appears at page 478 of the appeal book, where it says:

> "28. It is clear, from the evidence, in my view, that it was understood by the State through the office of the PNGCS and that the State was aware that K4.75 million was the net purchase price. This net purchase price did not include the agents fee and that the State was responsible for payment of the agents' fee. Consequently, K 4,750,000.00 was not the final purchase price for the property and did not include the agent's fee."
>
> (Underlining mine)

56. With respect, it seems to me that the National Court had ignored the meaning of the term "net purchase price" as used by the parties in their written agreement. In so doing, the learned trial Judge ventured out of the expressed agreement of the parties to include an obligation on the part of the Appellants in terms of the "State was responsible for payment of the agents' fee" despite acknowledging at the same time that "This net purchase price did not include the agents fee". Going by the expressed terms of the agreement, it is clear that the Appellants have intended to purchase the property from the Respondent for the sum of K4,750,000.00, which was accepted by the Respondent and nothing more.

57. In *Fly River Provincial Government v. Pioneer Health Services Ltd* (supra), the Supreme Court said:

> "9. In the construction of words used in a contract, the court is duty bound to adopt a fair and liberal approach with a view to upholding the agreement of the parties, if the intention of the parties can be ascertained.

> For the courts are there to uphold the agreement of parties and not to destroy it. In so doing, the court can supply any reasonable term missing from the contract or strike out meaningless words or clause in a contract. A part performance of a contract speaks in favour of a contract existing more than not. In the present case, there are sufficient details as to the price of a contract and or how it is to be ascertained. Therefore, there can be no uncertainty on such a term."

58. In this case, I find that the contract in the circumstances speaks for itself, it did not make provisions for any other fees, deductions, or outlays. The obligations of the parties are confined to the written terms of the agreement. There is a long line of authorities that stand for this principle, including the Supreme Court decision in *Curtain Brothers (Queensland) Pty Ltd and Kinhill Kramer Pty Ltd v. The State* [1993] PNGLR 285, where the Supreme Court held inter alia, that:

> "When terms of contract are contained in writing, it is not permissible to allow any evidence to add to, subtract from, vary, or qualify a written contract."

59. Other decisions of the Supreme Court on point include for example the decision in *Papua New Guinea Banking Corporation (PNGBC) v Tole* (2002) SC694.

60. In this case, I note that the Respondent's expectation was that the Appellants were required to pay the agent's fees. However, the Respondent and Century 21 entered into a separate agreement, titled the Appointment of Agent for Sale of Property on 26 September 2002, to which the Appellants are not privy to. It would therefore follow, that the arrangement is for the Respondent to pay for the agent's fees in the absence of any express agreement of the Appellants. I do not see how a Court can interfere and alter the terms of the party's agreement for the payment of fees or commissions or impose such conditions on a party without its agreement, except those which can be imposed by law.

61. In this jurisdiction, the courts have held that under the principle of the doctrine of privity of contract as set out in *Papua New Banking Corporation v Amevo* [1998] PNGLR 240, per Sevua J at page 240:

> "…. as a general rule, a contract cannot confer rights or impose obligations arising under it on any person except the parties to it. The scope of the doctrine means only that a person cannot acquire rights, or be subjected to liabilities, arising under a contract to which he is not a party."

62. Other decisions on point include the decisions in *Papua Club Inc v Nasaum Holdings Ltd* (2004) N2603, Gavara-Nanu J; *Koang No 47 Ltd v Mondo Merchants Ltd* (supra) and *Manau v Telikom (PNG) Limited* (2011) SC1146.

63. In the present case, I find the agent, Century 21 was engaged by the Respondent pursuant to a separate agreement which did not include the Appellants. Pursuant to that agreement, it was the Respondent's responsibility to pay the agent's fees. This is confirmed by a letter dated 2nd November 2004 from Century 21, the agent of Zen (see Annexure FK17 -page 146 of the appeal book) which amongst other things states:

> "As agreed, we have taken our pro-rata commission of K65,450.00
> The balance of our commission being K75,625.00 is being held in our Trust account awaiting payment of the second and final tranche to our trust account…"

64. Having had regard to the appointment of Century 21 by the Respondent as its agent and further having had regard to the letter from Century 21 to the Respondent, it is without a doubt that, the payment of the agent's commission is not the responsibility of the Appellants. It follows therefore that, there was no shortfall on the Appellants' part. Thus, the finding by the learned trial Judge that, the Sale was not completed because the Appellants had not paid the full agreed price is flawed. The evidence is that the Appellant did pay the full agreed price. The deduction of the agent's fees from the purchase price by Century 21 was done with the approval of the Respondent pursuant to their own agency agreement. The Appellants had fully performed their obligation when they paid the First and Second Instalment payments fully up to June of 2005. In my view, Sale ought to have been completed by then.

65. However, that was not the case. From the evidence, parties corresponded back and forth on the shortfall in the Contract for Sale.

66. The Appellants argued that the Agreement for the Sale and purchase of the property was varied in a letter written by the Chief Executive Officer of the Kramer Group Ltd to the Minister of Finance and National Planning dated 4 August 2006.

67. The terms of the letter read as follows:

> "[On Kramer Group Letterhead]

Minister for Finance, National Planning and Monitoring Folder: 583G
P.O Bo 631
WAIGANI, NCD
Papua New Guinea date: 4 August, 2006

Attention: Hon. John Hickey, MP

Dear Minister,

RE: SETTLEMENT OF PURCHASE OF KRAMER GROUP BUILDING AND TITLE TRANSFER

I refer to our meetings (Mr John Hickey, the Minister's executive officer, Mr William Nindim and Frank Kramer/Tom Fox of Kramer group) on 3rd August 2006 in your Parliament house office. The meeting was a follow-up on an earlier written briefing provided by Kramer Group to the Honourable Minister regarding the above subject matter.

After some discussion, the following was agreed:

[1] The Independent State of Papua New Guinea shall settle the matter forthwith by payment of Kramer Group the sum of K1,033.432.89 (one million and thirty-three thousand and four hundred thirty two kina and 89 toea) such payment to be made as soon as possible and no later than 10 days from the date of 3rd August, 2006.

[2] upon receipt of the payment in [1] above, Kramer group shall handover the property title of the subject land to the State and use its best endeavours to finalise and settle this matter.

[3] The State Solicitor on instructions from the State and Peter Pena Solicitors on instruction from Kramer Group shall together complete the Purchase / Sale Agreement to properly transfer the subject property back to the State. In this context the Purchase / Sale Agreement which was approved by the State Solicitor's letter dated 29" April 2005 shall apply and the only material change shall be that the amount of K4,750,000.00 in Item 4 of the First Schedule will now be K4,750,000.00 + K1,033,432.89 = K5,783,432.89 and Item 7 of the same Schedule shall include a reference of K1,033,432.89 being the third and final instalment. A corresponding change to Clause 3 of the Agreement (and other aspects of the Agreement as appropriate) to reflect these numbers shall also apply.

Following the meeting., Minister John Hickey and Frank Kramer agreed that each party will confirm these arrangements by an exchange of letters between the parties. This letter constitutes Kraner Groups confirmation of the matter.

Yours faithfully

Kramer Group

F M Kramer CBE

Chief executive”

(Underlining mine)

Was there a variation to the Contract of 6 October, 2004?

68. The Appellants argued that it was their intention to vary the contract to allow settlement to progress. They maintained that the payment would cater for any outstanding rentals from 11 October 2005 to 3 August 2006, or any time thereafter as well as the alleged shortfall in the purchase price. Hence, on the basis of above letter from the Respondent, the Appellant paid K1,033,432.89 to the Respondent on 22 January 2007 as only remaining part of the varied agreed purchase price.

69. The Respondent argued that this payment of K1,033,432.89 from the Appellants was for unpaid rents since the lease expired on 12 May 2005 up to December 2007 since the sale of the property was not completed. However, a close examination of what might have been owed in rentals and the alleged shortfall in the purchase price against the amounts paid shows even then, the Respondents were paid more than what was due to them. The following table applying the annual rental of K233,081.04 for 2005 brings this out clearly.

PARTICULARS	**CREDIT (K)**	**DEBIT (K)**	**BALANCE (K)**
Payment by State	1,033,750.00		1,033,750.00
Shortfall		141,075.89	892,674.11
Rentals 12 May, 2005 to 21 January, 2007 (613 days x K638.57/day)		246,332.82	646,341.29
Balance			**646,341.29**

70. The outcome of this submission by the Respondent as demonstrated in the table sees the payments applied to its benefit, are above the shortfall of the purchase price and any rentals alleged owed from 12 May 2005 to 21 January, 2007.

71. The letter of 4th August 2006 set out in [64] give rise to the following crucial matters. Firstly, the State would pay the Respondent, an additional K1,033, 075.00. Secondly, that such payment would be done in 10 days. Thirdly, upon receipt of that additional payment, the Respondent "shall handover the property title of the subject land to the State and use its best endeavours to finalise and settle this matter."

72. Hence, I do not agree with submissions by the Respondent that the payment of the K1,033,432.89 is for outstanding rentals only. Instead, consistent with the terms of the Respondents own letter of 04th August 2006 and other evidence before the Court the amount of K1,033,432.89 was inclusive of the sort fall claimed by the Respondent, alleged rental arrears and for other fees and charges. That was expressly agreed as the final contract price variation bring the total price to K5,783,432.89.

73. I consider that that the payment of K1,033,432.89 was agreed to be the "be all end all" payment where the Respondent would, in the terms of its own letter, *"handover the property title of the subject land to the State and use its best endeavours to finalise and settle this matter."*

74. In the case of *Nivani Ltd v China Jiangsu International (PNG) Ltd* (2007) N3147 the court per Lay J, stated at [22]:

> "22. In Commissioner of Taxation v Sara Lee Household and Body Products [2000] HCA 35; (2000) 201 CLR 520 Gleeson CJ Gaudron McHugh and Haynes JJ quoted with approval the statement of Taylor J. in Taller and Co. Pty. Ltd v Nathans Merchandise (Victoria) Pty. Ltd [1957] HCA 10; 98 CLR 144:
>
> > 'It is firmly established by a long line of cases... that the parties to an agreement may vary some of its terms by a subsequent agreement. They may of course rescind the earlier agreement altogether and this may be done either expressly or by implication, but the determining factor must always be the intention of the parties'."

75. In that matter his Honour held inter alia, that:

(1) Parties may by agreement, vary a contract made by them; and

(2) Where a contract makes no provision for variation there must be a contract of variation to bind the parties; and

(3) A contract of variation can be formed by the conduct of the parties.

76. In this case, I find the Appellants' letter by the State Solicitor of 29 April 2005 constituted the offer. The Respondent's endorsement in its letter dated 4 August 2006 for the addition of Items 4 to include K4,750,000.00 + K1,033, 432.89 and Item 7 of the Schedule constituted acceptance. The Appellant's consideration was the payment of the K1,033, 432.89 (Third Payment). The valuable considerations passing between the parties here are the Appellants are to pay the agreed additional purchase price in the sum of K1,033, 432.89 in return for the Respondent handing "over the property title of the subject land to the State and use its best endeavours to finalise and settle this matter."

77. Once the payment of K1,033, 432.89, was received by the Respondent on 22 January, 2007, from the Appellant, the contract of sale and purchase of the property was, in my view considered completed for the second time and the Respondent was obliged both in law and equity to keep its side of the bargain, to surrender, title, or its interest in the property to the Appellant, as by now, the Respondent had obtained a total benefit of K5, 783,432.89 under the contract from the Appellant.

78. From the evidence, there was a time clause in the variation to the agreement, however, the Respondent took no issue when there was a delay of 7 months in payment, and when the Appellants paid, on the 22 January 2007, the Respondent accepted the payment. It had acquiesced in its rights to insist on time being of the essence, failed to take any steps and renege, or terminate the contract. The Respondent was therefore, estopped by its own conduct for seeking and securing the reliefs it obtained from the National Court.

Conclusion

79. Having considered the 2 findings of the National Court which led to the conclusion that the Appellants had not completed the sale to be flawed, it follows therefore that, the National Court did err in its finding that the State did not complete the purchase of property when it did complete the purchase when it paid the full amount of the purchase price pursuant to the terms of the Agreement of 6th October 2004 and subsequently, the variation of 4th August 2006. As the appellants have paid the full purchase price, initially in May 2005 and later in January of 2007, which payment covered all outstanding rentals up to the date of payment.

80. As I have found that the Contract for the sale of the property was completed, I also find that all subsequent actions taken by the Respondent after the 22 January, 2007 relating to the Notice to Complete, and demand for payment of rentals to be void and of no effect, as the Appellants had effectively

discharged their obligations under the contract and it is now incumbent on the Respondent to ensure that it prepares and signs the Transfer Instruments and have those forwarded to the Appellants forthwith for the transfer to take place without further delay.

81. For all these reasons, I would allow the appeal with costs and would make the following orders:

(1) The Appeal is allowed.

(2) The Judgment of the National Court of 17 April 2020 in WS 1127 of 2016 is quashed in its entirety.

(3) It is declared that the Appellant has fully discharged it obligations under the Contract for Sale dated 6 October 2004 as varied on 29 April 2006.

(4) It is ordered that the Respondent prepare and exchange with the Appellants all necessary documentation to transfer ownership of the property described as Allotment 1, Section 427, Port Moresby, Hohola, National Capital District being all the property contained in this State Lease, Volume 76, Folio 200, to the State forthwith and fully cooperate with Appellants until the title is transferred and registered in favour of the Appellants.

(5) The Appellants' cost of and incidental to the appeal shall be paid by the Respondent to be taxed if not agreed.

82. **LIOSI J:** I have had the benefit of reading the draft decision of my sister Murray J and the additional points made by the Deputy Chief Justice. I agree with both of their views and decisions for the reasons they have given. I too would make the orders proposed by her Honour Murray J.

Decision of the Court

83. For the foregoing reasons, the Court upholds the appeal and makes the following orders:

1. The Appeal is upheld.

2. The Judgment of the National Court of 17 April 2020 in WS 1127 of 2016 is quashed in its entirety.

3. It is declared that the Appellant has fully discharged its' obligations under the Contract for Sale date 6 October 2004 as varied on 29 April 2006.

4. It is ordered that the Respondent prepare and exchange with the Appellants all necessary documentation to transfer ownership of the property described as Allotment 1, Section 427, Port Moresby, Hohola, National Capital District being all the property contained in this State Lease, Volume 76, Folio 200, to the State forthwith and fully cooperate with Appellants until the title is transferred and registered in favour of the Appellants.

5. The Appellants' cost of and incidental to the appeal shall be paid by the Respondent to be taxed if not agreed.

Lawyer for the appellant: *Solicitor General*
Lawyers for respondents: *Leahy Lewin Sullivan*