

**IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU**
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 18/1004 CoA/CIVA

BETWEEN: PAUL NEWHAM

Appellant

AND: ROBERT JAMES NEWHAM

First Respondent

GRAHAM HACK

Second Respondent

B & P INVESTMENT LIMITED

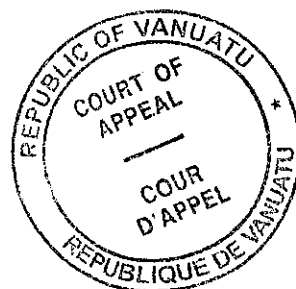
Third Respondent

Civil Appeal
Case No. 18/1006 CoA/CIVA

**BETWEEN: CAN 052 469 164 PTY. LIMIT (IN
LIQUIDATION) FORMERLY KNOWN AS
CUSTOM SECURITY SERVICES PTY
LIMITED**
Appellant

AND: ROBERT JAMES NEWHAM
First Respondent

AND: B & P INVESTMENTS LIMITED (034136)
Second Respondent



Date of Hearing: Thursday 12th day of July 2018 at 3 pm

*Before: Justice O. Saksak
Justice J. Mansfield
Justice D. Aru
Justice G. A. Andrée Wiltens*

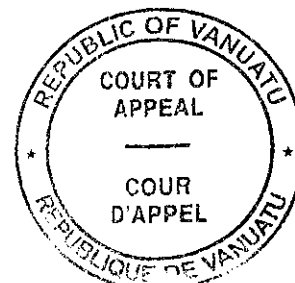
*Appearances: R Sugden for Appellant in CAC 18/1004 and Third Respondent in CAC 18/1006
M A Karam and M Hurley for Appellant in CAC 18/1006
Garry Blake for First Respondent in each appeal
No appearance for Second Respondent in CAC 18/1004
No appearance for Second Respondent or Third Respondent in CAC 18/1004*

Date of Judgment: Friday 20th day of July 2018 at 3 pm

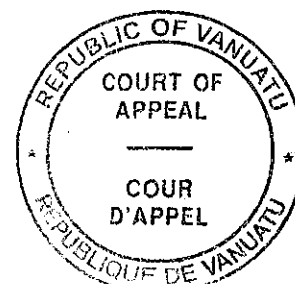
JUDGMENT

Background

1. These two appeals were heard together for reasons which will be apparent. They are brought from the same judgment of the Supreme Court given on 21 March 2018: CAN 052 469 164 Pty Ltd (In Liquidation formerly known as Custom Security Services Pty Ltd v Robert James Newham, B & P Investments Ltd, and Paul Newham [2018] VSC. (The Judgment).
2. The judgment is short and to the point. Robert James Newham (RJN) applied to the Supreme Court for the release of some of the funds held by the Court under a restraining order for their preservation pending the hearing and determination of the competing claims to entitlement to those funds.
3. RJN and his brother Paul Newham (PN) were in business together in Port Vila. They formed a company B & P Investments Ltd (B & P) in 2007 and became its sole directors and its sole, and equal, shareholders.



4. B & P in 2008 and 2009 acquired the leases over three adjacent properties (the Leases) and ran the business known as Sportsmen's Hotel and a café known as Emily's Cafe from that location for some years (the Businesses).
5. The brothers had a falling out in about 2010. RJN largely continued to run the Businesses. He then decided to sell them.
6. CAN 052 164 Pty Ltd (In Liquidation) was formerly known as Custom Security Services Pty Ltd. We shall refer to it as CSS. Its liquidator is Ezio Senatore. Both CSS and Senatore are resident in Australia. For a period between 1991 and 21 December 2011, RJN was a director and an officer of CSS.
7. Not surprisingly the Businesses were in part acquired and operated through borrowed funds. B & P acquired the Leases through funding (it is alleged) substantially provided by CSS. Funding was also provided by Westpac Banking Corporation, and it was granted mortgages over two of the leases in August 2008 (registered in April 2009) securing repayment of Vt 37,000,000. Much later, apparently prompted by the dispute between the brothers, in 2017 CSS lodged cautions over the leases, and after the cautions were warned under section 97 (3) of the Land Leases Act [Cap 163], CSS commenced proceedings against B & P and against RJN claiming that B & P held the Leases and the Businesses on trust for it, and to prevent both B & P and RJN from dealing with the Leases and the Businesses or the proceeds of their sale until its claims had been determined.
8. The extent of the CSS claims was set out in its Statement of Claim. It included part of the rent paid by the tenants of an apartment it acquired in 2007 called Amalfi Court, as it says RJN had received that rent and wrongly applied it to the benefit of B & P. It included certain cash of CSS which it says RJN also wrongly applied to the benefit of B & P. It included monies owing to CSS by RJN under a loan agreement.
9. For present purposes, it is sufficient to note that its claim against B & P and RJN is said to be Vt 88, 060, 439. That is the figure which the primary Judge identified.
10. The second action in the Supreme Court is by PN against B & P, RJN and Emily Lifkal Newham (EKN). She is the wife of RJN.
11. PN claims that the purchase of the Leases was in part funded by monies advanced by him, and the establishment and setting up the Businesses was also in part funded by him. He also claims that the Leases and the Businesses are owned by B & P, of which he is a director and shareholder. As there is an intransigent dispute between its two shareholders and directors, he says it should be wound up and its debts paid (including the debt owing to him) and its net assets distributed between himself and RJN.
12. He also sought and obtained a freezing order on the assets, pending the resolution of his claims. So too did CSS in its action. The freezing order was made on 8 September 2017.
13. It should be noted that RJN disputes all these claims.



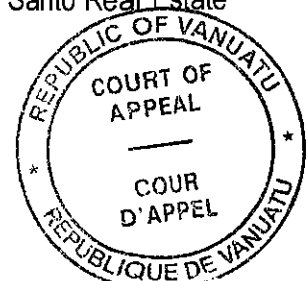
14. The two actions have been consolidated by orders made on 28 September 2017.
15. The assets in question have been sold, under the direction of RJN. The leases held by B & P were sold in April 2017 for Vt 120,000,000. RJN and EKL assert that the other assets of the Businesses, apart from the leases, were held by them personally. They have sold those assets for Vt 130,000,000.
16. After the settlement of the two agreements, and the payments properly made to achieve clear title to the Leases, there is presently held VT 108, 097, 460.

The Application

17. On the applications of RJN and Santo Real Estate the primary judge ordered that RJN and PN should each be paid out VT 2, 500,000 from those funds, and Santo Real Estate should be paid out VT 8, 437, 500.
18. Santo Real Estate is the agent for the selling of the Leases and the Businesses. Its agency fee (through Graham Hack, the Second Respondent in CAC 18/1004) was claimed at VT 16, 875, 000. It had received 50% of its claimed fee by agreement of all the parties when the transfers of the Leases were completed. The balance was disputed, at least by CSS.
19. Mr Hack was present during the hearing of this appeal, but chose to take no part in the course of submissions. He sought the full amount of his fees, based on the Agency Agreement. It was not signed by PN or by CSS.
20. The grounds for RJN's claim was the hardship he is experiencing due to a lack of funds, as he needs money for his and his family's daily living expenses. He gave details of those expenses.
21. PN did not make any claim for the release of funds to himself. He opposed the application. It appears that this order was made to maintain equality between the brothers. He has paid the payment of VT 2, 500,000 into a separate trust account.

The Judgment

22. The primary judge proceeded on the basis that the amount held in trust by the restraining order meant that there would be a surplus of VT 19,000,000 or so if the CSS claim were established in full.
23. He treated the claim by Santo Real Estate as unopposed by CSS, though opposed by PN. PN's objection was that the amount held in trust was the remaining asset of B & P, that its creditors were not known, and that it did not engage Santo Real Estate so its money should not be released to this entity. It should be noted that CSS had agreed to half of the Santo Real Estate



fees as claimed being paid out, and that had already occurred. It did not consent to any further payment to Santo Real Estate.

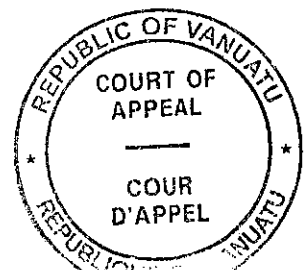
24. The primary Judge acted on the Sole Agency Agreement produced as there was no evidence that it did not introduce the buyers of the Leases. That matter had earlier been raised in submissions.
25. As to the position of B & P, the primary judge observed that there was no real evidence of unsecured creditors exceeding VT 1,000,000 so he could assume it could make a distribution to its shareholders. In the circumstances, he authorised the interim payment.

Consideration

26. In our view, it is and was not clear that the available funds as preserved by Court order were sufficient to meet all outstanding claims to these funds.
27. In addition to the claim of CSS, there is an outstanding claim by PN as expressed in his Supreme Court action. There is a dispute, as the evidence of FJN shows, whether the amount of VT 30,000,000 received for the assets of the Businesses is available to CSS or to PN. The Sale and Purchase Agreement records RJN and EKN as vendors. There is correspondence exhibited to the affidavits relied upon that RJN maintains that claim to VT 30,000,000.
28. If that claim succeeds, then clearly (contrary to the assumption of the primary judge) there will be insufficient funds to meet the claim of CSS. The claim of PN is also a very substantial one, and not only through his position as a shareholder of B & P. It was quantified in the submissions on his behalf at AUD 190,500 plus VT 11,007.
29. Appropriately, the primary judge did not proceed to assess the merits of the competing claims. That is for the trial.
30. But the factual assumption the primary judge proceeded on is not correct.
31. For that reason, we consider that it was an error to have made the orders for the release of funds. In addition, in our view in the case of Santo Real Estate, there was an ongoing dispute about its entitlements to its claimed fees for the two reasons referred to. We were not requested to reconsider the applications.

Orders

32. We accordingly allow the appeal.
33. RJN and PN are each directed to pay to Blake Ridgeway trust account (where the monies in disputes are presently deposited) the sum of VT 2,500,000 received pursuant to the Orders of the Supreme Court of 12 March 2018.



34. Santo Real Estate is directed to pay to Blake Ridgway trust account the sum of VT 8, 437, 500 received pursuant to the same Orders.
35. The appeal having been successful, we order that each of PN and CSS recover costs of their respective appeals from RJN fixed in each appeal at VT 80,000. We direct that recovery of those costs be deferred until the hearing and determination (or other resolution) of the two Supreme Court cases referred to above, and be paid out of any entitlement of RJN established in that process but not otherwise.

DATED at Port Vila this 20th day of July, 2018

BY THE COURT

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Justice O. Saksak.

