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

Civil Appeal Case No. 17/2845 CoA/CIVA

BETWEEN: COLIN PIERRE VENTER AND RITANA BRENDA JUERSEN
Appellants

AND: NATIONAL BANK OF VANUATU
Respondent

Coram: ***Hon. Justice John von Doussa***
Hon. Justice Ronald Young

Counsel: *Mr Avock Godden for the Appellant*
Mr Mark Hurley and Mr Abel Kalmet for the Respondent
Mr M Fleming for Applicant to join appeal

Date of Hearing: *Tuesday 20th February 2018 at 9 am*
Date of Judgment: *Friday 23rd February 2018 at 4 pm*

JUDGMENT

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1. Lope Lope Adventure Lodge Ltd borrowed at various times Vt 181,200,000 from the National Bank of Vanuatu. The advances were secured over a leasehold title owned by Lope. National's case in the Supreme Court was that the appellants, the directors of Lope, agreed to provide additional security for the loan over a leasehold interest controlled by them known as the Surunda lease.

2. When the appellants refused to sign the mortgage documents National issued proceedings to compel the appellants to sign, seeking specific performance of the agreement. They sought to protect their mortgage interest by registering a caution over the Surunda property.

3. The appellants before the Supreme Court argued there had never been a completed agreement with National for the collateral security. They counter claimed alleging the improper registration of the caution had caused them loss. The trial Judge concluded there had been a completed contract, ordered specific performance, and rejected the counterclaim.

KUNDALINI LTD'S APPLICATION

4. The above company applied to be joined as a party to the appeal. The application was supported by the appellants and opposed by the respondent. It needed leave to do so. The application to be joined as a party to the appeal was not made until 6 February 2018. We heard the application at the commencement of the hearing of this appeal. We refused the application. We now give our reasons.

5. The application to join this appeal is based on Kundalini's claim that it will suffer prejudice and loss of money if the Supreme Court judgment is upheld. It says therefore it has an interest in this litigation which should entitle it to be joined as a party to this

appeal. The basis of Kundalini's claim of a sufficient interest in the proceedings before the Court arises from it's claim that there are two agreements for sale and purchase of the Surunda lease between it (as purchaser) and the appellants as vendors. Agreements dated 2 May 2012 and 13 September 2013 were produced in evidence at the trial of this case. It says therefore it has an equitable interest in the Surunda lease. If the Court rejects this appeal then it says the appellant will be unlikely to provide clear title to the Surunda lease and the sale of the lease will not be able to proceed. This will cause Kundanlini loss. Kundalini submits this potential serious effect is sufficient to established it may be effected by this Court's decision and therefore should be joined as a party.

6. We are satisfied Kundalini has no direct interest in the legal issues raised by these proceedings. First, National has no cause of action against Kundalini nor has Kundalini against National in those proceedings. Secondly the appellants were free to enter into a mortgage with National at any time while they were the owners of the Surunda lease. Assuming one or both of the agreements for sale and purchase are valid contracts (we express some doubt as to whether either one was) their existence was no impediment to the appellants entering into a mortgage with National. When it comes to settle the sale from the appellants' to Kundalini it is highly probable the appellants will have to provide a mortgage free title. If they cannot do so then Kundalini will have its remedies against the appellants. But none of this has anything to do with the validity or otherwise of the claimed agreement to mortgage. Kundalini therefore has no interest in

these proceedings in the sense that would entitle it to be joined as a party. For these reasons the application must be refused.

7. Leave is refused, the respondent is entitled to costs on this application against Kundalini to be fixed on a standard basis.

THIS APPEAL

8. The appellants say that the finding by the trial Judge that there was a completed agreement to provide the collateral mortgage was against the weight of evidence and in so concluding the Judge made errors of law.

9. Secondly, the Judge erred in finding the fact that National had alternative means of suing for the debt was irrelevant. Further the Judge was wrong to conclude that the consideration for the loan was fore bearance to sue. The only consideration for the loan was past consideration being the loan advance to Lope which was no consideration at all.

10. The appellants counterclaimed. After National concluded they had an agreement with the appellants to provide the mortgage National registered a caution against the Surunda land. The Supreme Court rejected the counterclaim. It concluded the caution was properly registered and in any event the appellants had suffered no loss from the registration. The appellants' submit the caution was wrongly registered and wrongly

maintained. As a result the appellants' claim the Surunda Property could not be used to support Lope through the sale of some of the Surunda land. And so they had suffered loss.

BACKGROUND

11. The fundamental issue in this appeal between the parties is whether there was an agreement between the parties that Mr Venter and Ms Jeursen would provide a collateral mortgage secured over the Surunda land. To answer this question it is necessary to consider the circumstances which gives rise to the asserted agreement.

12. By October 2010 Lope's indebtedness through various loans to National was over Vt 180,000,000. By March 2012 National had noted the loans to Lope were *"non-performing"*. Repayments were in arrears.

13. In April 2012 National served demand notices on Lope. By that stage Lope's indebtedness had increased to Vt 208,000,000. The demand sought full repayment of the loans. Mr Venter and Ms Jeursen as directions were attempting to sell the resort owned by Lope.

14. The Bank decided to obtain a valuation of the assets of Lope. The valuation of the leasehold interest and building was Vt 556,000,000. The bank applied its standard 60% discount rate and concluded that the land and buildings did not provide them with

sufficient security for the loan. By October 2012 the loan had increased to Vt 220,000,000.

15. In September 2012, Mr Ishmael a National Bank Officer, in conversation raised with Mr Venter the possibility of a collateral mortgage over the Surunda lease. A series of e-mail exchanges between Mr Venter and Mr Ishmael followed. The subject matter related to the Lope business and National's concern that the business could not service or repay the loans and the possibility of a collateral loan being given by the appellants over the Surunda land.

16. In these email-exchanges Mr Venter expressed optimism about the possible sale of Lope and a boat he also had for sale. No sales were made. On 22 July 2012 Mr Ishmael asked for further financial information and he said *"I also request the company's balance sheet and debtors and creditors listing and their ageing. Information to include full update on the status of the expected funds and also decision on the Surunda property being offered as collateral and new details on how you plan to set aside Vt 1 m per month."*

17. Mr Venter responded to some of the financial enquiries but made no mention of the collateral mortgage.

18. In his email of 10 October 2012 Mr Venter asked Mrs Ishmael with respect to the collateral mortgage *"Assuming worse case scenario, how much time does it buy us (if we*

do surrender it) before the bank steps in and tries to sell it at a devalued price to offset the Lope Lope mortgage?".

19. The inquiry was repeated in an Email of 11 October by Mr Venter to Mr Ishmael.

20. On 12 October Mr Ishmael responded, he said:-

> *"On the collateral security over the Surunda Property. We will not commence legal proceedings once we obtain the mortgage. We will let you know well in advance if we (sic) looking at that process or go down that path.*
>
> *Once this full review is done I will be in a position to present to you a full outline but right now I can assure you that we will not commence any legal actions over the next 6 months. I think our actions over the last 9 months can assured (sic) my statement".*

21. Mr Venter did not raise the question of how much time the collateral mortgage might *"buy"* them again in Email correspondence until 18 September 2013.

22. On 29th October 2012 Mr Venter sent a further email to Mr Ishmael. Mr Venter mentioned what he believed were serious potential purchasers of Lope and that business was improving.

23. On 13 November Mr Venter sent an email to Mr Ishmael which said in response to the request for a collateral mortgage. *"Surunda – as we do appreciate and really want to see*

the resort sold and the loans paid off, we will agree to it .... Provided it is stipulated clearly what the purpose is, when it can be released, that matilda's section will be excluded etc.. Once you have the draft, please send to us so we can approve, add/delete etc."

24. By early January 2013, it became apparent that the Surunda lease was not registered in the appellant's names, but in the name of a company Jenver Ltd. The appellants then took steps to change the name of the registered lease from Jenver to the appellants. This was completed on 12th March 2013. On 3 July 2013 National sent the mortgage documents to the appellants for signature. Mr Ishmael was aware that Ms Jeursen was about to travel overseas and asked Mr Venter to ensure she signed the mortgage before leaving.

25. By 10th July a few days after the appellants received the mortgage documents National by email emphasized the need to return the signed mortgage. On 10th September Mr Venter advised Mr Ishmael they would not sign the mortgage. Mr Venter complained that the collateral mortgage required the appellants to sign over *"everything we have"*. Mr Venter then said in relation to the mortgage *"Perhaps it can be seen or approached in a different light where we firstly know what the bank wants to offer if we do this, and what security do we have that if we do sign it, the bank will not "fire sale" as you say"*.

26. On 30th September 2013 National registered a caution over the Surunda lease to protect what it said was the agreement to mortgage. That caution was withdrawn and a new caution registered on 10 October 2014.

27. The Judge in the Supreme Court after a consideration of the evidence concluded ([63]) that:-

> *"In the present case the element of formation of a contract being agreement (offer and acceptance); consideration; intention to create legal relations; and certainty of terms, are identified and present".*

And so the Judge concluded the appellants had agreed to provide a collateral mortgage over the Surunda land. And that there was no reason not to grant specific performance.

GROUND 1 OF APPEAL

The Appellant's

28. They submit that while there were discussions about a collateral mortgage the discussions did not finally amount to a completed agreement to mortgage. In particular they say that in their e-mail of 13 November 2012, they imposed conditions on any collateral mortgage and those conditions were never met by National. They say in any event by the email of 13 November 2012, which the Judge relied upon to find a completed agreement, the Surunda lease was in the name of Jenver Ltd and the appellants therefore could not agree to such a mortgage. They were not the leasees of the land. The appellants say they did not agree to change the name of the leasee from Jenver Ltd into their names to facilitate the collateral mortgage. This was done for other reasons.

29. We are satisfied the Judge was correct when he concluded there was a completed agreement between the appellants and National for the appellants to provide a collateral mortgage over the Surunda lease.

30. Mr Venter's e-mail to National of 13 November 2012 agreed to the mortgage – *"we will agree to it"*. There were four *"conditions"* attached to the agreement. First it had to be stipulated clearly what the purpose is. The appellants submit before us that they were not asking National simply to stipulate that the purpose of the mortgage was to provide additional security. However the appellants could not identify either in submissions or by evidence what purpose Mr Venter could have been referring to in his 13 November Email other than as the Judge found.

31. We agree with the Judge that the purpose of the mortgage would have been abundantly clear to the appellants and was known to them on 13 November.

32. The Judge said:-

> *"58. As to the purpose of the mortgage, I accept that having regard to all of the above evidence that the only conclusion is that the defendants knew that the purpose for which the claimant required the collateral mortgage over the Surunda Property was to provide it with additional security given the default by Lope Lope in respect of its facilities and also the Bank's concerns that it was under-secured in respect of the facilities advanced to Lope Lope and that is why the defendants agreed to give the mortgage to the claimant."*

33. That *"condition"* was therefore fulfilled because the appellants clearly knew the purpose of the mortgage.

34. The second issue raised in the 13th September Email was – *"when it can be released"*. This was not a condition of agreeing to the mortgage but an inquiry by the appellants of National.

35. We agree with the Judge that the mortgage sent to the appellants on 3 July 2013 made it clear the mortgage would be released when as the Judge said *"the underlying debt owed by the claimant's customer, Lope Lope was settled in full"*. The appellants were provided with this information and so they knew when the collateral mortgage could be *"released"*.

36. The third *"condition"* was that *"Matilda's section will be excluded"*. Again we agree with the Judge's analysis. He said:-

> *"60. As to the third condition that Matilda's section will be excluded, was a reference by Mr. Venter to the defendants' purported agreement to sell part of the defendant's title to his sister, Matilda Cole, however, any such agreement with Mrs. Cole was never capable of being completed as the defendants' title has never been sub-divided.*
>
> *61. Further, I agree and accept that, as a matter of law, one cannot "exclude a section" from a registered lease before a mortgage is granted over that registered title. The only way of "excluding a section" would be to surrender the registered*

title and then sub-divided titles. There is no evidence that that has even occurred in relation to the Surunda Property. Mr. Venter accepted that in cross-examination. In all the circumstances, the condition in the 13 November 2012 email "that Matilda's section will be excluded" was never capable of being achieved as a matter of law. That condition in the 13 November 2012 email can be and is disregarded."

37. We consider there were effectively two other *"conditions"* which would have to be met before there was a completed agreement.

38. First as the appellants have pointed out at the time of the 13th November Email the Surunda property was in the name of Jenver Ltd. The appellants were the directors of that company. When it became apparent that the appellants were not the leasees of the Surunda lease they arranged to transfer the lease into their names. They did so in March 2013. This could be seen as a pre-condition to the mortgage contract. The condition in any event was met by the transfer.

39. We note the reason for the transfer of the lease was the subject of some dispute in the Supreme Court. The Judge considered the reason for the transfer was the appellant's acceptance they had agreed to the collateral mortgage. The appellant's case is that there were other reasons for the transfer and that the transfer was therefore not evidence to support a completed contract. These arguments do not affect the fact that the *"condition"* relating to transfer was met and the reasons for the transfer for this

purpose, does not matter. However there was compelling evidence for the Judge to conclude the reason for the transfer was the mortgage and we see no reason to differ.

40. The other condition in the Email of 13 November 2012 was *"Once you have the draft please send it to us so we can approve add/delete etc."*

41. The mortgage document was not sent until July 2013 after the appellant's had transferred the Surunda lease into their name.

42. On 3 August Mr Venter responded to the documents. He said *"there is no mention of the offer the bank is making; it is basically signing over our house and everything – there is no guarantee that the bank cannot walk in the very next day and foreclose on everything, selling at record low prices to get their money back".*

43. Mr Ishmael responded pointing out the bank had already been *"tolerant and obliging"* of the appellant's position.

44. Mr Venter in this Email of 26 August then said:-

> *"I asked in the previous Email what the details of the offer are so that we can see what the bank is aiming at. As I mentioned simply signing everything over basically means the bank can foreclose on us the very next day and wipe out all our personal assets."*

45. In an email of 10 September 2013 Mr Ishmael pointed out the appellants had agreed to the mortgage months previously, and they had transferred the Surunda lease into their names. Although the position of Lope had deteriorated the bank had not taken enforcement proceedings. Mr Ishmael said: *"If it was the banks intention to "fire sale" Lope Lope"* they could have done so a long time previously. By this time the Lope loan default was over 18 months.

46. The Appellants knew what the bank was offering. National would not seek to enforce the Lope debt and give the appellants time to sell the Lope business if the collateral mortgage was agreed to. This, as the appellants knew, had been the purpose throughout. Indeed National had already carried out their side of this bargain. They had originally made demand of the Lope debt in April 2012, when it was in default. National had by September 2013 supported Lope for almost 18 months. National had given the appellants undertakings in Emails, that time would be given for an orderly sale of Lope. These *"conditions"* and concerns raised in the August 2013 emails had to the appellant's knowledge already been met by the bank.

47. By August 2013 there remained only one condition, the appellants' consideration of the draft mortgage. This was the appellants' opportunity to discuss for example mortgage details such as mortgage rates. It was not a chance to re-negotiate terms that had already agreed upon. The appellants did not raise any concerns about the details in the mortgage documents sent to them by National. The appellants received the mortgage

documents on 3 July 2013. By the end of August at the latest the appellants had had the chance to raise any of the relevant issues about the mortgage document. When they did not do so the final condition imposed by them on 13 November 2012 was met and the agreement was unconditional.

48. We therefore agree with the Judge's conclusion when he said:-

> *"65. The Court is satisfied that the evidence established the defendants agree to provide a mortgage to the claimant over Leasehold Title 04/2642/001. The answer to Issue No.1 is in the affirmative (yes)."*

49. The second submission in ground one of the appeal is that the only consideration for the mortgage was past consideration. We reject that submissions. The consideration for the advance was the bank's undertaking not to sue on the loan to Lope which was by March 2012 in default. National continued to provide financial support to Lope after November 2012.

50. As the Judge said:-

> *"83. In this case, the consideration for the agreement of 13 November 2012 was the loan advances to Lope Lope which, it was conceded by Mr Venter, were in default coupled with the Claimant's forbearance to sue Lope Lope. The past consideration had not elapsed."*

51. We note that in November 2012 when the mortgage was agreed to the debt by Lope to National was Vt 181 m, by September 2013 when Mr Venter refused to sign the mortgage it had grown to Vt 240 m.

GROUND 2 OF APPEAL

52. Ground 2 of the appeal raises two matters. First a repeat of the submission regarding past consideration. We have already rejected that submission.

53. The second issue raised relates to what is said to be alternative causes of action available to National to collect the money owed to it by Lope.

54. As we understand this submission the appellants say National should have exhausted other available rights to collect the money owed to them by Lope before seeking specific performance of the agreement to mortgage. These other rights included a claim under personal guarantees apparently provided by the appellants guaranteeing Lope's debt.

55. We agree with the Supreme Court Judge whether there were other alternatives ways of collecting any money owed arising from the Lope default was irrelevant to granting or refusing specific performance. National has no obligation to pursue any other rights it may have with respect to the Lope debt before seeking to enforce the mortgage agreement. Nationals decision to seek specific performance of the mortgage rather

than any other method of collection is not relevant to any discretion to grant or refuse specific performance.

56. There is no equitable principle that requires such action before seeking the equitable remedy of specific performance. We reject this ground of appeal.

GROUND 3

57. National registered two cautions against the Surunda Property claiming that the agreement to mortgage gave it sufficient equitable interest in the leasehold land to do so. The Judge accepted the agreement to mortgage gave National caution rights with respect to the Surunda lease. The challenge to the Judge's conclusion was based on the proposition that there was no agreement to mortgage and therefore no equitable interest was created. We have agreed with the Judge that there was an agreement to mortgage. In those circumstances National had sufficient interest to register the caution.

58. The appellants properly accepted that if their appeal against the conclusion there was an agreement to mortgage failed then the appeal grounds relating to the caution must also fail. We therefore reject this ground of appeal.

59. The same proposition applies to the fourth ground of appeal relating to the claim of a breach of fiduciary duty. We reject this ground of appeal.

60. For the reasons given we are satisfied the Judge was correct to conclude that there was an agreement to mortgage and order specific performance of the agreement.

61. The Judge was correct to reject the counter claim.

62. The appeal is dismissed. There will be costs in favour of National payable by the appellants on a standard basis unless agreed.

DATED at Port Vila this 23rd day of February 2018

BY THE COURT

John von Doussa
JUDGE