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

Civil Appeal
Case No. 19/225 CoA/CIVA

BETWEEN: Champalou Dominique
Appellant

AND: Marie Rose Molbarav
First Respondent

AND: Steven Remi
Second Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Gus Andrée Wiltens
Hon. Justice Stephen Felix

Counsel: *Mrs. M. N. Patterson for the Appellant*
Mr. L. Tevi for the First and Second Respondents

Date of Hearing: *2nd May 2019*

Date of Judgment: *10th May 2019*

JUDGMENT

Introduction

1. In 2010 Mrs. Molbarav as customary land owner leased a piece of land at Lope Lope to Mr. Champalou. The purchase price was VT4, 000, 000. The lease was registered in Mr. Champalou's name in July 2012 as lease no. 04/2641/084. The purchase price was to be paid by installments.

2. A dispute arose. The appellant issued proceedings against Mrs. Molbarav and Mr. Steven Remi. The proceedings alleged Mrs. Molbarav had prevented the appellant

having access to his land; she and Mr. Remi had removed sand from the property without the appellant's authority and as a result substantial remedial work was required on the property; the appellant had overpaid the purchase price by VT395, 000; Mrs. Molbarav and her family had harassed, assaulted and intimidated the appellants and their visitor to the appellant's property and caused loss to the appellants. The respondents denied the allegations and counterclaimed alleging the purchase price had not been paid in full and that VT1, 510, 000 remaining owing by the appellant.

3. At trial the judge dismissed the appellant's claim and found in favour of Mrs. Molbarav. He ordered the appellant to pay VT1, 510, 000 plus interest of VT906, 000 to Mrs. Molbarav.

4. In this appeal the appellant submits:-

   (a) There was independent documentary evidence which established Mrs. Molbarav accepted the appellant had paid the full purchase price;

   (b) The evidence established the appellant had paid by mistake an additional VT395, 000;

   (c) The second respondent, on instructions from the first respondent, had wrongfully removed a significant volume of sand from the appellant's land;

   (d) The first respondent had harassed and intimidated the appellant;

   (e) The first respondent had prevented the appellant's lawful access to his property;

   (f) The trial judge was not entitled to make any observations about rectifying the title. No such application was before the Court.

<u>The Supreme Court Judgment</u>

5. In rejecting the appellant's claim that he had paid the full purchase price the judge said:-

   "17.Apart from the claimant's own list of payments made shown in exhibit 'C10' he has not called evidence or produced receipts to show that he made cash

payments and that those cash payments were made as part payment of instalments towards the full purchase price of the lease. The first defendant when cross examined denied she was ever shown the list of payments in exhibit 'C10'. She says what she was given which she signed was an acknowledgment of receipt of payment by the claimant in the sum of VT 683,000 into her daughters account at Bred Bank.

18. Although the claimant now relies on exhibit 'C10' to say that the first defendant acknowledge receipt of all the payments made by signing, the claimant has not shown in his evidence that he produced and showed the first defendant the list of payments on the reverse page of exhibit 'C10' and they both went through the list of payments before signing the acknowledgement."

6. He also rejected the claim of overpayment of VT395, 000. He found that the appellant still owed VT1, 510, 000 of the original purchase price.

7. As to the removal of the sand the judge said:-

"20. The verbal agreement was for 1 hectare of land. That is not disputed. Given the error in the survey plan, the clamant alleges that he is entitled to 1 hectare 30. There is no evidence that he has paid for the extra 30 or that the first defendant agreed to the additional land. Having heard the evidence, I am not satisfied that the claimant has proved that the sand was dug from within his 1 hectare of land resulting in the damage alleged."

8. The Judge did not give any ruling on the claim for damages for harassment or deal with the claim for access to the property.

9. The judge did say "the survey map needs to *be* rectified to reflect what the parties agreed. The claimant cannot gain from an error on the survey map." These comments related to his conclusion (at 20) that the appellant had ended up with more land than he had agreed to purchase; 1.30 hectares rather than the one hectare said to be agreed upon.

Discussion

Purchase Price

10. We are satisfied that the evidence of the appellant did establish he had paid the full purchase price of VT4, 000, 000. The appellant and first respondent agreed at the

time of the purchase that the VT4, 000, 000 could be paid by instalments. The appellant's evidence was that he made instalment payments to Mrs. Molbarav either by cash or by bank transfer. The last payment of VT683, 000 was paid on Mrs Molbarav's instructions to Mrs. Molbarav's daughter. In support of his claim the appellant produced a sheet of paper which listed all of the payments said to have been made, including the dates of each payment (Exhibit C10). Those payments totaled VT3, 317, 000. The paper then noted the VT683, 000 payment was to be made to Mrs. Molbarav's daughter account.

11. The appellant's evidence was that this paper was signed by Mrs. Molbarav at the Port Vila airport as an acknowledgment of the payments made. Mrs. Molbarav admitted she had signed the document but said it only related to the VT683, 000 payment and was not an acknowledgment of the other payments of VT3, 317, 000. Mrs. Molbarav's husband confirmed in evidence that his wife had signed the document.

12. The document consists of one page with writings on both sides. Mrs. Molbarav's signature is on one side. Mrs. Molbarav has noted *"ok"* beside her signature with the words (in French) *"full payment made"*. On the face of the document therefore Mrs. Molbarav by her signature and notations *"ok"* and *"full payment made"* was saying that she accepted the paper accurately detailed the payments made by the appellant and that the full purchase price of the land had been paid.

13. As we understand Mrs. Molbarav's evidence she claimed her signature and notation only acknowledged the payment of VT683, 000. She said further she did not know or understand the document she signed was acknowledging the payments on the list on the other side of the paper.

14. We have had the opportunity to view the piece of paper on which Mrs. Molbarav's signature appears. It seems highly improbabe that Mrs. Molbarav would not have been aware of the list of payments on the other side of the paper. The list of payments on the reverse side from the signature showed payments of VT3, 313, 000. In that context the additional payment of VT683, 000 made up exactly the VT4, 000, 000 purchase price. This evidence supports Mr. Champalou's evidence that Mrs. Molbarav read all of the document and signed the document accepting its accuracy and accepting the final payment of VT683, 000 would mean the whole VT4, 000, 000 had been paid.

15. These figures strongly support Mr. Champalou's claim that this document identified the total payments made and to be made by Mr. Champalou and accepted as accurate by Mrs. Molbarav.

16. Mrs. Molbarav claimed that all she signed was a receipt for a payment of VT683, 000. As the appellant has pointed out the notation on the paper is not a receipt but an acknowledgment Mr. Champalou would pay a further VT683, 000 to Mrs. Molbarav's daughter. That is no doubt the reason why the daughter's bank account number is also provided. The evidence established the payment was sent on the day following the signing and received two days later.

17. We therefore disagree with the judge's conclusions. We are satisfied therefore that Mr. Champalou did make payments of VT4, 000, 000 to Mrs. Molbarav.

Payment of Extra VT395, 000

18. We are satisfied the appellant did overpay the first respondent for the lease of the land, although slightly less than the VT395, 000 claimed. The Supreme Court judge rejected this claim when he found the full purchase price of the lease had not been made. The appellant's case was that he made four payments to Mrs. Molbarav in addition to the VT4, 000,000. Those payments were made on 11 July 2011 VT45, 000, 20 January 2012 VT150, 000, 11 May 2012 VT100,000 and a final payment of VT 100,000 on 23rd November 2012.

19. As to the first three payments the appellant did not include these payment in his C10 list payment. However the appellant's evidence clearly established the payments were made. The appellant exhibited two bank transfer documents and one Western Union transfer of the three sums to Mrs. Molbarav's account. Mrs. Molbarav acknowledged she received these three payments but claimed they were part of the underpayment made by the appellant. We have already rejected that claim. One of the transfers, through Western Union was for VT100, 000 but the Western Union fee meant only VT94, 750 was actually transferred to Mrs. Molbarav.

20. As to the fourth transfer of VT100, 000, AJC was an accounting firm and had provided assistance to both the appellant and first respondent in negotiating the sale of the lease. On 23rd November 2012 they sent an account to Mr. Champalou which included an amount of VT100, 000 as an "advance" to Mrs. Molbarav. Mr. Champalou duly paid the account but when the VT100, 000 was paid he owned nothing to Mrs. Molbarav. He is therefore also entitled to reimbursement of this sum.

21. We are therefore satisfied that the four payments made by Mr Champalou were an overpayment of the purchase price of the land. He is entitled to a return of his money being VT389, 250 from Mrs. Molbarav.

What area of land was purchased?

22. We consider this issue because a resolution of this question is vital to the next question to be considered whether sand was extracted from the appellant's land.

23. The question of the area of land purchased by the appellant was not the subject of any pleadings from either side in this litigation. However the trial judge said that the arrangement between the parties had been for the purchase of one hectare of land for VT4, 000,000. However when the survey of the land was produced and the lease registered it showed 1.3 hectares.

24. The Judge said this difference was the cause of the dispute of the parties; it caused confusion to the surveyor and meant the Judge could not be sure the sand was extracted from the 1 hectare rather from the additional 0.3 of a hectare.

25. We are satisfied the parties agreed the lease of the land to be purchased was as described in the registered lease, that is 1.30 hectares. Both parties signed the lease which showed lha. 29a. 31ca. Mrs. Molbarav made no claim that the final area identified for the purchase and agreed to in the lease was in error. The initial reference to the purchase of 1ha was before any formal survey was carried out on the land to be leased and therefore could only have been an estimate. Finally, in cross examination Mrs. Molbarav confirmed her only issue in the case was her claim that she had not been paid the full purchase price.

26. We are therefore satisfied the Judge was wrong to conclude there was an error in the size and description of the land leased. We are satisfied there was no such error. We proceed therefore on the basis that Mr. Champalou leased the 1.30 hectares and the land was as the survey map, attached to the lease, identified.

The Sand Extraction

27. We are satisfied on the evidence that substantial sand was extracted from the appellant's land without his consent by the second respondent on the instructions of the first respondent.

28. Mr. Albert Bue is a registered surveyor. He visited the leasehold land. He was asked to identify where the extraction of sand took place; the amount of sand extracted; and the amount of rubbish subsequently dumped in the hole created by the removal of the sand.

wait for up to a year for natural compaction. Once the land was settled a hard surface could be established for construction. The cost of that option was VT4, 162, 500.

36. The other option involved filling the hole with quarry/road base and manually compacting the area. This would enable an immediate start on house construction. The cost of that option was VT5, 793, 750.

37. There was no challenge to this evidence at trial. The sand was unlawfully removed from the property in early 2015, now 4 years ago. As we have found this effectively prevented the appellant from building a house on his land. Given that delay we consider the appropriate assessment of damages for the remedial work is properly based on the immediate restoration of the land being option 2. The appellant is therefore entitled to Judgment against the first respondent as the instigator of the extraction and the second respondent who actually removed the sand for VT5, 793,750.

Restraining Orders

38. The Judge did not consider this cause of action. We do so. Part of the agreed facts at trial were "from May 2013 to May 2015, up to 2017 the first defendant caused disturbance on the property and incidents against the claimant and his family preventing the development such as but not limited to incidents in May 2013 and 10 September 2014."

39. In the Respondents submissions at trial the respondent said "the only relief the Claimant is entitle (sic) to is the interference by disturbance by the first defendant and the damages associated into it (sic)".

40. In the Supreme Court the appellant claimed he obtained an interim restraining order against Mrs. Molbarav on the basis of her conduct. However the terms of the Supreme Court order do not say it was an interim order or that it expired at any time. We note the order was made by consent. The order's existence was not challenged in this Court by Mr. Molbarav. Given the evidence at trial it was understandable the order was not challenged. The Supreme Court restraining order therefore remains 'live" and we will confirm the order in this judgment with some amendment.

Access to the land

41. The appellant complained that Mrs. Molbarav had prevented him from accessing his property. Counsel for Mrs. Molbarav submitted that there were two access roads to

the property and that Mrs. Molbarav would consent to an order confirming Mr. Champalou's right of access as long as he and his visitors used the access way on the other side of his property from Mrs. Molbarav's land.

42. The lease, signed by both parties shows only one access road. That road follows the line of Mrs. Molbarav's property. That is the access way Mr. Champalou is entitled to with respect to his land. It is the access way Mrs. Molbarav agreed to in the lease. The evidence established that Mrs. Molbarav has been blocking this access way. Accordingly the appellant is entitled to an order prohibiting Mrs. Molbarav, her servants or agents blocking the access way identified on the survey map attached to the lease.

General and Special Damages

43. The appellant sought general and special damages arising from the first respondent's conduct with respect to the land. The Judge in the Supreme Court did not deal with these claims. We now do so. The first respondent did not challenge the evidence filed by the appellant in support of these damages claims.

44. The special damages claims are as follows. First the appellant says that because of the actions of the first respondent in effectively refusing to acknowledge his lease of the land he had to undertake an extra 8 trips from Noumea (where he lived) to the land on Santo. The cost was VT53, 000 per trip and a total of VT424, 000. We are satisfied this claim for damages arose out of the wrongful actions of the first respondent and the appellant is entitled to an award of damages of VT424, 000.

45. In September 2014, Mr. Champalou hired a bulldozer to begin construction of his house. The evidence from the appellant established that the first respondent stopped the bulldozer from working. We are satisfied these events occurred and the wasted costs of VT64, 000 are properly payable as damages by the first respondent.

46. The third claim for special damages relates to a destruction of a fence on the appellant's property. The appellant's evidence established the first respondent destroyed the fence removed marker pegs and threw away marking tools. We accept the replacement cost of VT10, 000 is properly payable as damages.

47. Finally a claim for a wasted building permit fee of VT70, 750. We are satisfied that because of the removal of the sand the house could not be built and so ultimately the building permit expired. The building permit fee was therefore wasted and an award of damages of VT70, 750 is appropriated to reflect that wasted fee.

General Damages

48. The appellant sought an award of general damages. The basis for such an award was in a general sense that the actions of the first respondent prevented the appellant from enjoying his property for some years. In particular the appellant says the construction of his house has been delayed now for years because of the destruction of the building site, blocking access to the land, and abusive and aggressive conduct by the first respondent and her family toward the appellant and his family.

49. We have already found that the first respondent was responsible for destroying the intended house site on the appellant's land through the removal of the sand. The first respondent blocked the appellant's lawful access to the land and as we have found was abusive and aggressive toward Mr. Champalou and his family and workers. We consider these actions were a serious interference with Mr. Champalou's right to enjoy and develop his leasehold property as he chose. In those circumstances we consider an award of VT500, 000 damages is appropriate.

Summary of orders

50. In summary therefore we make the following orders.

1. We set aside the judgment of the Supreme Court of 17 January 2019 including the order for costs;

2. We make an order for costs with respect to the Supreme Court trial in favour of the appellant against the first respondent;

3. We order the first respondent to pay the appellant VT389, 250 for the over payment of the purchase price of the lease;

4. We order the first and second respondents jointly and severally pay the appellants VT5, 793, 750 for the remedial cost of replacing the sand;

5. There will be an order prohibiting Mrs. Molbarav, her servant or agents blocking the access way identified as such on the survey map attached to the Lease No. 04/2641/084;

6. An order for special damages of VT504, 750 payable by the first respondent to the appellant;

7. An order for general damages of VT500, 000 by payable by the first respondent to the appellant.

8. A restraining order as follows:-

   (a) The first respondent, her family members, agents and workers are restrained from threatening, intimidating, and assaulting the appellant, his family members and agents and workers in any way on lease no. 04/2641/084 or on the access road to the lease or anywhere in Santo.

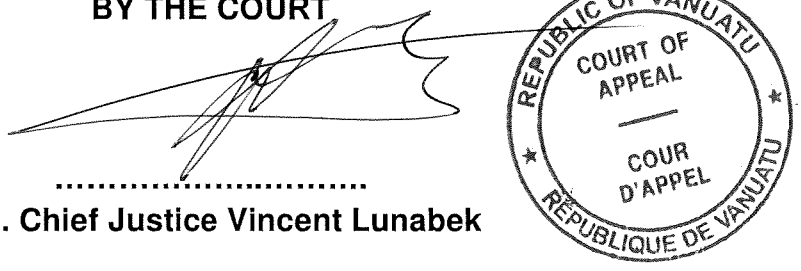
   (b) The first respondents, her family members, agents and workers are restrained from trespassing, putting namele leaves and interfering with the appellant's use of land title 04/2641/084;

   (c) The first respondents, her family members, agents and workers are restrained from entering the land of the lease and removing sand.

Costs

51. The first respondent will be solely responsible for 85% of the costs of the appellant in the Supreme Court and this court as agreed or as taxed by the Master. The first respondent and the second respondent will be jointly and severally responsible for 15% of the costs of the appellant in the Supreme Court and this Court as agreed or as taxed by the Master.

DATED at Port Vila this 10th day of May, 2019
BY THE COURT



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Hon. Chief Justice Vincent Lunabek