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IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 25 of 2008

BETWEEN: CYKAY DEVELOPMENT LIMITED

Claimant

AND: WILLY GORDEN

First Defendant

AND: THE REPUBLIC OF VANUATU

Second Defendant

AND: WU KIM KAM

Third Defendant

Coram: *Mr. Justice Oliver A. Saksak*

Counsel: *Mr. Felix Laumae for the Claimant*
Mr. Stephen Tari Joel for the First Defendant – Not appearing
Mr. Godden Avock for Second Defendant
Mr. Colin Leo for Third Defendant

Date of Hearing: *5th February 2013*
Date of Judgment: *8th August 2013*

JUDGMENT

Introduction And Preliminary Matters

1. This matter was originally filed on 20th May 2008. It proceeded by way of a default judgment. The first defendant applied to set aside the default judgment and sought further orders that the claims of the Claimant be struck out. The Court refused both applications. The first defendant appealed against the refusal and was successful and the matter was remitted to this Court.

2. On 20th July 2010 pursuant to an application to amend the claim, the Court granted leave to the claimant to file an amended claim. On 26th July 2010, the

claimant filed his amended claims. On 6th July 2011 the first defendant filed a defence to the amended claim. On 16th February 2012, the claimant filed a further amended claim joining Wu Kim Kam as Third Defendant. On 3rd September 2012, the first defendant filed a defence to the further amended claim. The second defendant filed a defence on 21st September 2012.

3. The further amended claims raised allegations of fraud against the first defendant when he transferred title to the third defendant (WU KIM KAM) (see paragraphs 10, 11 and 12).

4. The third defendant did not file any defence but she did file a sworn on 26th November 2012. Among other things the third defendant stated she purchased the property from the first defendant in good faith and maintained she was and is a bona fide purchaser of the title 03/1133/001, the subject-matter of this proceeding. Further she disputed all the matters raised by the claimant in paragraphs 11 to 16 of their further amended claims.

5. The claimant seeks the following reliefs:

    1. An order that the register kept in respect of Leasehold Title 03/1133/001 be rectified by substituting name of the claimant as lessee in place of the third defendant, pursuant to section 100 of the Land Leases Act [Cap 163].

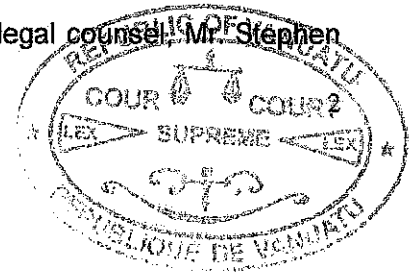
    2. And order directing the Director of Lands, Survey and Registry to effect such rectification.

    3. An order for damages.

    4. Costs of and incidental to the proceedings.

    5. Such further or other relief as deemed appropriate.

    6. When the matter was called on for trial hearing at or about 3.00 pm on 5th February 2013 neither the first defendant nor his legal counsel, Mr. Stephen



Joel appeared. Mr. Laumae raised concerns about the inavailability of the defendant and his counsel and about the considerable delays this case had gone through. Counsel enquired as to how best the matter could be progressed. Mr. Leo suggested to the Court to proceed under Rule 9.12 which provides for three options where a defendant does not attend when the trial starts –

"(a) The Court may adjourn the proceeding to a date it fixes; or
(b) The Court may give judgment for the claimant; or
(c) The claimant with the permission of the Court, may call evidence to establish that he or she is entitled to judgment against the defendant."

7. The Court accepted the suggestion of Counsel and proceeded with the hearing pursuant to Rule 9.12 (1) (c). The Court indicated that opportunity would be given to the first defendant and his Counsel to make written submissions in response to Mr. Laumae's written submissions.

8. The Court heard Mr. Laumae's opening address before he called one only witness for the claimant. This witness was Mr. Havo Moli, the Branch Manager of the claimant in Luganville, Santo. He merely identified his sworn statements dated 28th April 2011 and that of 26th November 2012. These were tendered into evidence as Exhibits C1 and C2. Mr. Leo did not cross-examine Mr. Moli.

9. As the first defendant was not present, the Court then gave opportunity to Mr. Avock. Counsel however advised the Court that the second defendant would simply abide by any orders of the Court, except as to costs.

10. The Court then gave opportunity to Mr. Leo for the third defendant. After an opening address Counsel called his client as the only witness. She merely identified and confirmed her sworn statement dated 26th November 2012. This was tendered into evidence as Exhibit D1. No cross-examination was allowed as no parties had given prior notice according to the Rules to do so.

11. Mr. Laumae then indicated his intention to file written submissions within 14 days and Mr. Leo indicated he would file responses within 14 days thereafter. At this juncture, the first defendant entered the Court room. The Court informed him about what had happened in his absence and reprimanded him for his failure to be at Court in time. He gave some explanation why his lawyer could not be in Luganville for the trial and that he had been in Court earlier but left to collect his children from school. The Court explained to him that it had proceeded with the hearing under Rule 9.12 (1)(c) and that he and his counsel were entitled to make written submissions based on his evidence by sworn statements before the Court delivers its decision or judgment. This was clearly understood by Mr. Willie at the time.

12. From what transpired at the hearing on 5th February 2013, it is apparent the facts are not in dispute. The claimant did not challenge the statement of Peter Pata filed on 2nd August 2012 in support of the defence of the second defendant. Further, the claimant did not challenge the evidence of the first defendant in his sworn statements filed in support of his defences dated 4th August 2011 and on 26th November 2012. As such, they are admissible evidence before the Court.

The Issues

13. As for written submissions, Mr. Laumae filed written submissions on 28th March 2013. The first defendant has not filed any written submissions but the Court notes the letter by Mr. Joel dated 20th August 2012 where counsel raised two specific issues namely:

(a) Whether or not the first defendant has rescinded the agreement by letter dated 14th April 2008?; and

(b) Whether or not there is fraud under section 100 of the Land Leases Act [Cap 163].

14. Mr. Leo filed written submissions in Vila on 7th August 2013, a copy of which was sent by e-mail to the Registry and received at 2.00pm. The Court has considered those submissions and accepted them.

15. Mr. Laumae raised the following issues:-

(a) Was the contract for sale of 5th July 2006 valid and enforceable?

(b) Was the claimant or the first defendant in breach of the contract?

(c) Was the action of the first defendant to transfer Leasehold Title 03/1133/001 to the third defendant fraudulent?

(d) Was the third defendant a bona fide purchaser for value?

(e) Whether the claimant suffered damages and loss as a result of the actions of the first defendant?

Relevant Facts

16. Before consideration of the issues raised by Counsel it is necessary to set out the relevant facts as follows:-

(a) On 5th July 2006, the claimant and first defendant entered into an agreement for the sale and purchase of Leasehold Title 03/1133/001. The sale price was agreed at VT3,500,000. It was the term of the sale and purchase agreement that upon signing the claimant would pay a deposit of VT1,000,000 to the first defendant. The balance was to be paid within 15 days after a consent to transfer was given.

(b) The deposit of VT1,000,000 was paid over on 5th July 2006. On 11th March 2008, the then Minister of Lands gave his consent to the transfer of

Title 03/1133/001. Final settlement would have taken place on 25th March 2008.

(c) However, the first defendant did not execute the transfer documents.

(d) Instead the first defendant transferred Leasehold Title 03/1133/001 to the third defendant and registered such transfer on 21st April 2011.

(e) The third defendant paid consideration for such transfer of VT4,000,000.

Discussions and Considerations

17.1. First, on whether or not the contract for sale and purchase dated 5th July 2006 was valid and enforceable?

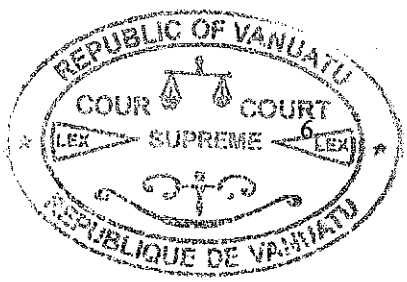
17.2. The said agreement is disclosed in the sworn statement of Mr. Havo Moli dated 28th April 2011 as Annexure "HM2". For ease of reference, I set out the full text of the agreement below –

"AGREEMENT FOR SALE AND PURCHASE OF A RURAL PROPERTY

VENDOR: *Willy Gorden*
Lands Department
PO Box 140
Luganville, Santo
Tel: 36459

PURCHASERS: *CIKAY DEVELOPMENT LIMITED*
BP 112
Port Vila
Tel: 22629

ADDRESS OF PROPERTY: *BELBARAV*



LEASE TITLE NUMBER: 03/1133/001
LESSOR: CIKAY LTD

PURCHASE PRICE FOR LAND: VT3,500,000
TOTAL PURCHASE PRICE: VT3,500,000
DEPOSIT TO BE PAID: VT1,000,000

BALANCE OF PURCHASE PRICE TO BE PAID AS FOLLOWS: BY ONE PAYMENT OF VT2,500,000 15 DAYS AFTER THE CONSENT TO TRANSFER HAS BEEN APPROVED BY THE LESSOR.

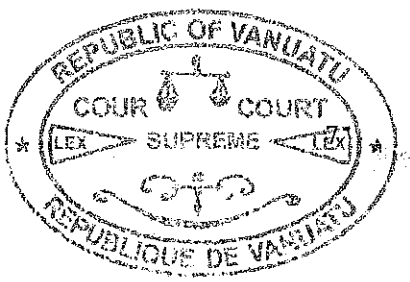
DATE OF POSSESSION: SUBJECT TO THE CONSENT OF THE LESSOR, AT COMPLETION.
INTEREST RATE FOR LATE SETTLEMENT: 10% per Annum.

Date: 5th July 2006

AGENT: CAILLARD KADDOUR (VANUATU) LTD
PO Box 34 – Luganville, Santo
(Duly signed and sealed)

(Duly Signed)
Willy Gorden"

17.3. Willy Gorden the first defendant filed a defence to the amended claim on 7th July 2011. He accepts at paragraph 4 that he entered into the agreement with the claimant on 5th July 2006 but stated in his defence that the said agreement was rescinded by him by his letter dated 14th April 2008 which he wrote to claimant's counsel. Alternatively, he stated in his defence that the claimant had breached the agreement by failing to include the defendant's costs and cost of registration being VT4,800,000 to the initial purchase price of VT3,500,000 bringing the total price to VT8,200,000.



17.4. The letter is headed "RE: TRANSFER OF LEASEHOLD TITLE 03/1133/001. In essence, the first defendant was bringing to the attention of Mr. Laumae some actions and/or omissions by his clients which he alleged amounted to breaches of the said agreement of 5th July 2006. But of more relevance perhaps is paragraph 7 of the said letter which reads:-

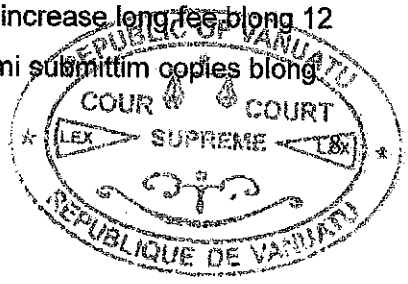
"Again mi wandem clarifaem long yu se mi no go long office blong Caillard & Kaddour blong demandem VT12,000,000 as new sales price blong property. The VT12,000,000 hemi wan ceiling figure we mi proposem long floor blong mifala ia (Mr. Havo Moli, Mr. Rejis Bebe & myself) I tok raond long hem. Mifala later after some discussion wetem tufala agents long Monday 31st March 2008 mifala agree se total expenses we mi agree long hem blong oli refundem mi hemi VT4,800,000 excluding agreement we mifala I bin saenem long 2006 which will totally amounted to VT8,200,000. Therefore, tufala agents blong Caillard & Kaddour long Santo tufala askem mi blong drawem newfala agreement blong save bindem together expenses and wetem existing agreement which I have done that in their office." (emphasis by underlining).

17.5. Further at paragraph 12 of the letter, the first defendant stated –

"And finally sapos Caillard & Kaddour or Cikay Development istap continue blong disregardem legal interest blong mi, mi kindly requestem olgeta blong be more professional when negotiating. And sapos oli continue blong usim some altermative ways blong treatenem mi bae mi gad no other choice but cancellem agreement blong mi." (emphasis by underlining).

17.6.. Mr. Havo Moli, the claimant's only witness in his sworn statement dated 26th November 2012 discloses Notes of Meetings he maintained as Annexure "HM1". He recorded a meeting held on 2nd April 2008 as follows:-

"Meeting wetem Havo Moli, Regis Bebe and Willie Gorden. Igat argument I kam out folem request blong increase long fee blong 12 Million. Long same time Willie Gorden emi submittim copies blong



"Transfer of Lease" wetem amount blong 3.5 Million."

Further, when discussing the price under Note 2 on 2nd April 2008, Mr. Moli recorded that –

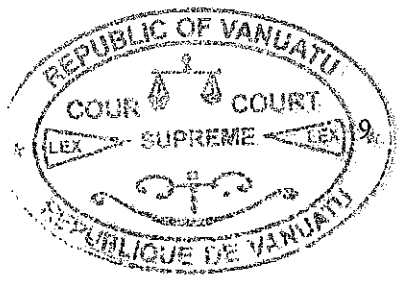
"After sam weeks we emi no available long ol contact blong mifala, emi askem 12 Million vatu. Emi spendem time blong hem blong buildem wan house long BP Born and hemi stap wokbaot wetem wan bundle blong Account blong ANZ.

Must ademap too wan advance payment blong Survey (200,000vt) through long Dept. blong Land Survey (sic) we emi olsem "steal" long ol plans blong Mrs Pakoa (see leta).

Total amount paid: 1,000,000 vt
150,000 vt
500,000 vt
200,000 vt
1,850,000 vt which is 53% total.

Blong risivim transfer we hemi tekem ples emi bin tekem ol document blong 3.5 million mo requestem 12 million which is a big cheat for the nation."

17.7. Mr. Havo's Notes do not record any meeting on 31st March 2008 as stated by Mr.Gordon in his letter of 14th August 2008. Mr. Havo's evidence do not make any reference to the sums of VT4,800,000 and VT8,200,000 as stated by Mr. Gordon in his letter. Mr. Regis Bebe did not give any evidence to confirm the evidence of Mr. Moli making it difficult for the Court to make an inference as to which of the two evidence is capable of being believed as probable. But be that as it may, whether the meeting was held on 31st March 2008 (which is moreprobable because the 15 day date line for settlement was due 6 days earlier on 25th March 2008), or on 2nd April 2008 some 8 days later (which is less probable) is immaterial.



18. What became clear at the meeting was that Mr. Gordon turned up with the transfer documents ready to transfer the title, but the claimants did not settle the outstanding of VT2,500,000 as stipulated and agreed to in the agreement of 5th July 2006.

19. What became clear also in that meeting (whether 31st March 2008 or 2nd April 2008) were that despite –

(a) Consent to transfer had been given by the Minister as lessor on 11th March 2008, the claimants were not in a position to settle the balance of the purchase price on 25th March 2008.

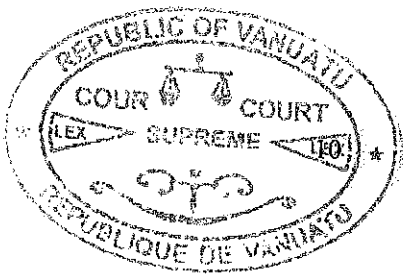
(b)The first defendant turning up at the meeting with the transfer documents (on 31st March or 2nd April 2008), there was nothing in the agreement of 5th July 2006 that required him to do so prior to settlement of the balance of the purchase price.

(c) The parties reaching verbal agreement about adding the sum of VT4,800,000 as costs to the purchase price of VT3,500,000 thus increasing the total to VT8,200,000, no new agreement in writing was entered into by the parties thereafter. As such, there was never a meeting of the minds about the final purchase price.

20. The letter of 14th August 2008 by the first defendant was not his recission of the agreement of 5th July 2006. It was merely a notice of his intention to do so if the claimant did not meet his requirements and if they continued to threaten him.

21. Subsequently, it transpired that is what happened. The first defendant did not have to give any further notice of recission of agreement. Clearly, the claimant had failed to perform their part of the agreement by failing to pay the balance of VT2,500,000 within 15 days as agreed. As such, the first defendant was entitled to treat the agreement as having come to an end after 2nd April 2008.

22. The issues therefore to be answered are –



(a) Was the agreement of 5th July 2006 valid and enforceable?
The answer is in the affirmative.

(b) Was the claimant or the first defendant in breach of the agreement?
The answer, for the reasons given show that it was the claimant who were in breach of the agreement of 5th July 2006.

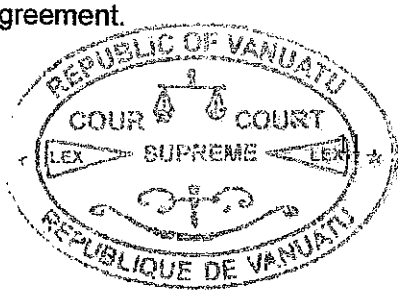
(c) Has the first defendant rescinded the agreement of 5th July 2006?
The answer is in the affirmative.

23. The remaining issues are:-

(a) Whether the action of the first defendant to transfer Leasehold Title 03/1133/001 to the third defendant fraudulently?
I find no evidence by the claimant to support their contention that the first defendant was fraudulent in his actions. This issue is answered in the negative.

(b) Was the third defendant the bona fide purchaser of Leasehold Title 03/1133/001 for value?
Clearly from the evidence, the answer is in the affirmative.

(c) Whether the claimant suffered damages and loss as a result of the actions of the first defendant?
From the evidence, their loss is limited to the VT1,000,000 they paid to the first defendant on 5th July 2006. The claimant is entitled to recover this amount from the first defendant but this may have to be a set-off against his costs of VT749,000 in Civil Appeal Case No. 6 of 2010. Unfortunately, the first defendant did not file any counter-claims in respect to these costs or any other costs he has incurred in the course of the agreement.



24. Accordingly, I record that the claimant is only partly successful in their claims against the first defendant. The reliefs they seek under paragraph 5 (1), (2), (4) and (5) of this judgment are declined and their claims are dismissed accordingly. They are however entitled to an Order for loss in the sum of VT1,000,000.

25. The first defendant is hereby ordered to refund the claimants the sum of VT1,000,000.

26. In this proceeding there will be no order as to costs. Each party will pay their own costs.

DATED at Luganville this 8th day of August 2013.

BY THE COURT

OLIVER A. SAKSAK
Judge