

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

**Civil**  
**Case No. 20/996 SC/CIVL**

**BETWEEN: Inigo August**  
Claimant

**AND: Tal Milfirer**  
First Defendant

**AND: Robert Rokvic**  
Second Defendant

*Date of Hearing:* 3 June 2020  
*Before:* Justice V.M. Trief  
*In Attendance:* Claimant – Mr M. Fleming  
Defendants – Mr N. Morrison  
*Date of Decision:* 23 June 2020

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**RESERVED JUDGMENT**

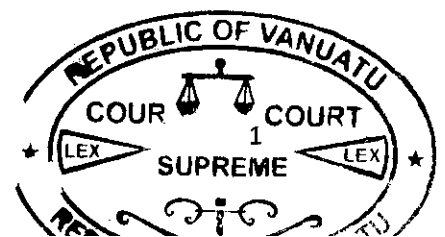
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A. Introduction

1. This is an Application for summary judgment and/or on a question of law on the basis that the Defendants have no real prospect of defending the Claim. The Defendants opposed the Application and filed a Cross Application that the Claim be struck out. This judgment determines the Applications.

B. Background

2. On or about 10 February 2020, the parties entered into a contract of sale for the sale and transfer of leasehold title property (the 'Contract').



3. Lease title no. 12/0311/020 over the subject land was registered on 25 July 2014 ('Lease 020').

4. The opening words of the Contract (at the top of p. 2) are:

*The Vendor and the Purchaser agree to sell and buy the Property by way of Transfer of Lease Title under the terms of the SCHEDULE and TERMS AND CONDITIONS of this Contract.*

5. The description of "Property" on p.2 is:

<b>PROPERTY</b>	<b>TITLE NO.</b>	<b>12/0311/020 (AS MODIFIED UNDER NEW COMMERCIAL CLASS)</b>
Location		SIVIRI, EFATE, VANUATU
Area		10,135 m <sup>2</sup>
Improvements		NIL
Inclusions		NIL
Zoning		AGRICULTURAL (COMMERCIAL TO BE)
Exclusions		NIL

6. Clauses 4 and 5 of the Special Conditions of the Contract provide:

**4. REGISTRATION OF NEW COMMERCIAL LEASE**

*This Contract is conditional upon the Vendor delivering to the Purchaser within a period of 6 (six) months, a duly registered Title for the Property, after completion of the change of Class into Commercial.*

**5. DUE DILIGENCE**

*This Contract is conditional upon the Purchaser completing a Due Diligence period of 7 (seven) days from the date of this Contract.*

7. Clauses 1.1(2)(k) and (m) of the Contract's Terms and Conditions (its 'General Conditions') define "Lease" and "Property" as follows:

1.1 *In this Contract:*

....

(2) *Unless the context otherwise indicates:*

...

k) **'Lease'** means the Lease registered over the Land pursuant [sic] to the Land Leases Act 1984 [CAP 163];

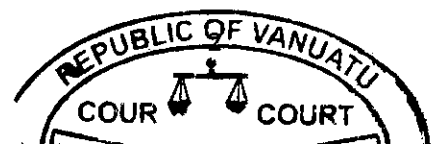
...

m) **'Property'** means:

- i. The Lease over the Land
- ii. The improvements; and
- iii. The inclusions and chattels.

8. To obtain a change of class of lease to Commercial, the Defendants surrendered Lease 020 and lodged a new Commercial Lease with the Department of Lands.

9. On 14 February 2020, the Claimant received a copy of the Commercial Lease and survey plan as lodged at the Department of Lands.



10. On 21 February 2020, the Claimant confirmed his satisfaction with his due diligence.
11. On 26 February 2020, the Claimant paid the Deposit under the Contract.
12. On 26 March 2020, the Claimant received a copy of the Commercial Lease title no. 12/0311/027 signed by the Minister of Lands.
13. On 27 March 2020, the Director of Lands registered Commercial class lease title no. 12/0311/027 between Eddy Kalowia Taripoamata (lessor) and the Defendants (lessees) over the land previously subject to Lease 020 (the 'Commercial Lease 027').
14. On 27 March 2020, the Claimant gave notice terminating the contract.
15. On 8 May 2020, the Claimant filed the Claim in this matter. On 14 May 2020, the Defence was filed.

C. Claimant's Objections to Defendants' Sworn Statements

16. The Claimant filed objections to the Sworn statements of Tal Milfirer and Francesca Grillo.
17. The purpose of a summary judgment application is not to determine facts in dispute therefore I will not rule on those objections in this judgment.

D. Application for Judgment pursuant to rr 12.8 and 12.9 of the Civil Procedure Rules

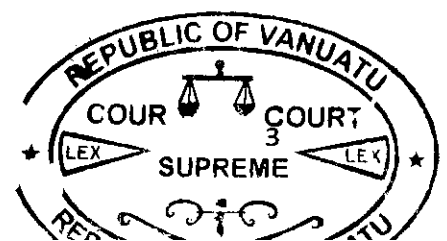
18. Rule 12.9 of the *Civil Procedure Rules* ('CPR') applies when a defendant does not attend the trial. This matter has not even been listed for Trial yet.
19. Rule 12.8 of the CPR provides:

12.8 *If the parties have agreed on the facts but there remains a question of law in dispute, the court must hear argument from the parties about the question of law.*

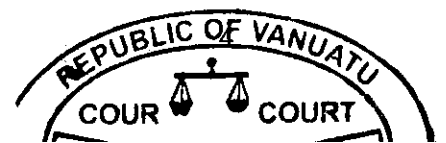
20. In the course of the hearing, Mr Fleming accepted that there are facts in dispute between the parties. Accordingly, rule 12.8 does not apply. This part of the Claimant's Application is declined and dismissed.

E. Application for Summary Judgment

21. The Claimant claims rescission of the Contract or a declaration that the Contract is void, damages for misrepresentation, return of the AUD\$62,000 deposit and costs.
22. By his Application, the Claimant seeks summary judgment on the basis that the Defendants have no real prospect of defending the Claim.



23. The only admissions in the Defence are that the parties entered into the Contract and admitting the Contract's express terms save for the fact that (see para. 2 of the Defence):
- (i) *references to sale or transfer of the "Property" being Lease 020 are not correct as the property to transfer is not Lease 020 but its replacement commercial lease. Accordingly, all statements referring to the Property being sold or transferred are incorrect and denied.*
  - (ii) *the area of the Property is properly described as being 01ha 01a 35 ca consistent with the registered survey plan and the exact same size as recorded on the survey plan of the replacement commercial lease.*
  - (iii) *that the Defendants rely on a full reading of the contract.*
24. The balance of the Defence denies what is alleged in the Claim.
25. Accordingly, the issues between the parties include:
- a) What was the area of Lease 020 and of the Commercial Lease 027? (questions of fact)
  - b) What was the Property being sold under the Contract? (question of fact)
  - c) Was there a misrepresentation by the Defendants? (question of law)
  - d) Was the Contract incapable of performance? (question of law)
26. Copies of Lease 020 and of Commercial Lease 027 are attached to Mr Milfirer's sworn statement. That evidences that the area of both Lease 020 and Commercial Lease 027 is 01ha 01a 35ca. Accordingly, the Defendants have realistic prospects of defending the parts of the Claim alleging that Commercial Lease 027 was over a substantially smaller area of land and alleging misrepresentation and mistake.
27. "Lease" is defined in the Contract's General Conditions as the Lease registered over the subject land.
28. The very first description of "Property" in the Contract (on p. 2) is, "TITLE No. 12/0311/020 (AS MODIFIED UNDER NEW COMMERCIAL CLASS)".
29. Clause 4 of the Contract's Special Conditions provides that the Contract is conditional upon the Vendor delivering to the Purchaser within a period of 6 months a duly registered Title for the Property, after completion of the change of Class into Commercial.
30. The Claimant's Claim is that there was no Property capable of being sold under the Contract as at the date of the Contract, Lease 020 had been surrendered and this was not disclosed to the Claimant. The Defendants' case is that the Contract is clear that the Property to transfer under the Contract was not Lease 020 but the replacement commercial lease. Further, that surrender of Lease 020 was a necessary part of



obtaining the Commercial Lease 027. These are serious questions to be tried. I also take judicial notice of the process and practice of the Department of Lands that a change of class of a lease requires surrender of the original lease and lodgement of the replacement lease with the new class of lease. Accordingly, I consider that the Defendants have realistic prospects of defending the balance of the Claim.

31. Given the factual matters in dispute, this Application for Summary Judgment had no prospect of succeeding.
32. The Application for Summary Judgment and/or on a Question of Law is declined and dismissed.

F. Strike-Out Application

33. The Defendants applied for an order striking out the Claim in the event his Application for Summary Judgment is unsuccessful on the ground that if he fails in his point of law argument for summary judgment, that it will render his claim meritless and without prospect of success.
34. I did not determine a question of law as sought by the Claimant because Mr Fleming conceded that there are factual matters in dispute. The ground for the Defendants' Application is therefore not made out. That Application is declined and dismissed.

G. Result and Decision

35. The Claimant's Application for Summary Judgment and/or on a Question of Law is declined and dismissed.
36. The Defendants' Application to Strike Out the Claim is declined and dismissed.
37. The costs of the Applications are in the cause.
38. This matter is listed for Conference at **11.20am on 26 June 2020.**

**DATED at Port Vila this 23<sup>rd</sup> day of June 2020  
BY THE COURT**

  
.....  
Viran Molisa Trief  
Judge

