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

Civil
Cases No. 21/1474 and 22/627 CVL

BETWEEN: **Robert Sugden**
Claimant

AND: **Alfred Rolland**
Defendant

Date of Hearing: 8 August 2022
Before: Justice C.N. Tuohy
Counsel: Mr R. Sugden for the Claimant
Defendant in Person
Date of Judgment: 19 August 2022

JUDGMENT

Introduction

1. This is an application for summary judgment. The remedy sought by the claimant is an order for specific performance of a deed of settlement requiring the defendant to:

   (a) sign and complete the form of mortgage over 12/0633/626 that was signed by him and witnessed by his then lawyer in December 2021, in triplicate, and duly certified for the purposes of section 78 of the Land Leases Act and in all respects capable of being registered.

   (b) Obtain, within a reasonable time, the lessors' consent to the mortgage in triplicate and the prescribed form.

   (c) Pay to the claimant the sum required as stamp duty for the mortgage and also the sum required as the registration fee for the mortgage.

2. The claimant, who is a lawyer, represented himself. The defendant, who is not, also represented himself.

Background Facts

3. The claimant acted as the lawyer for the defendant from about June 2017 in Civil Case 15/138 SC/CVL. This was a substantial and important case in which the defendant sought to set aside a lease registered in 2007 over Lenur Island on the south-west coast of Malekula. The grounds of his claim were that the

lease was registered by fraud or mistake, of which the subsequent transferee was aware. If his claim succeeded, the island would revert to its custom owner, which the defendant claims to be.

4. The case culminated in a trial over three days in September and October 2019 before Andree Wiltens J which resulted in a lengthy judgment dated 13 December 2019. The defendant's claim failed and was dismissed.

5. The defendant appealed. After a hearing in the Court of Appeal extending over two days, that Court issued a judgment dated 17 July 2020. This time, the defendant was entirely successful. The registration of the lease of Lenur Island and its transfer to the subsequent registered owners were cancelled with immediate effect. Costs of VT75.000 were awarded to the defendant. (There is no indication these have ever been paid).

6. After this resounding success, there was apparently no contact between the claimant and the defendant although there may have been practical reasons for that. In any event the claimant sent the defendant a bill for his services dated 23 October 2020 in the sum of VT 13,222,125 together with disbursements of VT 325,700 totalling VT 13,547,825. The hourly rate charged was VT 37,500 plus VAT. The time recorded was 18,396 minutes i.e. 306.6 hours.

7. Although not stated, this bill was inclusive of and not additional to two interim bills of VT 985,647 and VT 573,585 rendered to the defendant in February and September 2018 (both based on time expended at a stated hourly rate of VT35,000 plus VAT). In other words, the bill of costs covered all work from the time the claimant first started acting for the defendant until the end of the litigation.

8. The defendant was credited with the amounts he had paid on account, recorded as VT 2,375,000, leaving a balance owing of VT 11,172,825. In fact, it is accepted that one of the defendant's payments of VT 300,000 had been recorded twice so the correct total paid on account was VT 2,075,000 and the correct balance payable should have been VT 11,472,825.

9. The defendant was shocked at the size of the bill. He did not pay any part of it. On 10 May 2021, the claimant filed a claim in the Supreme Court (CC 1474 of 2021) for the assumed balance of VT 11,171,825 owing on the bill. Eric Molbaleh of Molbaleh and Taiva Lawyers filed a notice of beginning to act for the defendant and later a defence. Andree Wiltens J assumed charge of the proceeding.

10. Subsequent events are recorded in sworn statements but some are also apparent from the Court file which contains minutes and contemporaneous notes made by Andree Wiltens J. I consider that the Court is entitled to take these into account.

11. At a conference on 8 August 2021, the claimant agreed to reduce the hourly rate charged to VT 35,000 as charged in the interim bills and reduced his claim accordingly to VT 10,291,350.

12. A trial date was fixed for 18 October 2021. On that date the claimant appeared in person and the defendant was represented by Anna Sarisets, a lawyer employed by Molbaleh and Taiva Lawyers. His amended defence sought an order for taxation of the claimant's bill of costs. After the hearing, Andree Wiltens J issued a minute dated 18 October 2018 which read:

    1. The parties reached an agreement, which it is intended will be reflected in a consent memorandum to be filed. The provisional terms have been worked out but require finalisation.

    2. A conference is scheduled for 8 am on 22 November 2021, unless a consent memorandum is earlier filed.

13. He also made and signed a handwritten note on the file that day which recorded that at the start of the trial the claimant was granted leave to amend the amount claimed to VT 10,591,350 which no doubt was in recognition of the VT 300,000 double counting error referred to above. The case was then stood down for the parties to resolve if possible. There followed a note that a provisional settlement had been reached.

14. On 22 November, after a conference in chambers, Andree Wiltens issued the following Minute:

> 1. The parties have reached an agreement. A Consent Memorandum has been filed. To complete the matter certain further (actions) are required to be taken.
>
> 2. A conference is scheduled for 8 am on 21 March 2020 to ensure the agreement is effective.

15. At the conference on 22 November, the claimant appeared in person. Mr Taiva of Molbaleh and Taiva Lawyers appeared with the defendant. Rather than a consent memorandum, the parties filed a copy of a signed deed of settlement which is the foundation of the current claim. It is dated 22 November 2021 and the attestations record that it was signed by both parties on that date. Both signatures were witnessed by Mr Taiva. The evidence is not clear as to whether it was signed in the presence of the judge but it may well have been.

16. The deed is in standard form. The recitals record that "(the defendant) has agreed to pay (the claimant) seven million vatu over 4 years and to provide security if (the claimant) will cease pursuing his claim in CC1474 of 2021 and (the claimant) has accepted this offer."

17. The operative clauses record the obligation to pay VT 7,000,000 by monthly payments of VT 146,000 beginning on 31 December 2021. The clause relating to security reads:

> 6. Alfred agrees to secure his performance of this agreement by means of a first mortgage in favour of Sugden over his lease at Bladinière Estate, Port Vila registered number 12/0633/626 and agrees to obtain the lessors consent to the mortgage and to pay all necessary stamp duty and registration fees.

18. Following the signing of the deed, the claimant by email to the defendant's lawyers asked for a mortgage in triplicate together with a consent to mortgage from the customer owner (i.e. the lessor). The email correspondence that followed did not result in the delivery of a signed mortgage to the claimant. On 1 December 2021, the defendant paid the first monthly instalment of VT146,000 although it was not due until 31 December. On 2 December, the claimant filed a memorandum seeking a conference to apply for an order equivalent to a caution in relation to the leasehold title. Although there is no formal minute, it is apparent from a side note made by the judge on a copy of the claimant's memorandum that at a conference at 1:45 pm on 2 December 2021, one copy of a mortgage in the form contemplated by the deed was signed by the claimant and witnessed by his lawyer, Mr Molbaleh. This was delivered to the claimant.

19. However, it turned out this was insufficient to enable registration. The signed and witnessed mortgage required also the completion of the necessary certificate under Section 78 of the Land Leases Act. It also should have been executed in triplicate. The claimant's later attempts to obtain from the defendant the necessary documents to perfect his security were unsuccessful.

20. Subsequently, the defendant made a formal complaint to the Law Council attaching an affidavit sworn on 22 December 2021. This complaint was against both Anna Sarisets and the claimant. Mr Molbaleh filed a

notice of ceasing to act on 28 January 2022. The claimant subsequently made this application for summary judgment.

Summary Judgment Principles

21. Summary judgment is one of the ways provided in Part 9 of the Civil Procedure Rules for ending a proceeding early. The relevant rule is Rule 9.6. It is available where the defendant has filed a defence but the claimant believes that the defendant does not have any real prospect of defending the claim. The substantive provisions of Rule 9.6 are set out below:

> *9.6 (7) If the Court is satisfied that:*
>
> *(a) the defendant has no real prospect of defending the claimant's claim or part of the claim; and*
>
> *(b) there is no need for a trial of the claim or that part of the claim,*
>
> *the Court may:*
>
> *(c) give judgment for the claimant for the claim or part of the claim; and*
>
> *(d) make any other orders the Court thinks appropriate.*
>
> *(9) The Court must not give judgment against a defendant under this rule if it is satisfied that there is a dispute between the parties about a substantial question of fact, or a difficult question of law.*

22. The onus is on the claimant to establish the grounds set out in Rule 9.6(7)(a) and (b). A real prospect means one which is realistic not fanciful: *Swain v Hillman [2001] 1 All ER* approved by the Court of Appeal in *Bokissa Investments v RACE Services [2003] VUCA 22*. In regard to Rule 9.6(9), while the Court will not normally attempt to resolve material conflicts of evidence or assess the credibility of witnesses on a summary judgement application, it need not accept uncritically, as evidence raising a dispute of fact which calls for further investigation, every statement in a sworn statement however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same witness or inherently improbable in itself: *Eng Mee Yong v Letchumanan [1980] AC 331*. In other words, any dispute between the parties on a substantial question of fact must also be a real not a fanciful one.

23. In summary, while caution should be exercised in deciding applications for summary judgment, a realistic approach needs to be taken. If there is no realistic prospect of defending a claim, a grant of summary judgment gives effect to the overriding objective of the Rules; it saves time and expense for both parties, it avoids the use of the Court's resources for no purpose and is generally in the interests of justice: *Swain v Hillman (supra at p 94)*.

Claimant's case

24. The claimant's case is quite simple. It is based on clause 6 of the deed of settlement. The claimant says that the deed creates a binding obligation on the defendant to comply with the provisions of clause 6, that he has refused to do so and therefore the claimant is entitled to the orders he seeks from the Court.

25. He asserts that the defendant's claims that he was unlawfully coerced or forced to sign the deed have no substance and that there are no facts which would enable a Court to find the deed unconscionable. He also says that by giving effect to the deed the defendant is estopped from denying that he is bound by it.

Defendant's case

26. Even though the defendant was not represented by a lawyer, he has filed detailed and articulate pleadings in support of his defence. These consist of a two-page response, a sworn statement with annexures which detail his account of events and his complaints and a substantial submission which he amplified orally at the hearing of the application.

27. There are several partly overlapping strands to his case. The following list is my summary of its main planks:

- that the costs charged to him by the claimant are grossly excessive for a number of reasons and that the bill of costs was not sufficiently detailed.
- that he was not properly consulted or advised about the settlement which was reached and did not have a fair chance of understanding it.
- that he was wrongfully pressured by both the claimant and his own lawyer Anna Sarisets into signing the deed against his will. He wanted to continue to seek an order for taxation of the bill of costs.
- that he has made complaints to the Law Council against both the claimant and Anna Sarisets which have not yet been dealt with. He considers that the deed should not be enforced before his complaints have been determined.
- that it is unjust and unfair to enforce a contract which has been obtained by threats.

Discussion

28. It is common for litigants to agree to settle a disputed claim before or during trial. The terms of the agreement usually include a discontinuance of the claim either immediately or at least when all the terms of the agreement have been carried out. An agreement of this sort is a legal contract which is binding on both parties and can be enforced like any other contract. In this case, the agreement is in the form of a deed which is the most formal type of contract.

29. The terms of this deed, including clause 6, are clear. The necessary formalities have all been attended to. There is no argument that both parties signed it in the presence of a witness. Unless the deed is declared invalid or set aside, the claimant is entitled to have its provisions enforced in the normal way. The issue is whether the defendant has any reasonable prospect of successfully having the deed invalidated or set aside.

30. Even though the defendant is not a lawyer, in the defence he filed he was able to correctly identify the legal doctrines or concepts which are raised by the grounds asserted by him. These are duress and unconscionable bargains.

31. It has long been the law that a contract which has been entered into as a result of illegitimate pressure may be avoided by the party who was subjected to that pressure. Originally the type of pressure was confined to physical threats made against a person or against property but in modern times has been extended to include illegitimate economic pressure.

32. Although the defendant in his pleadings frequently referred to threats and pressure from the claimant towards him, his evidence about that was completely general. He has not identified any specific occasion when the claimant made any form of threat directly to him. In his sworn statement in support of the application the claimant stated that during the whole of negotiations that preceded the signing of the deed, he never communicated with the defendant but conducted all negotiations by communicating with his

lawyer at that time (either Ms Anna Sarisets or Mr Eric Molbaleh). The defendant did not dispute that statement nor does his evidence include any allegation of a direct threat from the claimant.

33. His sworn statement filed on 29 July 2022 attaches a letter of complaint to the Vanuatu Law Council and an affidavit attached to that, both of which contain the same account of what he says happened at Court on 18 October 2021. It reads:

> 8. *My instruction to Ms Sarisets was to proceed to trial, as I am disputing amounts on the total bill of costs. When we went to trial at Dumbea Hall, Ms Sarisets advised me to stay outside of the Courthouse. When Mr Sugden arrived, they had some discuss without me inside the Courtroom. Ms Sarisets came out to see me and said that Mr Sugden had agreed to reduce costs down to 7,000,000 VT. I was not happy about such offer as I was not properly consulted to discuss with both of them about such proposal. I raise my disagreement with Ms Sarisets but she insisted that I should accept such offer as it is quite difficult to negotiate a settlement with Mr Sugden. She then told me that this is the best offer and I should sign a settlement agreement with him. She advised me that I will be paying an amount of 146,000 VT per month. I was not given a proper legal explanation about that agreement. She then asked me to sign the agreement. I then signed the agreement and paid a deposit of 146,000 VT on 1st December 2021 to Mr Sugden's account.*

34. He went on to state that later he received correspondence and pressure from the claimant that he needed to surrender his family property at Bladinière Estate to him. This can only refer to correspondence between the claimant and the defendant's lawyers as there was no correspondence between the claimant and the defendant. He also said that he demanded a copy of the agreement (meaning the deed) and the emails between the claimant and his lawyers from Ms Sarisets which he was given. He said the agreement was then explained to him by a neighbour who has some legal background. The emails which he attached as annexures to his sworn statement were sent between 22 November and 1 December. The first, timed at 9:54 am on Monday, November 22 was from the claimant to Ms Sarisets. It stated that the claimant had the 'signed the deed of release' but sought the mortgage and consent to mortgage. None of the emails annexed preceded the signing of the deed. If there was email correspondence between the claimant and the defendant's lawyers between 18 October and 22 November, there is no evidence of it before the Court.

35. The defendant's sworn statements are the only evidence filed in support of either his defence to the claim or his opposition to this application. There is no evidence from Ms Sarisets or either of the other lawyers from Molbaleh and Taiva.

36. Although the defendant has made assertions in his sworn statements that the claimant pressured him and 'forced' him to sign the deed, the lack of even the slightest detail of how, when or where he did so together with the uncontradicted evidence that there was no direct communication from the claimant to the defendant during the relevant period leads me to the conclusion that these bald and general assertions cannot amount to a sufficient evidential foundation to provide a realistic prospect of successfully avoiding the deed on the grounds of duress.

37. At the hearing of the application, the defendant did say that pressure was brought on him by the claimant indirectly through Ms Sarisets in that she told him that the claimant was known to be prepared to pursue debts owing to him to the extent of selling up the debtor's property. Even though there was no actual evidence of that or any other type of threat or pressure applied by the claimant himself, it is important to make it clear that not every type of economic pressure applied to induce a person to enter into a contract can justify the avoidance of the contract. It is only **illegitimate** economic pressure which amounts to duress. For example, a threat to breach a contract unless the other party agrees to an amendment to it would be illegitimate. However, a threat to enforce a person's legal rights through civil proceedings cannot be an unlawful or wrongful threat. A threat to take or continue legal action to the ultimate level of

enforcement if the other party does not enter into an agreement to compromise the claim is not unlawful or illegitimate: *Chitty on Contracts (33rd ed) para 8.051*. Indeed, such a threat, implied or express, is the driver for most agreements to settle litigation.

38. This is the sort of threat or pressure which the defendant appeared to be talking about in his oral submissions. Even if there had been evidence of some sort of direct or indirect threat or pressure of that nature by the claimant, it would not be illegitimate pressure and could not provide a basis for avoiding the deed of settlement for duress.

39. Although it was not pleaded, it should be mentioned that the concept of undue influence has no application in this case. The relationship of lawyer and client which could give rise to a presumption of undue influence had ended before the claimant filed his claim. The lawyers representing the defendant on that claim were entirely independent of the claimant. There was no relationship between the parties except that of opposing litigants. In any event, the claimant had no direct communication with the defendant and was not in a position to directly influence him. The discussion and conclusions above in relation to duress apply equally to any suggestion of actual undue influence.

40. The principle of equity relating to unconscionable bargains can be applied to set aside a transaction which is patently unequal or unfair to one party. Even then, the principle will only be applied where the parties are on an unequal footing, that is, where the party on the wrong end of the transaction is financially vulnerable or uneducated and has no independent advice.

41. I do not think there is any realistic prospect of the defendant being able to successfully rely on this principle. First, there is no evidence from which the Court could conclude that the terms of the deed of settlement are unequal or unfair. Although the defendant stated that he did not agree to the claimant's very high hourly rate of VT35,000, the contemporary documents in the form of the 2018 interim bills prove that he knew that was what he was being charged and, indeed, that he paid those bills. Although undoubtedly a high hourly rate, many of the factors which might justify a high rate listed in Clause 51 of the Rules of Etiquette and Conduct of Legal Practitioners (Order No 106 of 2011) were present in the Lenur Island litigation.

42. There can also be no doubt that the lengthy and complex litigation in which the claimant represented the defendant required a large expenditure of time by the claimant, the great majority of it after the last interim bill as the defendant must have been aware. Accepting that the defendant might have been able to obtain a significant reduction in this large bill of costs on taxation, the fact is that the deed secured for the defendant a reduction of almost 40% of the sum finally claimed as well as time to pay. In entering into the deed, he avoided the risk that the claimant would recover a greater amount at trial and/or seek immediate enforcement. His lawyers clearly were of the view that the deed of settlement was in the defendant's best interest. There is nothing in the evidence to suggest they were wrong. The trial judge was aware of the terms of the deed and raised no objection. Indeed, the Court file indicates that he facilitated the conference at which the defendant later signed the mortgage.

43. In any event, the issue now is not whether the original bill was reasonable or whether the defendant might have done better on taxation. The issue is whether there is a realistic prospect of the Court finding that the compromise contained in the deed of settlement was patently unequal and unfair to the defendant. For the reasons explained above, I do not think there is.

44. An inability to establish that the transaction in question is patently unequal or unfair would of itself be fatal to a claim based on the unconscionable bargain principle. But even if that could be established, it would still be necessary to show that the parties were on an unequal footing in the sense described above. That

would be very unlikely in this case because the defendant was throughout represented and advised by his own independent lawyers. While he might have some remedy against them if their advice was negligent, the fact that he was independently represented and advised by qualified lawyers makes it very unlikely that a claim based on the equitable principle could succeed. Moreover, even if the defendant was in a poor financial position, which I assume in his favour, he is plainly an intelligent and literate person. I consider that his statement that he did not understand the deed when he signed it is the type of statement referred to above, that is, not credible in the light of the undisputed facts and his own statements in this proceeding.

45. The absence of a realistic prospect of successfully defending the claim is not the only matter which must be established on an application for summary judgment. The claimant must also establish that there is no need for a trial. In this regard I have considered whether there might be further evidence available to assist the defendant's case or whether cross-examination of the claimant (he was his only witness) might make a difference. I cannot see how the latter is likely to be helpful in any way to the defendant. I have also considered whether Anna Sariset's evidence might assist the defendant in a defence based on either duress or unconscionable bargain. While she is unlikely to be a willing witness, it might be possible to obtain evidence from her relevant to the making of the provisional agreement and the signing of the deed by the defendant. Mr Taiva, who witnessed the signatures of both parties on the deed, might also be able to provide some relevant evidence. However, there is no basis other than speculation, that such evidence might help the defendant's case (rather than the reverse). I do not think it is proper for the Court to enter into any such speculation on this application. On the material available to the Court, I do not see any need for a trial because I do not see that a trial could add anything material to the relevant facts as disclosed by the sworn statements and the Court file.

46. Nor do I think that there is a dispute between the parties about a substantial question of fact or at least not a real dispute. The primary fact which the defendant alleges and the claimant implicitly disputes is that the claimant pressured or coerced or forced the defendant to sign the deed in an illegitimate way which might enable him to avoid it. For the reasons set out above, I do not think that there is a real dispute about that because there is no credible evidence that he did.

47. There is also no basis for delaying the determination of this claim, whether by summary judgment or otherwise, until the Law Council resolves the defendant's complaint. The Council's statutory duty is not to decide whether the deed was signed under duress or whether it amounts to an unconscionable bargain. In any event, any decisions it might make are not binding on the Court which must make its own decisions on the claim before it.

48. The final matter I have considered is whether the orders sought may be granted on summary judgment. While they are in the nature of specific performance and therefore discretionary, it is well-established that summary judgment is available. There is no reason why the orders sought should not be granted in this case.

Result

49. Summary judgment is entered for the claimant. The orders requested will be made. The claimant should draft orders for approval by the court. As the successful party the claimant is also entitled to an order for costs. If the parties cannot agree on the amount, the procedure set out in Rule 15.7 (2) is to be followed by the claimant.

50. In the event that the orders (apart from the order for costs) are not complied with within 30 days after service on the defendant, the claimant has leave to seek a further conference to consider enforcement.

Dated at Port Vila this 19th day of August 2022
BY THE COURT

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Justice C.N. Tuohy

REPUBLIC OF VANUATU
COUR COURT
LEX SUPREME LEX
REPUBLIQUE DE VANUATU