

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

Civil
Case No. 23/2184 SC/CIVL

BETWEEN: KALTATAK AND KALMET COMPANY LIMITED
Claimants

**AND: MARCEL ANDRE BRUGGER AND FABIENNE
BRUGGER**
Defendants

Before: Justice Oliver A. Saksak

Counsel: Mr Mark Fleming for the Defendants as Applicant
Mr James Tari for the Claimants as Respondent

Date of Hearing: 4th March 2024

Date of Judgment: 12th April 2024

DECISION

1. The defendant applied on 8th November 2023 seeking orders striking out the claimant's claims filed on 17th August 2023 with indemnity costs.
2. The application is allowed and the orders sought are granted.

Reasons

3. The overriding objective set out in Rule 1.2 of the Civil Procedure Rules requires amongst others, that cases should be handled justly, quickly and expeditiously in a way that avoids unnecessary costs. Inherent in that is the Court's power to strike out a claim that discloses no reasonable cause of action, is frivolous, vexatious or an abuse of process in which there is no substantial factual dispute between the litigants.
4. It is this jurisdiction that the defendant is asking the Court to exercise by their application.



Background Facts

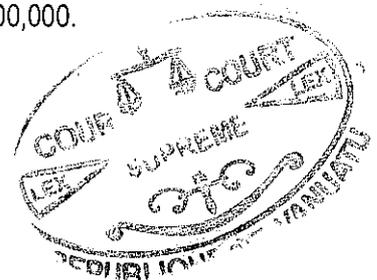
5. The claimant filed their claim on 17th August 2023 as transferor and lessor representative of Leasehold title 12/0932/055 (the Lease).
6. On or about 9th January 2015 the Claimants and Defendants signed a Sale and Purchase Agreement (the SPA) for the transfer of the Lease. Upon such transfer the defendant became the transferee of the Lease.
7. The defendants obtained a loan from the ANZ and mortgaged the Lease in security for the loan. The defendants failed in repayments and ANZ Bank enforced the mortgage and obtained powers of sale from the Court.
8. Jack Norris Kalmet negotiated successfully for the purchase of the Lease by him.

Claim

9. Kaltatak and Kalmet Company Limited filed this proceeding pleading that the defendants failed to pay-
 - a) The premium for the Lease of VT 18,000,000.
 - b) VT 3,000,000 annually under the SPA from 2015 to 2023, a total of 8 years in the total sum of VT 24,000,000.
10. The total sum claimed is VT 42,000,000 with interest and costs.

The Defence

11. The defendants denied the totality of the claims as follows-
 - a) That the claimants are the lessors of the Lease.
 - b) That the defendants are transferee of the Lease.
 - c) That the claimants had signed the SPA.
 - d) That the SPA contained any condition requiring payments of annual sum of VT 3,000,000.
 - e) That the defendants are liable to pay VT 18,000,000 and VT 24,000,000.



- f) That the claimants have suffered any loss or damage.
12. For those denials the defendants applied that the claims be dismissed.

Discussion

13. From the evidence of Norris Jack Kalmet by sworn statement dated 18th August 2023 he annexes a copy of the Lease as "NJK1". The lessors are or were Family Kalmet & Family Kaltatak as specified in Annexure "NJK1". The lessors are or were Family Kalmet and the lessees are or were Kaltatak Kalmet Company Limited.
14. Mr Kalmet annexed as " NJK2" an agreement between the lessor (Family Kalmet and Family Kaltatak) and the lessees (defendants Marcel and Fabienne Brugger).
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15. Clause 1 of the agreement states:
" The Lessees shall pay the Leassors the sum of THREE MILLION VATU (VT 3,000,000) annually for a period of 15 years with the first of such payments being done 1 year from the date of completion of the purchase of title 12/0932/055 through the Trust Account of Geoffrey Gee & Partners in such proportions and in such manner as requested by the lessors."
16. Clause 2 of the Agreement states:
"That such payments will only become due and payable upon completion of all the conditions in the Agreement for Sale and Purchase (SPA) of the Title 12/0932/055 between the Lessees and Kaltatak Kalmet Company Limited."
17. The claimants did not disclose the SPA rather it was the defendants who disclosed the document in the sworn statement of Marcel Brugger dated 8th November 2023 annexed as "FB1" showing that the vendor is Kaltak Kalmet Company Limited and the purchaser as Marcel and Fabienne Brugger (defendants). Further it shows the lessors are Jack Kalmet representing Family and Kaltapas Kaltatak and Kalkot Kaltatak representing the Kaltatak family.
18. The purchase price of the Lease was VT 18,000,000. The date of payment is shown as 16th January 2015 or 5 days after the contract became unconditional whichever is the later. Possession



was to be on the completion date. Completion date is defined in clause 1(b) and clause 6 provides for possession and completion.

19. Of importance is clause 10 which states:

"SPECIAL CONDITIONS

This contract is conditional upon the lessors and the vendor consenting to the Purchaser being granted an Easement in favour of the Lessee of the within Title to provide for an access to the foreshore on Title 12/0932/137 and the title which will issue pursuant to Clause 12 herein such Easement to be granted by the lessor and Vendor as custom owner and lessor respectively or as applicable on the residual of Title 12/0932/137 to the Lessee of Title 12/0932/055 as Grantee and if required vice-versa to provide for access to and from the main land at some time in the future and at the discretion of the purchaser."

20. Clause 11 states that " *This contract is also conditional upon the completion and execution of the variation of lease in the form attached.*"

21. Clause 12 states:

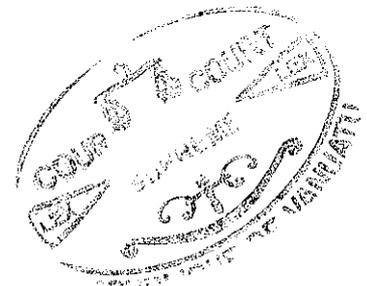
"The contract is further conditional upon the Vendor and the lessee subdividing Title 12/0932/137 and splitting an area of over one hectare more or less as delineated on the attached map and transferring the now Title to the purchase at value of one million vatu (VT 1,000,000) which sum is included in the purchase price under this Agreement."

22. Clause 14 provides that the purchaser shall cover all costs of survey, stamping and registration of the new lease to issue under clause 12.

23. Clause 15 states that "satisfaction of the conditions 10, 13, and 14 are conditions subsequent to completion and the parties shall use their best endeavours to complete satisfaction of the conditions subsequent within 12 months of completion date herein."

24. The evidence of the defendants show-

a) They had paid VT 18,000,000.



- b) Having paid, the Lease was transferred to the defendants on 16th January 2015. Annexure “NJK3” discloses a copy of the lease transfer from Kaltatak & Kalmet Company Ltd to Marcel and Fabienne Brugger as transferee. Clause 1 states that the Transferor has received from the Transferee the sum of EIGHTEEN MILLION VATU (VT 18,000,000) being the consideration of this transfer”.

Geoffrey Gee witnessed the defendant's signing of the document.

- c) The claimants have not performed pursuant to clause 10 of the SPA requiring the provision of an easement to entitle them to VT 3.000.000 annually from January 2015 to January 2023.

Findings

25. From the evidence before me I find that-

- a) The claimants have not performed their obligations under the SPA and have come to Court with unclean hands.
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- b) The Defendants have paid VT 18,000,000, as otherwise there could not have been a transfer of the Lease and ANZ Bank could not have instituted legal action against the defendants to enforce their mortgage.
- c) The claimants have no reasonable cause of action against the defendants.
- d) The claimants are not entitled to claim for VT 3,000,000 under the SPA.

The Result

26. The defendants' application is allowed.

27. The claimant's claims are dismissed in their entirety.

28. The defendants are entitled to their costs on an indemnity basis.

DATED at Port Vila this 12th day of April 2024

BY THE COURT


Hon. Oliver A. Saksak

Judge

