

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

Civil
Case No. 15/209 SC/CIVL

BETWEEN: PETER JAMES
Claimant

AND: CAILLARD KADDOUR (VANUATU) LTD.
First Defendant

AND: ANZ BANK (VANUATU) LTD.
Second Defendant

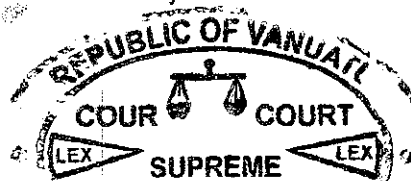
Date of Hearing: 6 – 9 October 2017
Before: Hon. Chief Justice Vincent Lunabek
Counsel: Ms Jane Bani for the Claimant
Mr Nigel G. Morrison for the First Defendant
Mr Mark J. Hurley for the Second Defendant
Date of Decision: 16 July 2024

JUDGMENT

1. By the claims contained in his Further Amended Claim filed 16th April 2016, the claimant seeks that a Sale and Purchase Agreement entered into by him with a third party be declared null and void; that he be awarded full restitution of VT36 million for loss suffered and that he be awarded interest and costs.

Background

2. The claimant is a resident of Vanuatu. He purchased a leasehold interest in Lease 12/0912/476 ("the lease") in May 2008 intending to have a residential building erected on the lease. A builder was engaged by him to do so, and the erection work was completed in October 2008. To finance the construction, the claimant borrowed VT21,820,000 from the Second Defendant (ANZ) on the security of a mortgage to be registered over the lease title. The loan was advanced to the Claimant on or about 19 September 2008 but the mortgage was registered much later on 8 July 2009.
3. The Claimant intended that he would for the time being lease the building erected on the lease title but eventually sell it. However in the period from November 2008 to January 2009 the Claimant could not find a tenant. On 26 January 2009 he entered into a management agreement



with the First Defendant Caillard Kaddour (Vanuatu) Ltd. (C&K) whereby C&K would manage the property, receive the rents and then pay them less a commission to the Claimant's loan accounts at ANZ. Evidence at trial from witnesses for C&K and ANZ establishes that payments made on the Claimant's behalf to ANZ were not sufficient to meet his obligations to ANZ and his accounts fell into arrears.

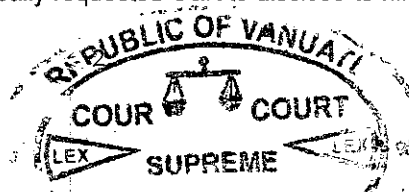
4. By 23rd February 2009, the leasehold interest was listed for sale by C&K on instructions from the Claimant for VT30 million. But there were no immediate buyers.
5. At some time in the early months of 2009 the Claimant instructed a local valuation service to value the leasehold property and improvements. By a valuation dated 14th July 2009 prepared by Linda Mala Olul an estimated value of VT36,335,000 was declared (the Olul valuation). The restitution claim is based on this valuation.
6. On 5 August 2009, ANZ served a notice of demand on the Claimant for arrears due on the mortgage account and other facilities he had with ANZ.
7. There is no dispute about the facts so far recited which provide the background to what followed.

Sale to Third Party

8. Thereafter, sometime between August 2009 and late December 2009 a Sale and Purchase Agreement prepared by C&K between the Claimant and a purchaser, Trustees International Limited, was executed by both parties to the agreement, and the sale was settled with the completion of a transfer of lease executed by the parties on or about 28 December 2009. The purchase price was set by the Sale and Purchase Agreement at VT21 million plus a further VT500,000 for furniture within the property. The date when the Agreement was signed is in dispute.

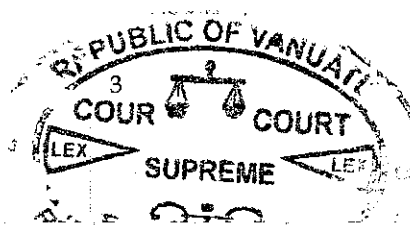
The Pleadings

9. In the Further Amended Claim, the Claimant alleges that he gave instructions to C&K to advertise the leasehold property for sale at a price more than VT21.5 million, and that initially he refused to sign the Sale and Purchase Agreement organised by C&K because he considered the proposed purchase price was relatively low compared with the costs involved in purchasing the land and the construction costs of the building. In his evidence he said he delayed signing the Agreement for about 3 months.
10. His pleadings also make the very serious allegation that in the negotiations between C&K and the purchaser it was agreed that the property would be sold for a full purchase price of VT21.5 million "*without the knowledge or approval of the Claimant*". And further, that sometime in September 2009 the Claimant verbally requested C&K to disclose to him the contract details of



the buyer "so that the Claimant can negotiate directly with the buyer for a best purchase price but the First Defendant (C&K) refused to disclose the contract details and only said the International investor is already in Vanuatu and the Claimant must sign the Sale and Purchase Agreement".

11. The Claimant seeks the relief claimed on the basis that he signed the Agreement as the result of pressures received by him from C&K and ANZ which he alleged constituted undue influence over him.
12. Against each of the defendants, it is separately pleaded that the Defendant "is presumed to be unduly influencing the Claimant to sign the Sale and Purchase Agreement due to inequality of bargaining powers".
13. Against C&K the following particulars are given:
 - (a) *The Claimant has established a long standing relationship with the First Defendant as his real estate agent to manage the affairs of the Claimant's residential property;*
 - (b) *The First Defendant demanded the Claimant to sign the Sale and Purchase Agreement even when the First Defendant knew that the Claimant had instructed a purchase price for more than VT21,500,000;*
 - (c) *The First Defendant failed to advise the Claimant to get an independent advice before the Claimant could sign the Sale and Purchase Agreement of his residential property Lease Title 12/0912/476;*
 - (d) *As a result of the First Defendant's action, the Claimant signed the Sale and Purchase Agreement and the Claimant's property was sold at an undervalued price resulting in the Claimant's failing to receive any proceeds of the sale as the purchase price was used by the defendant to offset the Claimant's loan accounts held with the Second Defendant.*
14. Against ANZ the following particulars are given:
 - (a) *The Claimant had a long standing relationship with the Second Defendant as his bank;*
 - (b) *The Second Defendant is in a dominant position over the Claimant and in a better position to know that the property was undervalued;*
 - (c) *The Claimant had acted on the Second Defendant's advice to sign the Sale and Purchase Agreement of the Claimant's residential property without getting an opportunity to seek an independent advice;*
 - (d) *The Claimant had delayed the signing of the Agreement for a period of more than 3 months but the First Defendant continued to demand that the Claimant signed the Agreement which the Claimant eventually signed the agreement;*



- (e) *The Claimant did not received any proceeds of the sale of his residential property of VT21,500,000 as the purchase price of VT21,500,000 which was transferred by the First Defendant to the Claimant's ANZ Bank Account No. 928595 was used by the Second Defendant to offset the Claimant's different loan accounts held with the Second Defendant.*

15. Each Defendant both in its pleadings and in evidence denies the factual allegations made by the Claimant on which these particulars depend. Each Defendant denies that its relationship with the Claimant was anything more than a straight forward common relationship between vendor and real estate agent in the case of C&K and between a customer and banker in the case of ANZ.

The law

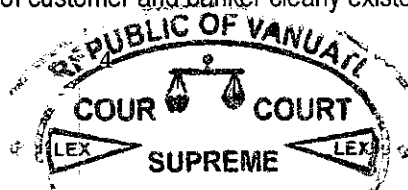
16. There is no dispute between the parties about the legal principles which apply where presumed undue influence is alleged. Both the Claimant and the Defendants relied in particular on passages from the speech of Lord Scarman in the House of Lords decision National Westminster Bank plc v Morgan [1985] 1 AC 686. The Claimant relied in particular on the following passages at page 9 of the copy of the judgment given to the Court which reads:

"... the wrongfulness of the transaction must, therefore be shown: it must be one in which an unfair advantage has been taken of another. The doctrine is not limited to transactions of gift. A commercial relationship can become a relationship in which one party assumes a role of dominating influence over the other. In Poosathurai's case the Board recognised that a sale at an undervalue could be a transaction which a court could set aside as unconscionable if it was shown or could be presumed to have been procured by the exercise of undue influence. Similarly a relationship of banker and customer may become one in which the banker acquires a dominating influence. If he does and a manifestly disadvantageous transaction is proved, there would then be room for the court to presume that it resulted from the exercise of undue influence."

17. And the ANZ Bank relies also on the next following passages in Lord Scarman speech which reads:

"This brings me to Lloyd's Bank Ltd. v Bundy [1975] Q. B. 326. It was, as one would expect, conceded by counsel for the respondent that the relationship between banker and customer is not one which ordinarily gives rise to a presumption of undue influence: and that in the ordinary course of banking business a banker can explain the nature of the proposed transaction without laying himself open to a charge of undue influence. This proposition has never been in doubt ..."

18. The usual relationship of vendor and real estate agent clearly existed between the Claimant and C & K, and the usual relationship of customer and banker clearly existed between the Claimant



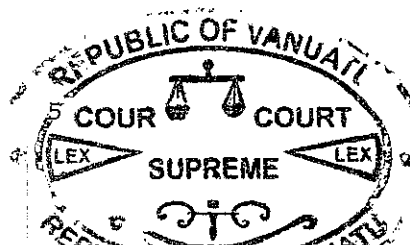
and ANZ. The issue which the Court must consider and decide is whether there are other special features of each of the relationships brought about by events between the parties such that each defendant has unfairly taken advantage of the Claimant and thereby caused the Claimant to suffer loss.

Issues for the Court

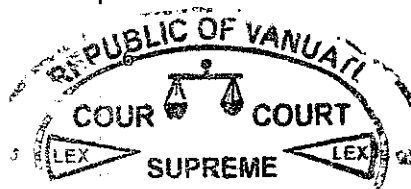
19. In opening the case for the Claimant, counsel posed three questions for consideration:
- (1) Is there any relationship between the Claimant and the First and Second Defendants before signing the Sale and Purchase Agreement?
 - (2) What are the events leading to the signing of the Agreement?
 - (3) Was the Claimant disadvantaged because of the signing of the Agreement?

Discussion

20. Questions (1) and (2) correctly require consideration of events before the signing of the Sale and Purchase Agreement as the particulars set out above are premised on events before that date. Central to these questions is the date when the Sale and Purchase Agreement was signed by the Claimant. Unfortunately whilst the Agreement is executed by both parties, neither has dated the document. Both Defendants say that it was signed on or before 23rd September 2009 whereas the Claimant says that he refused to sign the agreement in September and delayed doing so for about 3 months, eventually signing it in late December at the same time that the lease transfer was completed.
21. The Defendants rely on email exchanges between Mr Bernier of C&K and the Claimant which are part of the business records of both of them to establish when the agreement was signed. Important parts of the emails are referred to below. The emails were put to the Claimant in cross-examination. He said he could not remember the events recorded in them and simply maintained his position that he did not sign the Agreement until late December 2009. Further, Mr Bernier and Mr Shallvey and Ms David, both officers of ANZ, gave evidence of additional events, noted in file notes or by other documents, to support the fact that the Sale and Purchase Agreement was executed on or before 23rd September 2009. There is no reason to doubt their evidence save for the generalised assertion of the Claimant that he did not sign until December 2009.
22. Picking up the narrative from paragraph [6] above, on the day following the notice of demand dated 5th August 2009 the Claimant informed Mr Bernier by email that he would accept a sale price of VT28 million, and by implication authorised C&K to place the property on the market at that price.

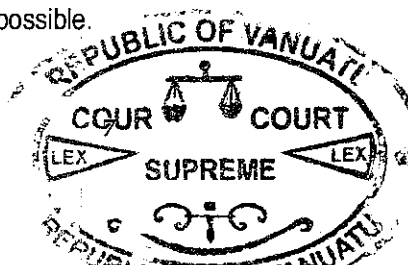


23. Mr Bernier gave evidence that no one was interested in the property at that price, and due to the lack of interest he sought instructions by email from the Claimant which he received to offer the leasehold title for sale by tender. Those instructions were received on 17th August 2009.
24. Mr Bernier says that as the result of the tender process the best offer received was for VT21 million. He says that the Claimant instructed him that he also wanted VT1 million for furniture. Ms David has a file note dated 21st September 2009 that confirms the Claimant also gave her this information. Mr Bernier contacted the prospective purchaser who declined to pay VT1 million but agreed to pay VT500, 000. This counter-offer was conveyed to the Claimant and led to the entry into the Sale and Purchase Agreement of a price of VT21,500,000.
25. On 23rd September 2009 Ms David has a file note recording that she was informed by both Mr Bernier and the Claimant that the Sale and Purchase Agreement had been signed.
26. There is documentary evidence that the deposit required under the Sale and Purchase Agreement was paid on 14th October 2009.
27. Mr Shallvey has a diary note that on 15th October 2009 he met with the Claimant and had a discussion with him on the basis that the Sale and Purchase Agreement had already been signed.
28. The claimant pleads in paragraph 21 of the Further Amended Claim that in October 2009 he did meet with Mr Shallvey and also Ms David. Mr Shallvey told the Claimant that as a buyer has been interested in purchasing the property and had already committed himself financially or had paid a deposit, if the Claimant continued to delay the signing of the Agreement, the buyer will sue the Claimant for damages. This amounted, on the Claimant's case, to pressure for him to sign the Sale and Purchase Agreement.
29. I consider the evidence establishes beyond doubt that the Sale and Purchase Agreement was signed on or before 23rd September 2009. It seems that the Claimant is confused by the fact that in October he was also required to sign another different document for the transfer of lease. It was the transfer of lease that the Claimant signed in December 2009.
30. The conclusion that the Sale and Purchase Agreement was signed on or before 23rd September 2009 means that all the particulars relating to the alleged unfair influencing of the Claimant occurred after the Agreement was signed, and could not have had any relevant effect whatever on the Claimant.
31. The particulars against ANZ also alleged unfairness in the way the proceeds of sale, once received by the ANZ after settlement in late December 2009, were applied to discharge indebtedness on various of the Claimant's facilities that were outstanding. Even if there were any unfairness in the way ANZ accounted for the proceeds, that could have no bearing on the claim that the Sale and Purchase Agreement was entered into as a result of undue influence. However I accept the evidence of ANZ that the proceeds of sale were dealt with in accordance with



authorities contained in the loan documents, and the treatment of the proceeds was not unfair to the Claimant, and did not cause him any real loss.

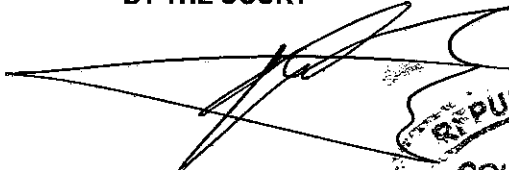
32. At trial there was debate about the value declared in the Olul valuation. There was argument whether the valuation was made on correct valuation principles, and whether it reflected comparable sales. There is no need to enter into these questions as even if the valuation assists in showing the sale price of VT21,500,000 was unreasonably low, the price fixed was not a matter in which ANZ played any part. Further, the claimant had the valuation and nevertheless went ahead and signed the Agreement in September 2009.
33. For these reasons in my opinion the claim against ANZ must fail.
34. The finding that the Sale and Purchase Agreement was signed on or before 23rd September 2009 does not wholly answer the particulars of undue influence alleged against C&K. The evidence already referred to concerning the email exchange between Mr Bernier and the Claimant shows that the Claimant was being kept informed about C&K's communications with the purchase over the price, and that the Claimant was himself giving instructions in the course of the negotiations. There is nothing in the emails or notes of any of the witnesses to lend weight to the allegation that C&K and the purchaser connived to fix the price at VT21,500,000 without the knowledge of the Claimant, or that the identity of the purchaser was concealed from the Claimant until after the Agreement was signed. The Claimant signed the Agreement which plainly disclosed who the purchaser was, and in any event by that stage the Claimant had already agreed to the price.
35. I consider there is no substance in the allegation against C&K that the Claimant was denied the opportunity to get independent advice as to value. The Claimant had already got the Olul valuation and was authorising negotiations at a lower price. The effect of the evidence is that by 23rd September 2009 the Claimant had made his own decision to sell at the VT21,500,000 price and he did so as his liability to ANZ was growing rapidly under the interest rate that he was required by the terms of his loans to pay. In my opinion the claim against C&K is not made out and must fail.
36. My rejection of the evidence of the Claimant that he did not sign the Sale and Purchase Agreement until December 2009 is not based upon my impression of the witnesses and an assessment of their credibility from the way in which they appeared in the witness box. It is based upon the force of contemporary file notes and the independent documents which show that the Claimant was mistaken in his belief.
37. So it must not be thought that the point has been overlooked, the claim to have the Sale and Purchase Agreement set aside on the ground of undue influence could not have succeeded in any event because the purchaser had not been joined as a party to the proceedings. It would have been open to the Court to consider a claim for equitable compensation had the undue influence been established, but as it has not been established there is no need to pursue what reliefs may otherwise have been possible.



38. As the claims against C&K and ANZ are dismissed, the Claimant must pay the costs of each defendant which are ordered on the standard basis to be agreed or assessed.

DATED at Port Vila, this 16th day of July, 2024.

BY THE COURT


Hon. Chief Justice Vincent Lunabel

