

**IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU**
(Civil Appellate Jurisdiction)

**Civil Appeal
Case No. 22/2554 CoA/CIVA**

BETWEEN: Alfred Rolland
Appellant

AND: Robert Sugden
Respondent

Before: *Hon. Justice John Hansen
Hon. Justice Dudley Aru
Hon. Justice Viran Molisa Trief
Hon. Justice Richard White
Hon. Justice Edwin P Goldsbrough*

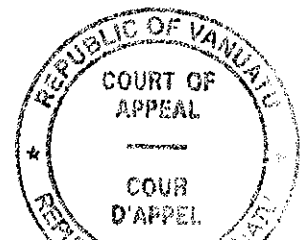
Appearances: *K T Tari for the Appellant
R Sugden In Person*

Date of Hearing: *9 February 2023*

Date of Judgment: *17 February 2023*

JUDGMENT OF THE COURT

1. On 22 November 2021, the parties executed a deed in settlement of Mr Sugden's claim for his fees for legal services rendered to the appellant. The deed provided (relevantly) that the appellant would pay Mr Sugden VT7 million by monthly instalments of at least VT146,000. The appellant agreed in the deed to secure the performance of his obligations by means of a first mortgage in favour of Mr Sugden over his lease at Bladinère Estate, Port Vila and agreed to obtain the lessor's consent to the mortgage and to pay all necessary stamp duty and registration fees.
2. Following the appellant's failure to provide the agreed mortgage, Mr Sugden sought specific performance of that part of the deed. The appellant resisted that claim by alleging that he had executed the deed under duress ("pressurized with threats") and that the deed was unconscionable.
3. On Mr Sugden's application for summary judgment, the primary Judge found that the appellant had no reasonable prospect of establishing those defences and granted the relief Mr Sugden sought: Sugden v Rolland [2022] VUSC 145.
4. The appellant now appeals to this Court. We consider that the appeal should be dismissed. Our reasons follow.



Factual setting

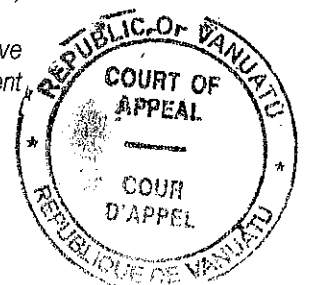
5. Mr Sugden acted for the appellant in the substantial litigation by which the appellant sought the setting aside of a lease registered in 2007 over Lenur Island on the South West Coast of Malekula. The appellant was unsuccessful at first instance (Orah v Titek [2019] VUSC 199) but succeeded on appeal: Orah v Butlin [2020] VUCA 20.
6. On 23 October 2020, Mr Sugden sent the appellant a bill for his services in the sum of VT13,222,125 together with disbursements of VT325,700. The total was VT13,547,825.
7. Mr Sugden had charged for his services at the rate of VT37,500 per hour plus VAT. His bill shows that he charged for 306.6 hours. After the bill was corrected for amounts already paid by the appellant, the amount claimed by Mr Sugden was VT11,472,825.
8. When the appellant refused to pay any part of the bill, Mr Sugden commenced proceedings in the Supreme Court. This was Action 1474/2021. The appellant retained Mr Molbaleh of Molbaleh and Taiva Lawyers and he filed a defence to Mr Sugden's claim. Among other things, the defence sought an order for a taxation of the costs claimed by Mr Sugden.
9. The matter came on for trial before Andrée Wiltens J on 18 October 2021. Mr Sugden appeared on his own behalf. The appellant was represented by Ms Sarisets, a lawyer employed by Molbaleh and Taiva Lawyers. Before the trial commenced, negotiations took place and a settlement was reached. Andrée Wiltens J then recorded in a Minute:
 - (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.*
10. At the conference on 22 November, Mr Sugden again represented himself. The appellant attended the conference represented by Mr Taiva of Molbaleh and Taiva Lawyers. The parties filed the deed of settlement which they had executed that same day.
11. Subsequently, the appellant took some steps in part performance of the deed. He made payment of the first monthly instalment of VT146,000 on 1 December 2021 and, on 2 December 2021, executed and delivered to Mr Sugden one copy of the mortgage required by the deed. However, in order to register the mortgage, Mr Sugden needed executed copies in triplicate as well as the necessary certificate under s.78 of the Land Leases Act 1983. The appellant declined to provide those documents.
12. The firm of Molbaleh and Taiva ceased to act for the appellant in Action 1474/2021 on 28 January 2022 after he lodged a formal complaint about them to the Law Council.



13. On 23 March 2022, Mr Sugden commenced his claim for specific performance of the deed. This became Action 627/2022.
14. The defence to that action filed by the respondent raised the pleas of duress and unconscionability to which we referred earlier. Specifically, the appellant alleged that:
 - (i) Mr Sugden had "made a deed" with Ms Sarisets without involving him and had "pressurized" him to sign the deed;
 - (ii) he had not been given a fair chance to understand the terms of the deed before signing it;
 - (iii) he had been 'pressurized' by Mr Sugden and Ms Sarisets with 'threats' so that he had signed the deed under duress; and
 - (iv) the deed was unconscionable and void *ab initio*.
15. On 24 May 2022, Mr Sugden filed an application for summary judgment, on the basis that the filed defence did not allege any facts on which the Court could find that the deed was unconscionable or signed under duress and, on the further basis, that the appellant had elected to give effect to the terms of the deed in part and was therefore estopped from denying that he was bound by it.
16. The appellant represented himself throughout the conduct of Action 627/22. He provided sworn statements from himself to support the defence but not from any other person.

The decision of the primary Judge

17. In an evidently careful judgment, the primary Judge upheld the claim for summary judgment. After setting out the principles which guide the Supreme Court in determining applications for summary judgment, His Honour noted:
 - (a) *the appellant's proposed evidence about the threats and pressure said to have been applied by Mr Sugden was "completely general", without the identification or allegation of any incident of the making of a direct threat. In fact, an account of the events on 18 October 2021 which the appellant annexed to his statement indicated that he had not had any direct contact at all with Mr Sugden that day. Instead all of his interactions had been with Ms Sarisets;*
 - (b) *the appellant had not filed evidence of any correspondence from Mr Sugden to himself or his lawyers before 18 October 2021;*
 - (c) *the appellant had not filed any evidence from Ms Sarisets, Mr Molbaleh or Mr Taiva;*
 - (d) *the absence of even "the slightest detail" of how Mr Sugden was said to have 'pressurized' the appellant in the relevant period meant that there was not 'a sufficient*



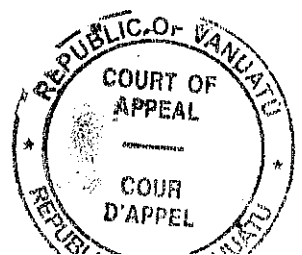
- evidential foundation to provide a realistic prospect of [the appellant] successfully avoiding the deed on the grounds of duress';*
- (e) *even if Mr Sugden had threatened to continue Action 1474/2021 in the absence of a satisfactory settlement, such a threat would not have been unlawful or illegitimate, citing Chitty on Contracts (33rd ed) at [8.051];*
 - (f) *at the time of the settlement, the appellant and Mr Sugden were not in a relationship in which undue influence would be presumed;*
 - (g) *there was no evidence on which a finding that the deed constituted an unconscionable bargain could be based, such as that the appellant was in a position of special disadvantage or a position of vulnerability. To the contrary, the Judge characterized the appellant as 'intelligent and literate' and, moreover, noted that on 18 October and 22 November 2021 he had had the advice of his own independent lawyers;*
 - (h) *the deed reflected a compromise, with the settlement being almost 40% less than Mr Sugden's bill; and*
 - (i) *it was difficult to see that the appellant would be able to produce further evidence if the matter did proceed to trial.*

The appeal

18. On this appeal, the appellant has had legal representation throughout. His notice of appeal contains three grounds. Although there is some overlap between them, we will address them separately.

Alleged denial of opportunity to present and defence

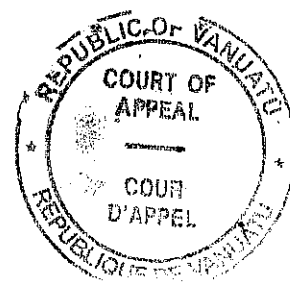
19. By Ground 1, the appellant contends that the Judge was in error in determining the application for summary judgment without *directing* him to seek legal representation, especially given that the Judge knew that he was alleging that he had not been given an adequate explanation of the terms of the deed.
20. This ground of appeal is untenable, as it had not been open to the Judge to *direct* the appellant to engage legal counsel. That is because it is well recognised that parties in litigation are *entitled* to appear unrepresented. We note for example that in the High Court of Australia, the right of a litigant to appear unrepresented has been described as fundamental; *Cachia v. Haines* [1994] HCA14; (1994) 179 CLR 403 at [22]. It would accordingly have been an error for the Judge to have *directed* the appellant to obtain legal representation.
21. Trial judges do of course have a duty, within limits, to assist unrepresented litigants in the presentation of their cases. It is not necessary to discuss those duties presently, because the appellant (now represented by counsel) does not make any complaint about the assistance he did receive from the primary Judge during the summary judgment hearing.



22. It is possible that this ground of appeal should be understood as a contention that the Judge should have *encouraged* the appellant to obtain legal representation and to have granted him an adjournment for that purpose. However, even if the ground is understood in that way, a number of matters indicate that it is not made out.
23. First, the appellant did not challenge the Judge's characterisation of him as 'plainly an intelligent and literate person'. Secondly, by the time of the summary judgment hearing, the appellant had had substantial experience in litigation and can be taken to have been well aware of the challenges which litigation can present. The Judge was entitled to think that the appellant would know that he could have legal representation if he wished and also of the desirability of doing so.
24. Thirdly, the appellant had in any event sought assistance from a 'neighbour who has some legal background'. He must have made a choice about not having legal representation at the hearing.
25. Fourthly, the appellant had had some four months between the commencement of Mr Sugden's application for specific performance and the summary judgment hearing in which to obtain legal representation if he wished.
26. Finally, we note that the appellant did not seek to adduce evidence as to what he would have done had he been encouraged to obtain legal representation or as to the further evidence or submissions which could have been advanced had he been represented by competent counsel. His counsel's submissions did not go beyond a submission that, had the appellant had legal representation, he would have been advised of the evidence to provide at the summary judgment hearing. In particular, counsel did not identify any further evidence which the appellant may have been advised to adduce, and which may have assisted him. In this respect, we note again the Judge's conclusion that it was difficult to see that the appellant could produce any further evidence if the matter did proceed to trial. The appellant did not contend that that finding was erroneous.
27. Accordingly, Ground 1 fails.

The challenges to the bill of costs

28. By Ground 2, the appellant alleges that the Judge had failed to consider the evidence concerning 'irregularities' in Mr Sugden's hourly rate and evidence that he had already paid the costs for some aspects of Mr Sugden's legal services.
29. This Ground seemed to be argued only faintly. It cannot succeed for two principal reasons.
30. First, the matters to which the appellant referred were matters to be taken into account in the settlement of Action 1474/2021 before Andree Wiltens J on 18 October 2021. That did not bear on the issues of duress or unconscionability in the formation of the deed.



31. Secondly, and in any event, the Judge did in his reasons address both matters. Counsel seemed, at least tacitly, to accept that that was so.

The weight placed on the content of the deed of settlement

32. By Ground 3, the appellant contends that the Judge had erred by placing more weight on the content of the deed than on the circumstances of its formation. He also repeated the substance of Ground 1.
33. The appellant is correct in submitting that a defence of duress focuses on the circumstances in which the aggrieved party entered into the relevant transaction. However, the content of the deed was relevant to the plea that it was an unconscionable bargain. The Judge was correct, in our view, in proceeding on the basis that a finding that the deed was 'patently unequal and unfair' to the appellant would have been relevant to the assessment of whether the appellant had been a position of special disadvantage *vis a vis* Mr Sugden of the kind which may found a finding of unconscionability: Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd [2003] HCA18: 214 CLR 51.
34. But even if that consideration be ignored, it is plain that the Judge's principal focus was on the circumstances in which the deed was made. We have already referred to the matters on which the Judge relied. They were matters to which the Judge properly had regard. Ground 3 fails.

Conclusion

35. For these reasons, the appeal is dismissed. Given that Mr Sugden represented himself on the appeal, the appropriate order with respect to costs is that there be no order as to costs.

DATED at Port Vila this 17th day of February, 2023

BY THE COURT

J. W. Hansen
Hon. Justice Hansen J

