

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

Civil Case No. 70 of 2007

BETWEEN: IRIRIKI ISLAND HOLDING LIMITED
Claimant

AND: ASCENSION LIMITED
First Defendant

AND: RIDGWAY BLAKE
Second Defendant

Coram: Justice Clapham

Counsel: Mr. Ozols for the Claimant
Mr. Sugden for the First Defendant

Date of Hearing: 21 September 2009
1 October 2009
2 October 2009

Date of Decision: 27 October 2009

DECISION (PRELIMINARY POINT)

This case is about whether or not there was a contract between the parties. This issue was isolated and is come before me for resolution.

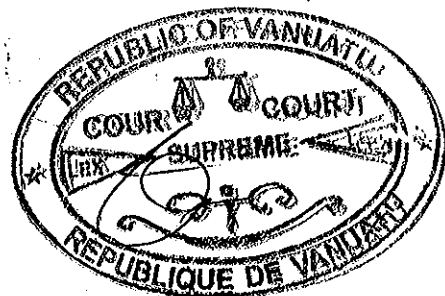
This decision is of necessity brief. On the 3rd of September 2009 I sent the following Memorandum to Counsel.

"This claim is set down for one day fixture on the 21st day of September 2009 before me.

The identified issue I will be asked to resolve "is there a contract?"

I seek advice from the claimant.

1- *Which filed documents inclusive of sworn statement and the particulars therein will they seek to rely on?*



- 2- *What is the alleged factual situation they seek to establish?*
- 3- *What (if any) are the inferences that may be drawn from any claimed facts?*
- 4- *Legal submissions and supporting cases to be filed on before 14th September 2009.*
- 5- *I seek similar advice from the Defendant as in 1, 2, 3 and 4, above."*

The claimants submission responses are as follows:

A. "The question

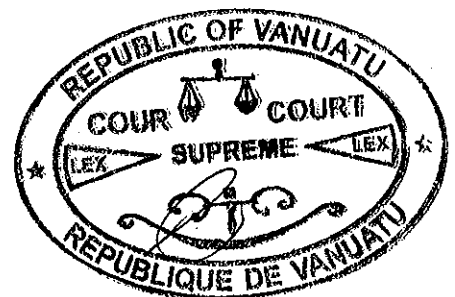
- 1- *The question that Court has been to resolve by Ascension Limited ("Ascension") as a preliminary question is: "is there a contract?"*

The principles

- 2- *The defendant, Ascension Limited is seeking to have a preliminary question determined in accordance with the Civil Procedure Rules. As is an application by the defendant we, the Claimant, submit that the onus is upon them.*

B. Which filed document inclusive of sworn statements and the particulars therein will they seek to rely on?

- 3- *The relevant statements are:*
 - (a) *The statement sworn by Copperwaite on the 29 May 2007;*
 - (b) *The statement sworn by Copperwaite on 17 March 2009;*
 - (c) *The statement sworn by Gee on the 10 March 2009; 18/9/09*
 - (d) *The statement sworn by Sugden on 12 Dec 2008; and*
 - (e) *The statement sworn by Adrian Sinclair on 29 May 2007.*



The documents are referred to in the submission above.

C. What is the factual situation that is sought to be established?

- 4- The factual situation that is sought to be established is that Ascension Limited ("Ascension") and Iririki Island Resorts Limited ("Resort") were parties to a written contract bearing the date 14 October 2005 concerning the sale of leasehold title 11/C22/009 ("the Mainland Title"). Resort has also been known as Island Resort Ltd and Resort Limited¹.

The facts

- 5- The facts are:
6- The application should be dismissed because:
7, 8, 9 and 10 are Submission for resolve....."

Defendant Submissions

"The defendant's Factual Issues, Inferences and Preliminary Submissions

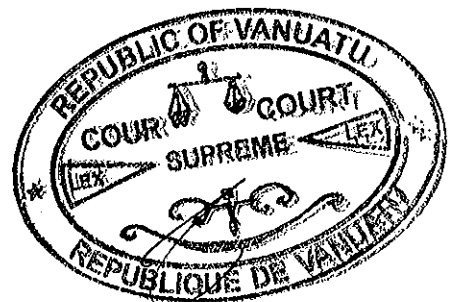
The Pleadings

The Claimant, at paragraph 12 of its claim alleges that there was a (by implication) written undated Agreement entered between Resorts Limited and the Defendant for the sale of the subject leasehold title to the Defendant and (at paragraph 13 of the clam) that this written Agreement contained the Clause 11 that is there referred to and which is central to the Claimant's claim.

At paragraph 9 of its Defence, the Defendant denies this and its position is that the relevant transfer and payment therefore took place without reference by the transferor and transferee (the defendant) to any formal written agreement.

The claimant has produced as an Annexure to Mr. Gee's statement a document that is claimed by Mr. Gee to be a contract of sale executed by Iririki Resort Limited and which on its face has provision for execution by Iririki Island resort Limited.

The only other document put forward by the claimant as the relevant written agreement, is that which is in Annexure "D" to the sworn statement of Robert Edgar Sugden (as adopted by Mr. Copperwaite's sworn statement).



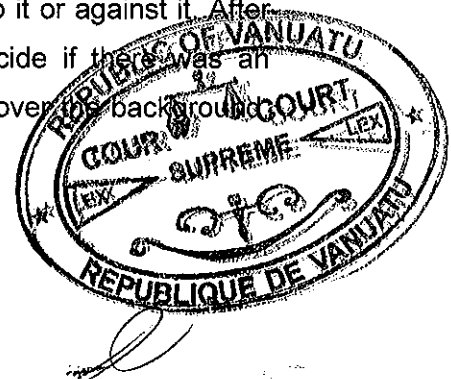
The claimant bears then onus of proof on the issue for this trial. The defendant's position is that the claimant will be unable to satisfy this burden generally, but in particular because of the following:-

ISSUES

- (I) There appears to be no document in evidence that fits that described in paragraphs 12 and 13 of the claim
- (II) It appears that document annexed to Mr. Gee's affidavit that is claimed to be a Contract of sale, those defects being:-
 - (a) Iririki Island Resort Limited no longer existed by that name after 2,002
 - (b) There was, at the relevant time, no company seal of Iririki Island Resort Limited or at least not having legal force.
 - (c) In any event, no company seal for Iririki Island Resort Limited has, in fact, been affixed to the document.
- (iii) There is evidence suggesting that the date 14 October, 2005 and the seals of Regent Ltd and Satellite Holding Limited were not affixed to the purported Contract until well after 14/10/2.005
- (iv) It is clear from the terms of the purported contract that the defendant's offer to be bound by those terms, made when it executed it, had expired by 14 October, 2.005.
- (v) The evidence suggests that another reason for the document having no contractual force is that there was no consideration flowing from the claimant for the promises by the Defendant (past consideration).
- (vii) The evidence suggests that the transfer of the subject leasehold title was given by Resorts Limited and paid for by the Defendant pursuant to an agreement reached in correspondence between the Defendant's director, Mervyn Copperwaite and the representative of Resorts Limited, Robin Holt.

Dated 17 September, 2009"

1. This was a hearing where it was difficult to contain the wide ranging submissions and suggestion. As indicated the central issue is "Is there a contract?" I recall stating to Mr. Sugden that the real issue before the Court is the value of land that with or without a caution attaching to it or against it. After some hours of hearing he conceded this point. To decide if the agreement between the parties it is necessary to briefly cover background

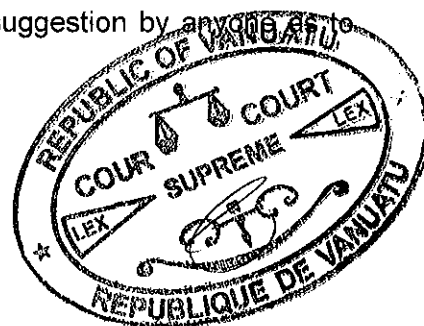


The contract that the Claimant seeks to establish as the contract on the evidence is the one dated 14th October 2005. That document is executed by Satellite Holdings and Regent Limited and the common seal of Ascension Limited is affixed to it.

2. Of particular importance in my view is paragraph 12 where the clause has been altered and initialed by the addition of the words "*other than Christiane Brunet*". The document to which I refer is signed with a pen of distinctive colour and it seems at first glance (claiming no expertise) that this pen was used to add those words initial the alteration and execute the document under the seal of Ascension Limited. That document contains within it a number of conditions and the one of relevance for this hearing is clause 11. I set it out as follows:-

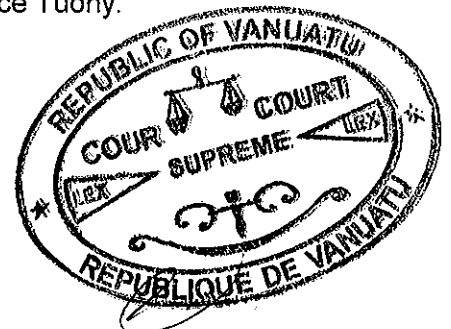
"CLAUSE 11 At completion the Vendor will provide a Title clear of all encumbrances thereon excepting the right of access maintained under Caution in favour of Iririki Holdings Limited which the Purchaser acknowledges and is accepted by it provided that the Vendor shall at completion hand over the Consent of Iririki Holdings Limited as a Cautioner to the registration of the Transfer of Lease to the Purchaser."

3. Clause 10 contains the obligation to obtain a waiver in respect of a right of first refusal Clause 12 relates to the personal guarantee and 13 sets out the effect if settlement hasn't taken place by 15th September 2005. Of some importance is that there is an interest rate for late settlement. Under the heading of conditions at page 2 is the basis for clause 10. The provision of the lease title number is set out at page 1 being 11/OC22/009. This document then identifies vendor (that is an entity which seems to change its name). The purchaser, title number, the consideration, the settlement date, the interest rate for late settlement and special conditions to which I have previously referred.
4. The attitude of the Defendant to this document is that it is not the agreement between the parties and there was a strong suggestion that it had been created at a later date. This being the reason that it was sent to Australia to be examined. As I grasped this evidence there is no suggestion by anyone as to



how the alteration in paragraph 12 could have been recreated that is the alteration in hand writing by the exclusion of Christiane Brunet.

5. The transaction itself is captured in the evidence of Mr. Gee. Firstly, I wish to make it clear that I accept his explanation as to the misplacement of the document dated 14th October 2005.
6. His evidence establishes the background to the current claim, he dealt with procedural matters and the manner in which business transactions were settled and documents executed in Vanuatu. There was no challenge other than the cross-examination by Mr. Sugden as to the way in which company names were approved, documents were executed in the Republic on behalf of entities abroad. I had the opportunity to see and hear Mr. Gee give his evidence. I accept his evidence. Where it is in conflict with that of Mr. Copperwaite. I accept the evidence of Mr. Gee.
7. I accept his evidence without hesitation. He's a person in my view, from whom one would accept an undertaking. The cross-examination of him did not shake his evidence in anyway rather it emphasized his competence. He is a competent commercial practitioner.
8. I record my surprise at the manner of the challenge. I note that Judge Tuohy said something similar see per paragraph 28 of his decision of 31st May 2007. My impression is the same.
9. The suggestion as to the recreation of the agreement by a solicitor of a competence at this level without any evidence to support it is deserving of the strongest criticism.
10. The challenge that was made to him by Mr. Sugden as to his "*belief*" as to the manner in which name changes were made indicated the closeness to the proceedings in respect of counsel spoken about by Justice Tuohy.

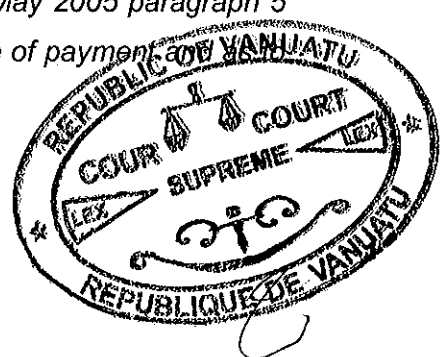


11. To challenge a professional witness as to his belief and that was unfounded in my view requires evidence to be available from an expert of similar standing to the contrary. This was not available nor was it suggested to Mr. Gee that it existed. If by chance there is some personal vendetta of which I am unaware it needs to be immediately removed from these proceedings. The challenge to a person of high professional competence on behalf of a client without specific instructions should cause counsel to reconsider the approach.
12. This is simply a commercial transaction the resolution of which at some stage will be spelled out in Vanuatuan or Australian dollars. There are a number of issues relevant to the conduct of the case and the taking of the evidence at a distance that because of the shortness of time I put to one side.
13. The name has little relevance, it is a clear that it is the same legal entity involved at all time.
14. Concerning the evidence of Mr. Mervyn John Copperwaite the evidence has been typed back from his questioning and led evidence over the computer link but in reality it does not take the matter much further. Of greater import in my view are the withdrawals contained in paragraphs 18 and 19 of this sworn statement of 17th March. I refer particularly to paragraph 19. It speaks in there of paragraph 5 in his sworn statement of 29th May 2005. That paragraph provides:-

"The principals of the vendor live in Australia and on Garry Blake's advise I paid the balance of the purchase price to them there, sometime around July 2005 and would ultimately obtain the necessary documentation to obtain registered title to 11/OC22/009 except for a number of cautions on the title."

Paragraph 19 says this:-

"Similarly in my other statement sworn on 29th May 2005 paragraph 5 my recollection was an error, both as to the time of payment and Garry Blake's advice."



15. I find it very difficult to accept that this comment does not go to reliability in view of the claim made by the witness Brunet as to actual payment in Vanuatu. And the identification of the lease.

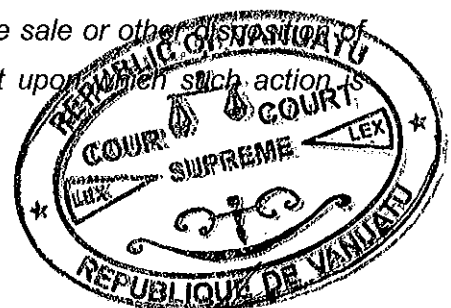
Paragraph 16 of the sworn statement of the same date provides as follows:-

"While this is going on on Garry Blake's advice I completed payment of the purchase price partly in Port Vila and partly by direct payment to directors of the vendors in Australia. This happened prior to September 2005 when the Ministerial consent to the transfer was obtained."

His paragraph 18 of the same date provides as follows *"In paragraph 16 of statement sworn 29th May 2007 I mistakenly said that I paid the purchase price prior to the obtaining of the ministerial consent to transfer in September 2006. That is in a further correspondence in annexure A I confirmed what I state herein"*.

16. The lack of care demonstrated here when competing parties are trying to jockey for position as in these proceedings to obtain a better or lesser prices in respect of land is a cause for concern and goes to reliability.
17. Inadvertently in my view Mr. Copperwaite overlooks confirming his awareness of the cautions. It is also further acknowledged earlier in his sworn statement.
18. The law in Vanuatu in respect of land is that a contract in writing is required to be in existence as set out in the decision *Nutley v. Kam & Molipalau* 01/2003 page 8. *"We are in no doubt that of the two competing claims the appellant's is the better and stronger and must prevail over the first respondent's unwritten oral agreement which is rendered unenforceable in terms of Section 40 of the Law of Property Act 1925 (UK) which we are satisfied has application as part of the laws of Vanuatu. The section reads:-*

No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action

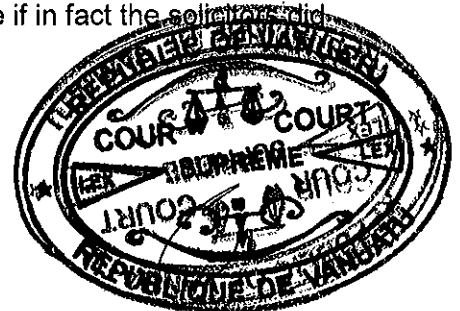


brought, or signed by the party to be charged or by some other person thereunto by him lawfully authorized."

19. I record that having considered the totality of the evidence adduced before me listened to counsel's submissions read their written submissions and perused the documentation that it is clear that a contract in writing is required.

And the only documentation that provide the necessary detail to make out a contract is that contained in the document dated 14th October 2005.

19. In my view it is not necessary to deal with the totality of the submissions. The reason for this is that the requirement of me at the hearing was to decide if there was a contract. This is confirmed in many areas. Mme Brunets written statement refer to the lease number at time of payment. It is fundamental to the negotiations and settlement (late as it was)all parties relied on the terms of this document.
20. This in my view is a straight forward sale of land transaction with the agreement clearly identified at all stages. Any mysticism. Exists with the defendant and his counsel. The agreement executed by the defendant, forwarded relied on by all the parties and executed.
21. I find there was such a contract. That the contract in fact is that dated 14th October 2005 included within that of course is condition No. 11 which is at the very heart of the respective arguments of counsel.
22. Late in the hearing it was suggested by Mr. Sugden the correspondence created an agreement. I have considered this submission and it is simply not made out. Accordingly I reject it.
23. The test that I have applied in reaching this decision is on the balance of probabilities.
24. My final reason for my decision in favour of that document being the contract is what would the position have been for Mr. Copperwaite if in fact the solicitor did



not proceed to execute the transfer and achieve registration. Is it really their argument that there was no contract and that nothing more was required of any party other than to receive the funds Putting the matter like that one can see that the defendants stance in my view lacks merit.

25. To put it in another way. I am concerned with time restrictions I may not have been blunt enough.

It is helpful sometimes to consider the reverse situation. Here payment made and the vendor chooses to do nothing after receipt of the funds, that is not to assist with execution of transfer and registration. Against whom and on what contract would the purchaser rely for specific performance or relief? The answer is obvious in such a situation.

26. Costs must follow the event so that costs are awarded to the Claimant. It consideration needs to be given and they are not agreed between counsel. I direct that the Master should fix the costs to be paid plus disbursement.

27. In addition there will need to be some financial disbursement to the Courts or Court staff to meet the costs of computers and other equipments supplied by them. The arrangement that I approved was that it was for the Defendant to arrange the necessary international connection at its expense. In the event it turned out that a staff members personal computer was used for this particular purpose.

DATED at Port Vila this 27th day October 2009

