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

Civil Case No. 45 of 2006

BETWEEN: PETER COLMAR
Claimant

AND: RAOUL TRAN
First Defendant

AND: JOSEPH LIVO MALUM
Second Defendant

AND: SCOTT WALKER
Third Defendant

AND: THE REPUBLIC OF VANUATU
Fourth Defendant

Hearing : ***19 and 20 September 2011***
Before: ***Justice RLB Spear***
Appearances: ***Claimant – Mr N Morrison***
1st Defendant – In person (excused)
2nd Defendant – Mr F Laumae
3rd Defendant – Mr J Malcolm
4th Defendant – Mr J Ngwele and Mr T Loughman

JUDGMENT

Discontinuance
Judgment by Consent

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1. This case has proceeded to point where the claimant Peter Colmar has now given his evidence. There is to be no further evidence adduced by the claimant.

2. The case turns entirely upon whether, as a matter of law and fact, Mr Colmar is able to prove that he had a contract with the lessees of the land; a French couple residing in New Caledonia. There is an agreement in writing that has

been produced (*PC 1)*, and that appears on its face to be between Mr Colmar for the first part and the first defendant Raoul Tran as *"official representative in Santo of Renee Anies and Marjorie Charvert (formally Vunafae Ltd) of Noumea".*

3. The issue that I raised with counsel, both yesterday and in particular this morning, is to do with the validity and enforceability of that contract *PC 1* as between Mr Colmar and the couple from New Caledonia -the lessees.

4. It is fundamental in the law of agency that apparent authority of agency cannot come just from the agent purporting to represent the principal. There must be some step taken by or on behalf of the principal to establish the circumstances in which apparent agency can be accepted and acted upon.

5. In this case, Mr Colmar knew Mr Tran as a person who also resided in Luganville and who was looking after the property for the couple from New Caledonia. Mr Colmar was aware that Mr Tran paid the house girl and paid the man who kept the grounds. Mr Colmar's evidence is that he was approached by Mr Tran to see whether Mr Colmar would be interested in purchasing the property. He was interested and that is how the agreement *PC 1* came into being. It appears to have been prepared by Mr Colmar.

6. Mr Tran, at that stage, could not be considered by Mr Colmar, on his own evidence, as any more than a custodian of the land for the absentee landowners. It is a huge step to contemplate that a custodian, at that level, would necessarily have the authority to enter into a contract for the sale of the land without some confirmation of that authority from the principal. Mr Colmar did not check with the principal and that was a fundamental mistake on his part.

7. This, indeed, appears to have been accepted, at least initially, by Mr Colmar because his first response on finding that another person (the third defendant) had purchased the leasehold interest from the couple from New Caledonia was to sue the first defendant and the second defendant for damages. Somehow, that turned into an order for specific performance against the first

and second defendants but not significantly against the couple from New Caledonia. At no stage, as I understand it, has any proceeding ever been brought by Mr Colmar to establish a contract between himself and the couple from New Caledonia.

8. On one view, Mr Tran was agent for a disclosed principal and, if he did have apparent authority to act as agent, the contract is entirely between Mr Colmar and Mr Anies / Ms Charvert; not with the agent. At best, Mr Colmar would have an action in damages for money had and received because monies have apparently been paid to the custom owner on the basis that Mr Colmar had a contract.

9. Mr Morrison now has instructions to discontinue the claim against the third and fourth defendants which of course means that Mr Comar gives away his claim that he was entitled, at law or in equity, to purchase this property. The claim is formally discontinued in respect of the third and fourth defendants.

10. That leaves remaining the action for damages against the second defendant which, more correctly, would be considered for money had and received. That is estimated to be approximately Vt 2m although that will need to be determined in due course.

11. By consent, between the claimant and the second defendant, there is judgment for the claimant against the second defendant for the money or the value of items that were paid or given by the claimant to the second defendant on the basis that there was a contract by Mr Colmar for the purchase of this land requiring the consent of the custom owner.

12. This hearing will stop now on the basis that particulars will now be given by Mr Morrison to Mr Laumae as to what is sought to be recovered from the second defendant on the basis of money had and received.

13. So, there is judgment for liability with the quantum of damages to be determined in due course. The evidence that have been heard so far from Mr Colmar and the other evidence that has been tendered by way of sworn

statements not yet considered in the case, remain as evidence in respect of the outstanding issue as to quantum of damages.

14. Mr Morrison and Mr Laumae both confirm that this covers all matters in so far as they are concerned. However, there remains an issue as to costs for the third and fourth defendants.

15. Costs are now sought by Mr Malcolm for the third defendant and Mr Ngwele for the fourth defendant. Mr Malcolm seeks costs on an indemnity basis (that is solicitor/client costs) to be taxed if not agreed. Mr Ngwele seeks costs only on the standard basis.

16. Mr Malcolm's argument is that this matter has been prolonged over the course of some 5 years principally because of certain steps taken at different times by the claimant personally and, apparently, without or against his own legal advice. There is some substance to that given the way that the initial claim was commenced against the first and second defendants for damages seeking the return of monies paid. Judgment was issued which unhelpfully (as it turned out) contained the observation that there was a valid contract held by Mr Colmar for the purchase of the land. Mr Colmar then appeared personally at the next hearing after the judgment had been delivered and persuaded the Judge to issue an order for specific performance against the first and second defendants. That was appealed and, unsurprisingly, the appeal was allowed and all orders made in the Supreme Court were quashed and the matter returned for trial.

17. It was clear in the Court of Appeal that there was a missing party. That was Mr Scott Walker, the third defendant, who had not yet been joined to the proceeding – and neither had the Republic of Vanuatu.

18. This is one of the very rare cases where indemnity costs should be awarded in respect of the third defendant. There is no evidence to suggest that Mr Walker, the third defendant, was complicit in some dealing behind the back of Mr Colmar but, in any event, Mr Colmar never had a contract for the purchase of the land and so he has been asserting a hollow position right

from the outset. This, again, is one of those cases where the judgment could start, *if only the claimant had sought legal advice from the outset*. It is a pity that that did not happen.

19. So, I formally order on the discontinuance against the third defendant that the claimant pay indemnity costs to the third defendant to be taxed if not agreed.

20. In respect of the discontinuance against the Republic of Vanuatu, I order standard costs.

BY THE COURT