

**BETWEEN: HOSEA NEVU**

Claimant

**AND: MARC ATI**

Defendant

**Coram:** *Mr. Justice Oliver A. Saksak*

**Counsel:** *Mr Daniel Yawha for Claimant  
Mr James Tari for Defendant*

**Date of Hearing:** *18<sup>th</sup> July 2014*  
**Date of Judgment:** *1<sup>st</sup> August 2014*

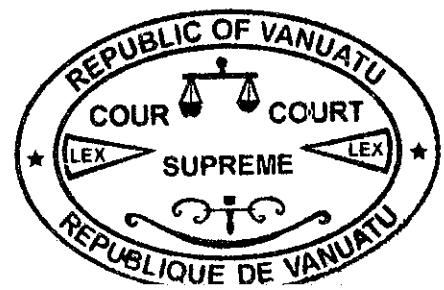
## **JUDGMENT**

### **The Claims**

1. The Claimant sues the Defendant for specific performance of their sale and purchase contract for the payment of the price of Vt 14.000.000 being the balance outstanding, for interests at 10% per annum from May 2012 until Judgment is settled, and for costs on an indemnity basis.

### **Back ground Facts**

2. The Claimant as vendor and the Defendant as purchaser entered into a sale and purchase agreement (the Agreement) on 25<sup>th</sup> February 2011 in relation to the sale of the Claimant's property situated at Red Corner in Luganville, Santo. The property is categorised as Commercial / Residential and is registered as title 03/0H64/061 (the Title). The Republic of Vanuatu is the lessor. The purchase price agreed was VT 20.000.000. The deposit agreed was VT 500.000. This was to be paid immediately upon the Claimant and the Defendant signing the Agreement. The balance of the agreed purchase price was to be paid in instalments. The Agreement did not specify the amount of the instalment and the dates on which the instalment payments were to be made. The Agreement however stipulated that after the deposit of VT 500.000 was paid, the vendor would allow the purchaser to mortgage the Title within a period of three weeks and to pay the sum of VT 8.000.000 as part payment of the property.



### **Undisputed Facts**

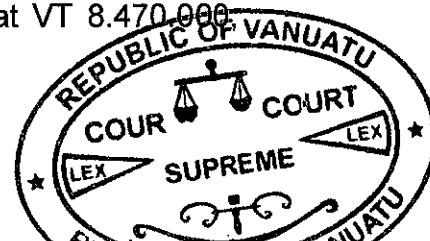
3. The Government as lessor consented to the transfer of Title to the Defendant. The Defendant entered into a Mortgage Agreement with his bank. The first loan the Defendant obtained was VT 25.000.000. The second loan the Defendant obtained under the Mortgage was for VT 50.000.000.
4. The Defendant has paid the sum of VT 5.560.000 through various instalments to the Claimant. Despite him obtaining two loans under the Mortgage, the Defendant did not pay VT 8.000.000 to the Claimant as agreed.

### **Defendant's Defence and Counter- Claims**

5. The Defendant filed a Defence and counter-claim on 22<sup>nd</sup> February 2013. He admits that he defaulted in payments as agreed, but relies on a provision of the agreement that states that in the event of default, the vendor is entitled to claim his property back and reimburse all the moneys paid to him by the purchaser. He alleges in his defence that he paid VT 7.000.000 to the Claimant and is entitled to a reimbursement of that amount. Further, he claims he will consent to the title being transferred back into the Claimant's name. He seeks relevant Orders, including an order for costs as his counter-claims.

### **Claimant's Evidence**

6. In support of his claim the Claimant relies on his evidence by sworn statements filed on 8<sup>th</sup> April 2013 and that filed on 17<sup>th</sup> July 2014. These were agreed as read into evidence by Counsel. In the first statement the Claimant gives evidence that he was the former proprietor of the Title and that he entered into a sale and purchase agreement on 24<sup>th</sup> February 2011. See Annexure "A" He further testifies to two mortgages entered into by the Defendant mortgaging the Title as security for two loans of VT 25.000.000 executed on 9<sup>th</sup> November 2011, and the second for a loan of VT 50.000.000 executed on 12<sup>th</sup> June 2012 See Annexures "D" and "E". The Claimant testifies to a transfer of lease dated 14<sup>th</sup> March 2011. See Annexure "B". Finally the Claimant testifies to a consent by the Minister of Lands dated 14<sup>th</sup> January 2012 in relation to the Title over which a Second Ranking Collateral Third Party Mortgage was made between the Defendant as Mortgagor and the National Bank of Vanuatu as Mortgagee for a sum of VT 50.000.000. See the last document to Annexure "E".
7. The Second sworn statement dated 17<sup>th</sup> July 2014 contains the responses of the Claimant to the Defendant's sworn statement filed on 15<sup>th</sup> July 2014. He simply confirms the Defendant has paid a total of VT 5.560.000 and that the Defendant still owes him VT 8.470.000. He annexures as " HN1" payment vouchers showing a payment of VT 50.000 made by the Defendant on 26<sup>th</sup> March 2014 which also recorded the balance outstanding at VT 8.470.000.



and a further payment of VT 30.000 made on 31<sup>st</sup> March 2014, and the balance remaining to be VT 8.440.000.

### **Defendant's Evidence**

8. The Defendant relies on his evidence by sworn statement filed on 15<sup>th</sup> July 2014 in which he makes reference to the initial agreement. Further he confirms paying to the Claimant the sum of VT 5.560.000 in good faith. He testifies to his understanding that having paid the said sum, that the Claimant should have withdrawn the claims. Further he claims a reimbursement in the sum of VT 11.560.000 from the Claimant.

### **The issues In Relation to the Counter-Claims**

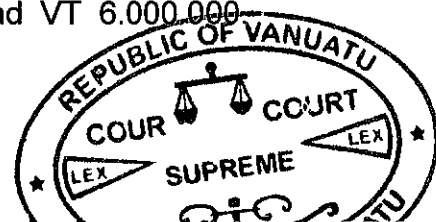
9. Counsel Mr Tari did not identify or raise any issues for the Court's consideration in his written submissions. But from those submissions the issues appear to be whether under the Agreement the Defendant is entitled to-
- a) Reimbursements of the moneys he has paid so for to the Claimant?, and
  - b) Re-transfer the title back to the Claimant?

### **The Issues in Relation to the Claimant's Claims**

10. Mr Yawha raised three issues in his written submissions as follows:-
- a) Whether the Claimant is entitled to recoup the balance of the agreed price under the Agreement being in the sum of VT 8.440.000?
  - b) Alternatively, whether the Defendant is entitled to the full refund of monies paid by him under the Agreement in exchange for the return of the land?, and
  - c) If either position is affirmed, whether ancillary relief as to costs and interests will follow the event?

### **Discussions**

- 11.1 In the Defendant's submissions he accepts the balance outstanding as VT 8.440.000 as shown in Annexure "HN1". See paragraph 1 of the submissions.
- 11.2 At paragraph 2 of the submissions the Defendant submits he is entitled to a refund of VT 11.560.000 from the Claimant. Although the Defendant did not produce any evidence showing he in fact made payments totalling the amount of VT 11.560.000, he accepts paying VT 5.560.000 to the Claimant which the Claimant readily accepts. And the Defendant claims he paid a further VT 6.000.000 to the Claimant at some point, which the Claimant readily accepts at paragraph 13 of his sworn statement dated 8<sup>th</sup> April 2013. The sum of VT 11.560.000 is arrived at simply by adding VT 5.560.000 and VT 6.000.000.



Deducting VT 11.560.000 from the purchase price of VT 20.000.000 under the Agreement, we arrive at the figure VT 8.440.000 which is consistent with the figure shown on Annexure " HN1". It appears therefore the figure of VT 7.000.000 the Defendant counter- claims for under paragraph 1 is the wrong figure. The correct figure should have been VT 11.560.000.

11.3 The issue then is whether the Defendant is entitled to claim a refund of VT 11.560.000 in return for the transfer of the Title back to the Claimant?

The Defendant relies on paragraph C of the Agreement which states-

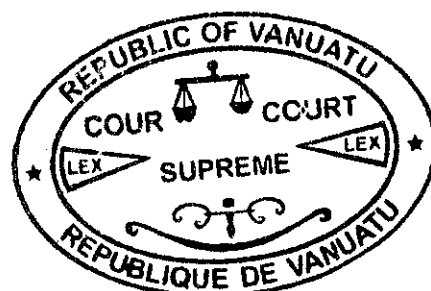
**" (c) If the vendor is unable or unwilling to remove as to Title so delivered by the Purchaser and the purchaser does not on or before the fifth working day after the date on which he is notified in writing of such inability or unwillingness notify the vendor in writing that he waives the objection or requisition the vendor may ( notwithstanding any immediate negotiation) by notice in writing to the purchaser cancel the contract the purchaser shall be entitled to the return of the deposit and all other monies paid under this Agreement but shall have no other claim whatsoever against the vendor".**

11.4 Mr Yawha submits that this clause of the Agreement is ambiguous and unconscionable and should be declared void. The Court agrees and accepts Mr Yawha's submission.

11.5 The further reasons why clause ( c) cannot assist the Defendant in relation to his counter-claims are-

- a) This clause does not authorise the Defendant to re-transfer the Title back to the Claimant, and
- b) The Defendant as purchaser has not produced any evidence of any objection by the Claimant as vendor or any requisition by him as purchaser to the vendor which he was unwilling to remove or comply with.

11.6 Clause (c) could be invoked only in a situation where the Claimant as vendor having received VT 11.560.000 from the Defendant and then not transferring the Title to the Defendant. If that was the case, the Defendant as purchaser would be expected to deliver a requisition to the Claimant to transfer the Title within 5 days after which, if the Claimant failed, that would amount to an unwillingness or non-compliance by the Claimant would then entitle the Defendant as purchaser to rescind or cancel the Agreement.



11.7 Unfortunately, that is not the way Clause (c) is framed. Indeed it is ambiguous and unconscionable and as such it cannot be enforced as giving any entitlement to the Defendant to-

- a) Reclaim VT 11.560.000 he has paid so far, or
- b) Re-transfer the Title back to the Claimant.

11.7 For those reasons the counter-claims of the Defendant fail and are hereby dismissed.

12.1 I turn now to deal with the issues raised by Mr Yawha for the Claimant. The first is whether the Claimant is entitled to recoup the balance of the purchase price which is agreed at VT 8.440.000?

12.2 The answer is in the affirmative. It is generally accepted by the parties that the Agreement dated 24<sup>th</sup> February 2011 signed by them in persons on 25<sup>th</sup> February 2011 was a legally binding agreement. It had all the elements of an offer, an acceptance and a consideration to make it a legally binding contract between them.

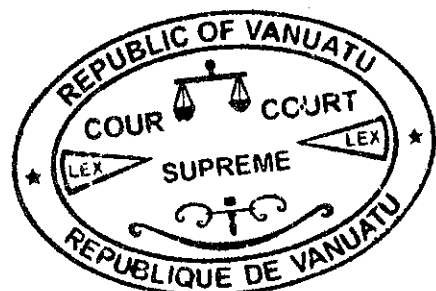
12.3 The consideration was (a) the transfer of a commercial / residential Title by the Claimant as vendor to the Defendant as purchaser for (b) the sum of VT 20.000.000.

These were conditional on-

- a) The Defendant paying a deposit of VT 500.000, immediately after signing the Agreement, which the Defendant did, and
- b) The Defendant obtaining a bank loan and mortgaging the Title as security for such loan within a period of 3 weeks and paying VT 8.000.000 to the Claimant as vendor as part payment for property. This is the method of payment agreed under clause (b) of the Agreement.

12.4 The Defendant obtained a bank loan of VT 25.000.000. The mortgage is dated 9<sup>th</sup> November 2011. Despite that bank loan, the Defendant did not perform his part under the Agreement to pay VT 8.000.000 as agreed to under clause (b) of the payment method.

12.5 The Defendant obtained a Third Party ranking collateral Mortgage for another loan of VT 50.000.000 on 12<sup>th</sup> June 2012. Despite obtaining that collateral loan, the Defendant still did not perform his part of the Agreement.



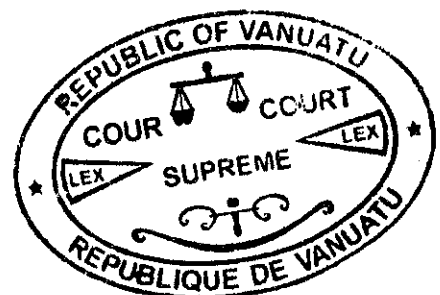
12.6 The Claimant had by then transferred Title to the Defendant by 9<sup>th</sup> November 2011, as otherwise the first loan and mortgage would not have been possible. The Defendant has not provided any evidence as to how much he had paid over to the Claimant prior to 9<sup>th</sup> November 2011. It seems obvious the Defendant did pay moneys to the Claimant prior to 9<sup>th</sup> November 2011 but it was certainly not the VT 8.000.000 he had agreed to pay after obtaining a loan under clause ( b ) of the Payment Method.

12.7 It is apparent the Defendant had enriched himself twice by the two loans he obtained under mortgage of the Title. For him to give financial difficulties as an excuse for non-payment under the Agreement can never be a tenable argument and a reasonable excuse for him not performing his part of the Agreement.

12.8 That being the position, the Court concludes that the Defendant is not entitled under the Agreement to any refund of the monies he has paid so far to the Claimant. The accepted amount is VT 11.560.000. Further, the Defendant is not entitled under the Agreement to return the Claimant's Title. The Second issue raised by the Claimant is therefore answered in the negative.

12.9 The final issue relates to interest and costs. The Court agrees the Claimant is entitled to his costs of and incidental to this action on an indemnity basis. Had the Defendant paid VT 8.000.000 as agreed by him in December 2011, and pay VT 1.000.000 monthly thereafter, by January 2013 the VT 20.000.000 purchase price agreed would have been paid in full and they would have been no need for the Claimant to file this proceeding. The matter could have been settled on 11<sup>th</sup> July 2014 but defence Counsel sought an adjournment to receive instructions from the Defendant. However on 1<sup>st</sup> July 2014 the Defendant filed a sworn statement which implies generally that he did not accept the Claimant's offer. That sworn statement should have been filed within 21 days after the Court issued specific directions to the Defendant to that effect on 11<sup>th</sup> April 2013 to support his count counter- claims. For those delays and omissions and failures, it is necessary for the Court to award indemnity costs against the Defendant.

12.10 As regards interests the Court accepts that the Claimant is entitled to interests on the amount outstanding which is VT 8.440.000. That interest has to be 5% and not 10% as claimed. The amount of interests is VT 422.000.



## Conclusions

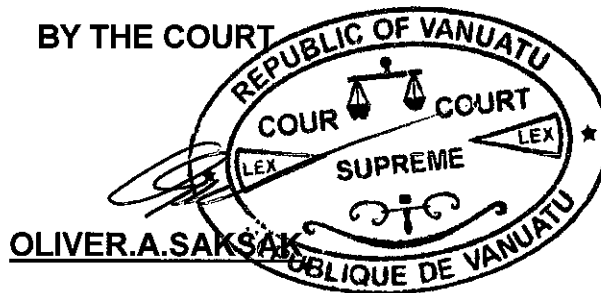
- 13 The Claimant is successful in his claims and judgment is given in his favour. The Counter-Claims of the Defendant are dismissed.

## ORDERS

- 14 The Claimant is entitled to the following Orders-
- a) An Order of specific performance against the Defendant for payment of the outstanding sum under their Agreement in the sum of VT 8.440.000
  - b) Interests on VT 8.440.000 at 5% per annum from the date of last payment being 31<sup>st</sup> March 2014 to the date of Judgment. The amount is calculated to be VT 422.000.
  - c) The Defendant will pay the Claimant's cost of and incidental to this action on an indemnity basis, which shall be agreed, if not, be determined by the Court.

**DATED at Port Vila this 1<sup>st</sup> day of August 2014**

BY THE COURT



OLIVER.A.SAKSAK

Judge