

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil jurisdiction)

Civil
Case No. 18/2145 SC/Civil

BETWEEN: **Li Jian Jun**
 Claimant

AND: **ANZ Bank (Vanuatu)**
 Limited
 First Defendant
 Republic of Vanuatu
 Second Defendant
 Weng Jian Fan
 Third Defendant

Date of Hearing: 21 September 2020

Before: Justice G.A. Andrée Wiltens

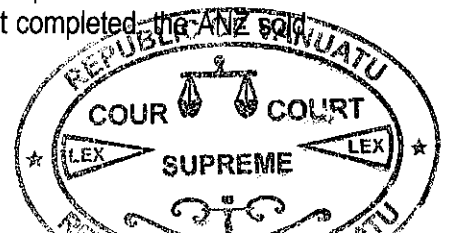
Counsel: Mr S. Hakwa for the Claimant
 Mr G. Blake for the First Defendant
 Ms F. Williams-Reur for the Second Defendant
 Mr A. Godden for the Third Defendant

Date of Decision: 12 October 2020

JUDGMENT

A. Introduction

1. This dispute concerns an Agreement for the Sale and Purchase of leasehold property in Port Vila, Efate. The property involved Lots 4, 8, 12 and 16 in Strata Plan 0133. The vendor was the ANZ Bank (Vanuatu) Limited ("ANZ") exercising its mortgagee power of sale and the purchaser was Mr Li Jian Jun ("Mr Li"). When the purchase was not completed the ANZ sold

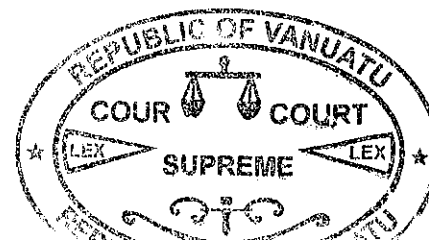


the property to Mr Weng Jian Fan ("Mr Weng"), who then became the registered proprietor of Leasehold Title No. 11/OE24/055.

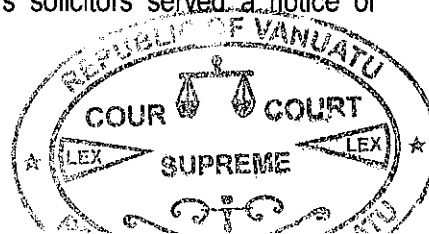
2. Mr Li sought to set aside the sale to Mr Weng, sought specific performance of the agreement to compel ANZ to sell the property to him; as well as damages in an amount of VT 23.86 million, interest and costs. There is no particular remedy sought in relation to the Republic of Vanuatu which is named as the Second Defendant due to being vicariously responsible for the Director of Lands' alleged misconduct in relation to one aspect of the failed transaction..
3. At the commencement of the trial I sought clarification of Mr Hakwa as to the basis on which Mr Li was proceeding against Mr Weng, there being no apparent legal relationship between Mr Li and Mr Weng. Mr Hakwa immediately conceded that there was no basis to continue the Claim against Mr Weng and discontinued that part of his Claim.
4. Accordingly, the Claim against Mr Weng was dismissed. By consent Mr Li was ordered to pay VT 150,000 costs to Mr Weng within 21 days.
5. At the conclusion of the trial I reserved my decision. This is my decision and the reasons for it.

B. Background

6. ANZ wished to regularise its accounts by the sale of Leasehold Title No. 11/OE24/055 due to non-payment of loans secured by a mortgage over the title. Prior to obtaining Court Orders entitling it to exercise its mortgagee rights, ANZ entered into an unconditional contract for the Sale and Purchase of the land with Mr Li for VT 100 million.
7. The contract was undated, but is agreed to have been entered into on 10 January 2017. Mr Li duly paid the required deposit of VT 10 million.
8. The contract provided for completion within 30 days or such other date as agreed between the parties. Neither side took any steps in relation to completing the transaction until well after ANZ had obtained a Supreme Court Order entitling it to sell the property as mortgagee, which was granted on 9 June 2017. Mr Li suggested the delays in settling were due to ANZ not giving him notice it was able to settle. He was adamant that he was not responsible for any delay. However, ANZ also point to the fact that Mr Li did not give notice to complete as provided for in clause 3.4 of the contract.
9. In early December 2017 there was communication between Mr Glen Craig (acting for ANZ) and the tenants of the properties which Mr Li was seeking to purchase. This prompted a response from Mr Hakwa and in turn a response from Mr Blake of 7 December 2017. This letter contains a number of surprising comments, which Mr Li rightly objected to as all were erroneous. The letter wrongly suggested the sale and purchase contract had been signed on 4 May 2017 and wrongly stated that Mr Li had failed to pay the balance of the purchase price due on 14 July 2017 – there is no evidence to the effect that that was the date for settlement. The letter further recorded that a notice to complete had issued on 19 August 2017 (no such document was presented in evidence), and further that the notice to complete had not been complied with and the contract therefore terminated.



10. As a direct response, Mr Li caused a caution to be lodged against the title to protect his interests on 8 December 2017.
11. There was then a series of communications between Mr Hakwa and Mr Blake and the ANZ, which ran from December 2017 onwards. Mr Hakwa was suggesting that Mr Li had been poorly and/or improperly treated and was looking at ways to rectify the situation for Mr Li. The telling correspondence in the series was a "without prejudice" letter from Mr Blake of 18 August 2018, which I will come back to.
12. On or about 11 July 2018, the Director of Lands of his own motion wrote to Mr Li requiring him within 30 days to justify the continuation of the caution or remove it from the title. A second such Notice, dated 25 July 2018 followed.
13. On 10 August 2018 Mr Li filed his original Claim in this matter, against only ANZ, later to be replaced by the Amended Claim currently before the Court and including the other 2 parties.
14. On 13 August 2018 Mr Hakwa wrote to the Director of Lands enclosing a copy of this litigation to justify the continuation of the caution. However, that was 3 days too late, as the Director had cancelled the caution on 10 August 2018. Mr Li was concerned that the documentation surrounding the cancellation was incorrect as to date and accordingly that it was improperly done.
15. The 18 August 2018 earlier referred to letter was an offer to settle the dispute by reverting to the original contract and completing the transaction as originally agreed by Mr Li paying the balance of the purchase price, namely VT 90 million. To achieve that, it was intended that ANZ would serve Mr Li with a notice to complete within 14 days, as provided for in the contract.
16. By letter of 24 August 2018 Mr Hakwa advised that Mr Li agreed in principle to settle the matter in the manner proposed.
17. At around this same time NBV advised Mr Li the funding arrangements to complete the purchase needed to be re-negotiated, due to the delay. NBV advised there would be no difficulty but required certain information before the loan could be confirmed. Mr Li blames ANZ for not providing that information, despite several requests, for his ultimate inability to re-arrange the NBV funding.
18. By letter of 5 September 2018 the Director advised Mr Li the caution was re-instated.
19. By letter of 18 September 2018 Mr Blake again set out the terms of his proposal to settle the matter. On 19 October 2018, Mr Hakwa confirmed his client's agreement, but pointed out that Mr Li was actively seeking the necessary funding to be able to complete. A subsequent letter by Mr Hakwa accepted the date was incorrect, and it should have been recorded as 30 October 2018. The subsequent letter re-iterated that funding was still being sought and that certain information from Mr Blake/ANZ would assist in the process to confirm the funding.
20. On 2 November 2018 ANZ's solicitors served a notice to complete within 14 days on Mr Li. Mr Hakwa objected to the Notice by letter of 9 November 2018. However, when settlement of the transaction did not eventuate, on 22 November 2018 ANZ's solicitors served a notice of



Termination of the contract on Mr Li. The contract provided for forfeiture of the deposit in that event as set out in clause 12.3 of the contract.

21. Months later, in April 2019, the property was sold by ANZ to Mr Weng for VT 95 million.

C. The Claim

22. Mr Li sought to set aside the subsequent agreement between ANZ and Mr Weng. This was on the basis that the previous agreement between ANZ and himself should proceed to settlement, and he sought specific performance of that contract.

23. Mr Li sought damages, in respect of expenses he stated he had paid towards the maintenance and upkeep of the property, as well as rent payments he considers he should have received.

24. The Republic of Vanuatu was included in the Claim as Mr Li considered the cancellation of his caution was improper and instrumental in permitting the subsequent transaction to be registered to his detriment.

D. Evidence

25. Mr Li's evidence was to the effect that when he negotiated the purchase of the property he had arranged for VT 70 million of funding through National Bank of Vanuatu to be able to settle the transaction.

26. However, as ANZ did not notify him regarding its ability to complete, the funding expired – the offer was only good for 12 months. Mr Li also experienced difficulties with his then lawyer, who did not do as instructed by Mr Li, which also caused delays. Mr Li maintained that after he had secured his funding he instructed his previous lawyer to give notice to ANZ to settle, but he was unaware whether the lawyer had done that.

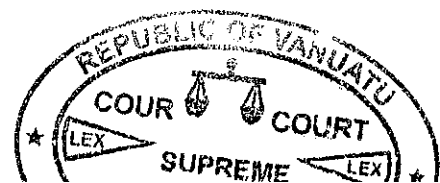
27. Mr Li further stated he had attended on ANZ personally, but the bank was only interested in dealing with his lawyer.

28. Subsequently, Mr Li was arrested and his documentation in relation to this transaction and other matters was seized and later lost by the Police. That contributed to further delay and affected his ability to settle the transaction.

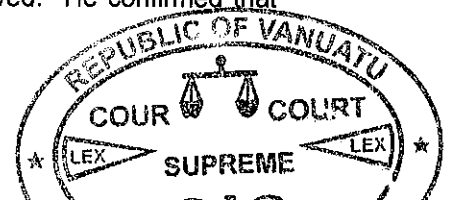
29. Finally, when in the process of re-negotiating the loan in 2018, Mr Li caused numerous requests for additional information required by NBV to be sent to Mr Blake, but the information was never provided which resulted in Mr Li being unable to get confirmation of the funding. He attributed the further delay caused due to his inability to obtain the necessary funding to ANZ's non-compliance with his information requests.

30. Had there not been these delays/difficulties, he considered he would have been able to settle. The fact the transaction did not settle he attributes entirely to the ANZ.

31. In cross-examination Mr Li conceded he never obtained or supplied the information NBV was seeking – he accepted the information was readily available. In the end, he conceded that he couldn't settle and was seeking further time to arrange his funding. He accepted also that the agreement was not subject to finance.



32. Mr Li stated that he checked to see if the funding was still available in November 2017 and he was advised by NBV that it was. The NBV officer advised that ANZ had now obtained the necessary Court order to be able to sell the land to Mr Li – that was when he first became aware of that. Mr Li is of the view the ANZ had an obligation to advise him that the necessary Court Order had been obtained so that settlement was possible.
33. Mr Li further considered that had ANZ responded with the requested information, he would have secured the funding to be able to complete. He blames the ANZ for not providing the information. Mr Li's attitude to this case is best demonstrated when he said:
- "You refused to settle when I had a loan. Then you wanted to settle when I had lost my finance."
34. Mr Li was concerned about the manner in which the caution was cancelled. His concerns stemmed from the fact that the application was unsigned, and both it and the letter of advice of cancellation were dated 23 August 2018, yet the caution was actually alleged to be cancelled on 10 August 2018. Accordingly Mr Li considered the removal of the caution to be incorrectly done. He also complained that he did not receive the notice until a considerable time had lapsed, which meant he was unable to respond in a timely manner.
35. Mr Li advised he had come to an arrangement in 2016 with the previous owner of the property to collect rent on his behalf and to account to the owner in the monthly sum of VT 600,000. The amount collected varied on the number of tenants, but was in the order of VT 160,000 to VT 200,000 per month. He was adamant he lost money every month due to the arrangement.
36. Mr Li was also concerned to recover the VT 10 million deposit he had paid.
37. Mr Stevens from the ANZ also gave evidence. He disputed the idea that ANZ was required to give Mr Li notice it had obtained the required Court Orders to enable it to complete the sale. He accepted that the contents of the 7 December 2017 letter contained erroneous statements. He confirmed the attempts to settle by reverting to the original agreement, as a result of which the notice to complete was issued, not complied with, and accordingly the contract treated as at an end.
38. Mr Stevens was cross-examined about the December 2017 notice to quit, and explained it was quite a different kind of notice to one requiring completion. He explained the VT 10 million deposit was retained by ANZ due to the contract recording it be forfeited if not completed. The forfeiture occurred around 22 November 2018. Mr Stevens advised ANZ had nothing to do with the caution being registered or cancelled.
39. Mr Stevens confirmed that the deposit had not been treated as the contract required. He confirmed also that there was no notice to complete issued to Mr Li dated 19 August 2017.
40. Mr Stevens was a credible witness. I accepted his evidence.
41. The final witness was Mr Gambetta. He confirmed that two notices requiring the justification for the caution were issued to Mr Li – the second he stated was sent in error due to not realising the earlier Notice had been issued. Two different officers were involved. He confirmed that

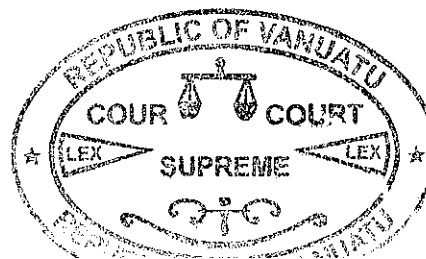


after 30 days of silence following the first such notice, he caused the caution to be removed from the title. Subsequently he received Mr Hakwa's letter with a copy of the amended Claim, which caused him to re-instate the caution. He maintained there was no incorrect procedure involved in any of these matters.

42. Mr Gambetta ultimately again cancelled the caution to enable the subsequent transfer to Mr Weng on the application of Hurley Lawyers dated 23 August 2018, then was then acting for Mr Weng.
43. Mr Gambetta explained the process of serving the notice to justify cautions. It is far from perfect. Firstly, it appeared to not be understood that the 30 days notice did not run from the date of the letter, but from the date of service of the letter. Secondly how service was effected involved a member of staff taking the notice by hand to Stade Post Office, and the Post Office was then responsible to transfer the Notice to Mr Hakwa's post box at Tassiriki. There can be no certainty as to when that Notice was actually received, and Mr Gambetta accepted that the process was flawed and that he was not really in a position on 10 August 2018 to cancel the caution.
44. Mr Gambetta's evidence improved. At first he was less impressive, but he made proper concessions when tested and admissions of errors. I accepted his evidence.

E. Discussion

45. Mr Li was a poor witness, incapable of succinctly answering questions and prone to raising his voice to make his point, even when that point was not relevant. No amount of attempting to coach him to simply answer what was put to him gained any traction. His rambling responses did nothing to bolster confidence in his reliability or credibility. I did not accept his account regarding collecting rent, as I considered it highly unlikely he would happily suffer a monthly loss of up to VT 450,000. I considered his reliance on the lack of information forthcoming from ANZ as an implausible reason he was unable to secure funding. The information sought was innocuous and readily available from a number of sources. I did not find him to be a witness whose evidence could be given weight, save where it matched the documentary evidence.
46. His position of wanting to complete the contract did not fit with other accounts of what had transpired. I was sure that following the resurrection of the contract by dint of the 18 August 2018 letter from Mr Blake, the only impediment to settlement was Mr Li's inability to produce the balance of the purchase price.
47. I further considered that Mr Li's other complaints were overtaken by that 18 August 2018 letter and all the matters complained of over the period between can be put to one side – as of that date, Mr Li was back in the position he was in in January 2017.
48. The fact he did not complete the purchase lies entirely at Mr Li's feet. Mr Hakwa did what he could to afford Mr Li more time to find the necessary funding, but eventually after the notice to complete was properly served, there was no further evading of the issue. ANZ were quite entitled to then consider the contract at an end, forfeit the deposit and attempt to sell the property to another.



49. Mr Li's concerns regarding the caution and its removal are also overtaken by what occurred post the 18 August 2018 letter. The caution was re-instated by then, and remained in place to protect Mr Li's interests even after he no longer had any interests when the transaction was ended in November 2018. The concerns Mr Li raised are of no further consequence.
50. In closing Mr Hakwa did his best but was restricted by the pleadings. Mr Hakwa was unable to explain how the agreement between ANZ and Mr Weng could now be set aside, given that Mr Weng was the registered proprietor with the protections in his favour set out in the Land Leases Act [Cap 163].
51. Mr Hakwa was also unable to explain how the ANZ agreement with Mr Li could now be the subject of specific performance. Not only was Mr Li not in a position to settle, but the property is registered in the name of Mr Weng and he has an indefeasible title.
52. Mr Hakwa was asked to explain the claim for damages. Putting aside Mr Li's explanation that he was collecting rent for another, the fact remains that he is not and never was entitled to collect the rent from any tenant on his own behalf. The Claim appended a spreadsheet showing how the VT 23.86 million was arrived at, and it involved collecting rent from 13 separate apartments. The agreement to purchase involved only 4 of them. At no stage was Mr Li beneficially the owner of any of the apartments. This aspect of Mr Li's claim was wholly misconceived.
53. Significantly, there is no mention in the relief section of the Claim of the deposit paid. It is therefore not possible for Mr Li to seek the return of the VT 10 million paid. However, even if that had been included in the Claim, the fact is that the contract was not completed due to Mr Li's failure to be able to pay the full purchase price. His failure to complete resulted in the contract coming to an end and the deposit being forfeited. Accordingly, even if return of the deposit had been Claimed, that would not have been granted in this judgment.

F. Result

54. Mr Li's claim fails on all grounds and is dismissed in its entirety.
55. Costs are due to both defendants. They are to be settled by agreement, or failing that, by taxation. Once settled, the costs are to be paid within 21 days.

**Dated at Port Vila this 9th day of October 2020
BY THE COURT**

G.A. Andree Wilens
Justice G.A. Andree Wilens

