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

Civil Appeal
Case No. 20/2411 CoA/CIVA

BETWEEN: **Arthur & Jeanette Faerua**
Appellants

AND: **Samuel & Sophie Lnparus**
Respondents

Date of Hearing:	***16 November 2020***
Coram:	***Hon. Chief Justice V. Lunabek*** ***Hon. Justice J. Mansfield*** ***Hon. Justice R. Young*** ***Hon. Justice O. Saksak*** ***Hon. Justice D. Aru*** ***Hon. Justice V.M. Trief***
Counsel:	***Mr S. Kalsakau for the Appellants*** ***Ms J. Kaukare for the Respondents***
Date of Decision:	***20 November 2020***

JUDGMENT

A. Introduction

1. The Appellants Arthur and Jeanette Faerua and the Respondents Samuel and Sophie Lnparus entered into a rent to purchase agreement in relation to leasehold title no. 12/0633/233 at Beverly Hills, Port Vila (the 'property'). Mr and Mrs Faerua and Hugh Langdale (deceased) occupied the property for 27 months during which rent was part paid or not at all. The contract was cancelled when Mr and Mrs Lnparus gave notice to quit for non-payment of rent. Mr and Mrs Lnparus claimed unpaid rent and late payment fees in the Supreme Court. On the day of trial, the Court granted summary judgment for the VT6,206,500 claimed. Mr and Mrs Faerua appeal that decision.

B. Background

2. On 30 November 2012, Mr and Mrs Lnparus (as "Owners") and Mr and Mrs Faerua and Hugh Langdale (as "Renters") entered into an agreement for the sale and purchase of the property on a rent to purchase basis (the 'agreement').

3. The National Bank of Vanuatu Limited ('NBV') has a registered mortgage over the property.

4. The terms of the agreement included that:

   a. Mr and Mrs Faerua and Mr Langdale are jointly and severally liable;

   b. The NBV 'has full knowledge of this Agreement and has approved to sign as a witness to the transactions contained in this Agreement';

   c. Mr and Mrs Faerua and Mr Langdale are to pay a VT3,000,000 deposit payment on the day of the execution of the agreement, into Mr and Mrs Lnparus' loan account at the NBV;

   d. The deposit payment is not refundable and shall be applied towards the VT16,000,000 Purchase Price of the property;

   e. Mr and Mrs Faerua and Mr Langdale are to pay monthly rent of VT250,000 into Mr and Mrs Lnparus' loan account at the NBV;

   f. If payment of the monthly rent is late by more than 5 days, a late fee of VT5,000 applies; and

   g. Upon Mr and Mrs Faerua and Mr Langdale completing payment of the Purchase Price, the mortgage would be discharged and ownership of the property be transferred to them.

5. Mr and Mrs Faerua and Mr Langdale occupied the property and operated a shop on it from 30 November 2012 to 26 February 2015.

6. The only rent payments made were:

   - 28 January 2013 VT100,000;
   - 12 February 2013 VT93,500;

- 28 February 2013 VT100,000;
- 14 March 2013 VT50,000;
- 28 March 2013 VT250,000; and
- 9 April 2013 VT80,000.
- TOTAL VT673,500

7. On 9 February 2015, a formal Notice to Vacate was issued to Mr and Mrs Faerua and Mr Langdale. They vacated the property on 26 February 2015. The Notice effectively cancelled the agreement.

8. On 2 May 2019, Mr and Mrs Lnparus commenced action in the Supreme Court for VT6,076,500 unpaid rent (27 months rent, less the amounts received) and VT130,000 late payment fees (26 times VT5,000).

9. On 18 March 2020, Mr and Mrs Faerua filed a Defence.

10. On 20 May 2020, the primary judge listed the trial on 3 August 2020.

11. On 17 July 2020, Mr and Mrs Lnparus filed and served Application for summary judgment.

12. On the day of trial, the Court granted summary judgment for the VT6,206,500 claimed.

C. Discussion

Ground 1

13. The first ground advanced was that the primary judge erred by wrongly entering a summary judgment based on a late application, having failed to offer an opportunity to hear the parties in person, and determine that there was an actual dispute existing between the parties which needed to go to a full trial. In short, was there procedural unfairness to Mr and Mrs Faerua?

14. Mr and Mrs Faerua knew there was to be a hearing of their case on 3 August 2020, either a full trial or a summary judgment hearing. The *Civil Procedure Rules* require that notice to cross-examine a witness be given at least 14 days before the trial. Mr and Mrs Faerua gave their notice to cross-examine Mr and Mrs Lnparus on the day of the trial – impossibly late. We note that Mr and Mrs Lnparus also gave notice to cross-examine on the day of trial. Neither notice was allowed by the Judge given their lateness. Further, Mr and Mrs Faerua did not personally appear at trial. However, they had filed sworn statements which as far as relevant they were entitled to have taken into account.

15. The primary judge was entitled to proceed on the day of the trial. We note that he could have decided the case as if a trial as sworn statements had been filed, the notices to cross-examine witnesses were deficient, and notice of the trial had been given. The fact that he chose to deal with it as a summary judgment makes no difference to the claim of procedural unfairness. In the circumstances, there was no procedural unfairness to Mr and Mrs Faerua.

16. The primary judge wrongly noted in his decision that there were no sworn statements filed on behalf of Mr and Mrs Faerua. Both Mr and Mrs Faerua had filed sworn statements. However, examination of the sworn statements shows that the only issue of substance raised was a claim that they were not aware that the NBV had given approval for the agreement. Mr and Mrs Faerua did not have any actual knowledge that the NBV did not know about the agreement. No evidence was obtained from the NBV in support of the contention that the NBV was not aware of the agreement. In the absence of evidence from the NBV, the only evidence is the agreement itself which stated that the parties agreed that the NBV had full knowledge of the agreement. There was no material in their sworn statements denying the essential terms of the contract and their breaches through default with the monthly payments.

17. The primary judge granted summary judgment after he was satisfied that Mr and Mrs Faerua had no real prospect of defending the Claim. He did so after Mr Nalyal confirmed in answer to his questions that there was a contract between the parties; it was an agreement to rent to purchase for VT16,000,000; a VT3,000,000 deposit was agreed; rent of VT250,000 per month was agreed; Mr and Mrs Faerua defaulted with their monthly payments; and it was agreed for additional costs to be incurred for late payments. Mr and Mrs Faerua had filed sworn statements. There was no evidence that the NBV did not have full knowledge of the agreement. In the circumstances, no error is disclosed in the entering of summary judgment by the primary judge.

Ground 2

18. The second ground advanced was that the primary judge erred by wrongly holding that Mr and Mrs Faerua were liable for the Claim relating to the agreement, having failed to allow essential facts to be provided in the matter by a third party which would have disclosed a legal impossibility in the agreement.

19. As we have observed, Mr and Mrs Faerua filed sworn statements before trial. There was no evidence from them or the NBV that the written agreement did not reflect what the parties had in fact agreed. First, counsel's concessions at trial confirmed the essential terms of the contract and the breaches. Secondly, Mr and Mrs Faerua and Mr Langdale occupied the property, lived in it and operated the shop business and paid some rent – all consistent with the terms of the agreement. Thirdly, they paid the VT3,000,000 non-refundable deposit into

Mr and Mrs Lnparus' loan account at the NBV – also consistent with the terms of the agreement.

20. Mr Kalsakau submitted that the agreement was void or voidable as sections 56 and 57 of the *Land Leases Act* prohibited Mr and Mrs Lnparus from disposing of their lease or mortgage unless NBV's prior written consent was obtained. However, the only evidence before the Court was the agreement itself which stated that the parties agreed when they executed the agreement that the NBV had full knowledge of it. There is no evidence to the contrary from the NBV. This submission is not based on any evidence and is contrary to the contract. It is misconceived.

21. Finally, no disposition of the property within the terms of sections 56 and 57 of the *Land Leases Act* occurred. Mr and Mrs Faerua did not complete payment of the Purchase Price to activate the term of the agreement that the property be transferred to them. Therefore those sections did not apply. The submissions to that effect are roundly rejected.

Ground 3

22. The ground advanced was that the contract had been misrepresented in the Claim because the following clauses of the agreement were false:

- para. 4 of the recitals – that the NBV had full knowledge of the agreement;
- clause 5.1 – that Mr and Mrs Faerua and Mr Langdale were granted the exclusive right or option of settling the remaining balance of the Purchase Price at any time during the term of the agreement; and
- clauses 6.2 to 6.4 – that payment of the VT16,000,000 Purchase Price would relinquish Mr and Mrs Lnparus' obligations with the NBV so that the mortgage be discharged and the property transferred to Mr and Mrs Faerua.

23. Mr Kalsakau submitted that the above clauses were false as the parties could not agree that upon Mr and Mrs Faerua completing payment of the Purchase Price that the property would be transferred to them as the NBV never had knowledge of the agreement. He submitted that the agreement was therefore an illegal contract and had been entered into under a false misrepresentation.

24. As discussed above, there was no evidence for the contention that the NBV was never aware of the agreement. The only evidence before the Court was the agreement itself in which the

parties contracted for the sale and purchase of the property on a rent to purchase basis, with a non-refundable deposit that would be applied towards the Purchase Price.

25. As to clauses 5.1 and 6.2-6.4 of the agreement, they were not false and reflected the parties' agreement.

26. Given the lack of evidence, there is no merit in this ground of appeal.

Ground 4

27. The ground advanced was that the primary judge erred by wrongly holding that Mr and Mrs Faerua were liable for payment under the agreement when there was an issue that part of the claim was filed outside the time limits in the *Limitation Act*. The parties are bound by their pleadings. Limitation was not pleaded in the Defence filed in the Supreme Court therefore it cannot be considered by this Court. Mr Kalsakau properly accepted this when put to him by the Court.

28. Mr Kalsakau also raised a possible issue of set-off of the VT3,000,000 deposit payment. Set-off of the deposit was not pleaded in the Defence. In addition, clause 2.4 of the agreement provided that the deposit payment is not refundable and is to be applied towards the VT16,000,000 Purchase Price of the property. We note that it is common in contracts for purchase of land for the deposit to be forfeited in the event of breach. Not having been pleaded in the Defence, set-off cannot be considered by this Court.

D. Result

29. The appeal is dismissed.

30. Costs should follow the event. The Appellants are to pay the Respondents' costs of the appeal of VT30,000.

DATED at Port Vila this 20th day of November 2020

BY THE COURT

Hon. Chief Justice Vincent Lunabek

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL