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

Civil Appeal
Case No. 20/3193 CoA/CIVA

BETWEEN: Li Jianjun
Appellant

AND: ANZ Bank (Vanuatu) Ltd
First Respondent

AND: Republic of Vanuatu
Second Respondent

Coram:	***Hon. Chief Justice V. Lunabek*** ***Hon. Justice J. Mansfield*** ***Hon. Justice J.W. Hansen*** ***Hon. Justice D. Aru*** ***Hon. Justice V.M. Trief***
Counsel:	*Appellant in person* *Mr G. Blake for the First Respondent* *Mrs F.W. Samuel for the Second Respondent*
Date of Hearing:	*16 February 2021*
Date of Judgment:	*19 February 2021*

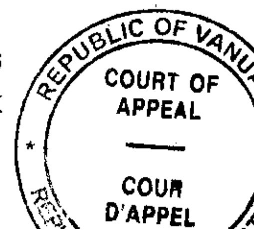
REASONS FOR JUDGMENT

A. Introduction

1. This appeal arises from a contract for the sale and purchase of certain leasehold property in Port Vila made between the Appellant and the First Respondent and entered into on 10 January 2017 (the 'Contract').

2. The Contract price was VT100 million, and it provided for a deposit of VT10 million which the Appellant duly paid. The contract could not immediately proceed to settlement, as the First Respondent was selling the property exercising its power as mortgagee, and it needed the approval of the Supreme Court under section 59 of the *Land Leases Act* [CAP 163] before it could exercise that power. In the meantime, the Appellant protected his position by lodging a caution against the title. For reasons briefly noted below, it is not necessary to record the history of the status of the caution or subsequent cautions from time to time.

3. The approval of the Supreme Court to the sale of the mortgaged property was obtained on 9 June 2017. The Appellant was not made aware of that. It is not



surprising that the Appellant did not give any notice to proceed to settlement of the Contract after that date in the circumstances, although he, and the Second Respondent, were each entitled to do so under clause 3.4 of the Contract.

4. In December 2017, the question of settlement of the Contract resurfaced. The First Respondent quite wrongfully asserted to the Appellant that he had been due to settle on the Contract on 14 July 2017 and had failed to do so; secondly, that he had been given notice to complete the settlement by notice of 19 August 2017 and had failed to do so; and thirdly, that it was entitled to terminate the Contract. None of those matters were correct. They remain unexplained by the First Respondent.

5. Some vigorous correspondence then ensued. It is not useful to record it. On 11 August 2018, the Appellant commenced his claim in the Supreme Court to seek specific performance of the Contract and other relief against the First Respondent.

6. Then, on 18 August 2018, the First Respondent offered to settle on the contract according to its terms. The Appellant had to re-arrange the finance for the settlement, under which he was to pay VT90 million. He apparently was delayed in securing that funding. On 2 November 2018, the First Respondent gave the Appellant notice under the Contract, requiring him to settle on the sale and purchase within 14 days. The Appellant did not do so, apparently as he was still trying to re-arrange his funding. Consequently, on 22 November 2018 the First Respondent gave notice of termination of the Contract for non-payment of the purchase price. It was entitled to do that.

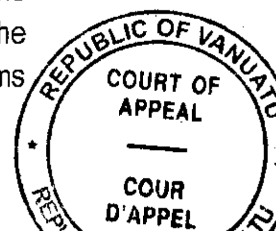
7. The First Respondent also appropriated the deposit of VT10 million, as it said it was entitled to do under clause 12.3 of the Contract.

8. In March 2019, the First Respondent sold the property to an arms-length third party for VT95 million. That meant that the Appellant's claims could not extend to having the Contract settled and the property transferred to him, and he was restricted to a monetary claim.

B. The Judgment

9. The primary judge recorded the relevant background facts, referred to the evidence with comments about its significance, and then proceeded to review and assess the claims of the Appellant.

10. The claims against the First Respondent were met by the conclusion that the Appellant could have secured the property had he been able to settle on the transaction in November 2018, and was not satisfied that the other detailed claims of the Appellant were made out.



11. The claims against the Second Respondent related to the way in which it recorded, and removed, the several cautions which the Appellant had lodged from time to time. The primary judge did not need to make any careful analysis of the correctness or otherwise of those actions by the Director of Lands. That was because, as the property the subject of the Contract was available to be transferred to the Appellant had he settled the transaction in late 2018. There could have been no loss to the Appellant by reason of those matters.

12. So, the claims of the Appellant were dismissed. He was ordered to pay the costs of the claims to each of the First Respondent and the Second Respondent.

C. <u>The Appeal</u>

13. At the commencement of the appeal, the Appellant sought an adjournment to a later session of the Court of Appeal. He was unable to persuade the Court that the delay of the hearing would make any real difference to his capacity to present his arguments on the appeal, having regard to the length of time which had elapsed since the judgment appealed from (9 October 2020), and the fact that he had prepared his extensive appeal book. The application for the adjournment was opposed by the First Respondent. Delay would have operated as a relevant disadvantage to it, and would also involve the wastage of costs when it had to re-prepare for a later hearing.

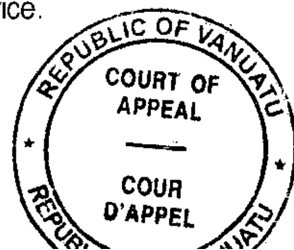
14. The application for the adjournment was refused.

15. The Appellant then made his submissions in support of his appeal. He said all that could reasonably have been submitted. His position was that he was entitled to significant damages, and he focused 'at least' on the recovery of the deposit of VT10 Million. He said that the principal blame for the failure to settle on the Contract was that of the First Respondent, who should have notified him of the approval obtained from the Supreme Court to sell the property, given on 9 June 2017.

16. Counsel for both the First and Second Respondents made brief submissions.

17. In our view, no error has been shown in the reasoning and conclusions of the primary judge.

18. When the issue of performance of the Contract became a focus in late 2018, the Appellant was simply unable to settle by paying the balance of the purchase price. The trial judge was correct to conclude that.



19. The issue about the removal and reinstatement of cautions also could lead nowhere, because it did not present any impediment to the Appellant settling on the transaction and securing the property as agreed, if he had been able to obtain the funds to do so. The primary judge correctly decided in that circumstance that the claim should fail.

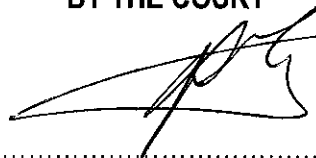
20. Finally, it is necessary to refer to the forfeited deposit. It was forfeited in the event of the Appellant not settling by paying the balance of the purchase price. That is provided for in clause 12.3 of the Contract.

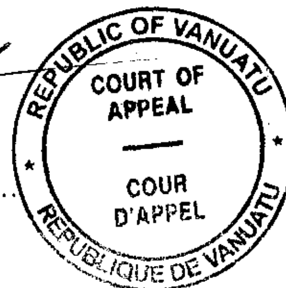
21. As it happened, the Second Respondent was subsequently able to resell the property for VT95 million, so there was a shortfall of VT5 million. The First Respondent was in any event deprived of the unpaid balance of purchase price of VT90 Million for the period between 23 November 2017 and 9 April 2019; interest on that sum over that period would well exceed the shortfall. So we cannot see any basis on which the Appellant is entitled to repayment of the deposit or any portion of it.

22. The appeal is dismissed. The Appellant is to pay the costs of the First Respondent which we fix at VT50,000 and of the Second Respondent which we also fix at VT50,000.

DATED at Port Vila this 19th day of February 2021

BY THE COURT





Hon. Chief Justice Vincent Lunabek