

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

Civil
Case No. 19/3121 SC/CIVL

BETWEEN: JANET MAKI

Claimant

AND: SAMUEL ANDREW, ANATOLE TOM

First Defendants

AND FPF Limited

Second Defendant

Date of Conference: 9th April 2021
Date of Judgment: 6th August 2021
Before: Justice Oliver.A.Saksak
In Attendance: Ms Tabisa Harrison for Claimant
Mr James Tari for Defendants

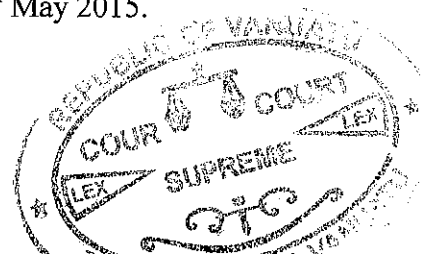
JUDGMENT

Introduction

1. The claimant claims (a) for a declaration that her agreement with the defendants was breached, (b) an order for specific performance for the payment of VT 7,700,000, (c) for damages in the sum of VT 5,000,000 (d) for interest and (e) costs.
2. The claimant is a sole trader trading as Malier Real Estate, providing real estate services. She is Ni-Vanuatu.
3. The first defendants are also Ni-Vanuatu citizens residing at Eratap Village, Efate.
4. The second defendant is a private local company duly registered in Vanuatu.

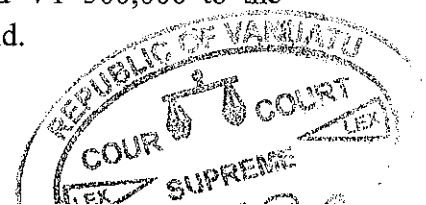
Background Facts

5. The subject matter of this claim is Leasehold Title 12/0943/167 (Lease 167). Lease 167 was initially registered in the name of Vanuatu Livestock Development Limited. It was transferred to the First Defendant on 18th October 2012 for a consideration value of VT 100,000. Presumably it was a rural agricultural lease.
6. However on 12 November 2012 the First Defendants surrendered Lease 167 and sought the Minister's consent to subdivide the title into more than 200 plots and to change the lease to commercial and residential. The Minister of Lands gave consent on the same date. The consent was however only registered on 8th May 2015.



The First defendants subsequently obtained planning permission and subdivision permit from the Shefa Provincial Council on 4th October 2013.

7. Lease 167 was therefore subdivided into 23 commercial lots and 308 residential lots, a total of 511 plots.
8. The First defendants then registered their business on 17 December 2013 as Esale Estates Subdivision and obtained a certificate accordingly issued by the Vanuatu Financial Services Commission. Subsequently they obtained a Business Licence No.2059060 on 1st March 2014.
9. Having acquainted themselves with the claimant when she was working for Bladinere Real Estate, the First Defendants then approached the claimant at her office at the Orchid Building in Port Vila and proposed to her to manage the sales of the subdivided plots within the Esale Subdivision within Lease 167.
10. The proposal transpired into a verbal contract with terms and conditions that the claimant would manage, advertise and prepare all lease documents for sale of all subdivided lots within Lease 167 and that in return for her services, the claimant would be paid 5% commission out of all the sales, and a sum of VT 60.000 per month as salaries until she completed the sales of all subdivided plots.
11. Subsequent to that verbal agreement the claimant sold 94 of the subdivided plots. All moneys collected by her were paid to the First Defendants in cash from the claimant's office or into their bank account. She did not deduct any commissions.
12. For 10 months from 2014-2015 the First Defendants paid VT 60.000 per month.
13. In about August 2015 the First Defendant introduced the claimant to the Second Defendant and disclosed their intentions to sell the full subdivided plots within Lease 167 to the Second Defendant. The First Defendants assured the claimant she would be paid her commission of 5% from that sale.
14. Mr Feng, the Second Defendant's representative paid a visit to the claimant at her office with Ms Nancy Zhang, a translator and assured the claimant she would be paid her 5% commission upon the sale of Lease 167 to the Second Defendant, and that the Second defendant would refund all the 94 clients who had made payments for their plots.
15. Lease 167 has been sold and transferred by the First Defendants to the Second Defendant for the sum of VT 120.000,000.
16. Despite that sale and transfer, the Defendants have only paid VT 500,000 to the claimant and the balance of her 5% commission has not been paid.



17. The claimant therefore based on those facts, filed her claim and proceeding.

Defence

18. The defendant filed a Draft Defence on 2nd June 2020. They admitted to the allegations in paragraphs 1, 2, 3, 12, 13 and 14. They did not plead to paragraphs 4 and 7. They partly admitted the allegations in paragraphs 8, 9, 10 and 15. They have omitted or failed to provide any defence to the claims in paragraphs 11, 16 and 17. And they have not pleaded to the reliefs sought by the claimant.

Evidence

19. The claimant gave oral evidence in support of her claims at trial. She relied on her sworn statements filed on 28 May 2020 (Exhibit C1) ad of 1st February 2021 (Exhibit C2).

20. The defendants Samuel Andrew gave oral evidence and confirmed his sworn statements filed on 14th September 2020 tendered into evidence as Exhibit D1. Ruimin Cheng, Director of FPF Limited, Second Defendant gave oral evidence and confirmed her sworn statements of 29th March 2021 into evidence as Exhibit D2.

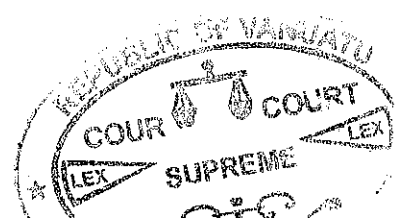
Submissions

21. The claimant filed written closing submissions on 3rd May 2021 and the defendants filed their written submissions on 13th May 2021.

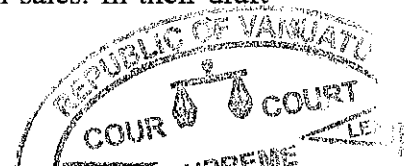
Discussion

22. First the filing date shown on the Filing Stamp of the Court bears the date 13/04/21. That appears to be the wrong date. It should have been either 13th May 2021 or 4th May 2021 to correspond with the date at the end of the submission being 4th May 2021 and the Scan Date shown in the Scan Stamp being 4/05/21. But that is a minor point.

23. Secondly, the Draft defence of the defendant dated 2nd June 2020. Firstly it does not specify that it is the defence of both the First and Second Defendants. Thirdly it is only a draft and is not a proper defence. Rule 4.5 of the Civil Procedure Rules requires a defence to be filed and served, not a draft defence. Fourthly, the Defendants, both First and Second Defendants failed to plead to the claims in paragraphs 8, 16, and 17, including the reliefs sought by the claimant. These are serious omissions and/or failures by the Defendants. Further discussion will be made in relation to these later in the judgment. But sixthly, the draft defence was filed very late on 2nd June 2020, more than 6 months after the claim was filed on 12th December 2019. The claim was served on 13th December 2019, on the First Defendant's brother.

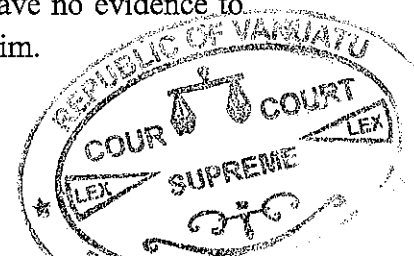


24. The Defendants' failures to file their defences on time resulted in the claimant filing for request for default judgment on 6th February 2020. As a result of the application the Court issued judgment by default on 3rd April 2020.
25. Two months had lapsed and on 2nd June 2020 Mr Tari filed an application to set aside the default judgment. It was on the same date the defendants filed their Draft defence.
26. The Court heard the application to set aside on 10th June 2020. Ms Thyna had conceded the application and the default judgment was set aside with an understanding the parties would reach agreement as to the payment of the 5% commission due to the claimant. Mr Tari did not seek leave to file a proper defence but sought directions to file sworn statements within 21 days by 1st July 2020. Direction was issued accordingly with liberty to Ms Thyna to file responses within a further 21 days, by 22nd July 2021.
27. The Defendants failed to comply with that direction. Defendant Samuel Andrew filed his sworn statement only on 14th September 2020, more than 2 months later. And Ruimin Cheng filed her sworn statements on 29th March 2021, more than 9 months later just some 11 days before the trial date. These were serious failures and omissions by the defendants.
28. The defendants did not respond adequately or at all to the sworn statements of the claimant in particular to paragraph 7. 3 of her statement dated 28th May 2020 (Exhibit C1) where she pleads Mr Feng and a translator Nancy Zhang had gone to her office and assured her of the payment of 5% commission she was promised under the first verbal agreement.
29. The defendants did not call Mr Feng or Ms Zhang to rebut or discredit the evidence of Ms Maki. As such her evidence stands unchallenged and must be accepted as the truth.
30. I return to the draft defence. The claims in paragraphs 1, 2, 3, 13, 13 and 14 are not in issue as the Defendants have admitted them.
31. The defendants do not plead to paragraph 4. This is the claim that the defendants had registered a business name Esale Subdivision in December 2013 and entered into a verbal agreement for the claimant to manage and sell all the subdivided lots within Lease 167. This claim should have been admitted by the defendants but they omitted to or failed to plead to it because they have no defence to it. Ms Maki produced the Certificate of Registration to her statement as Annexure JMO3. And the Business Licence of Esale Estate Subdivision is annexure JMO4.
32. At paragraph 5 the claimant alleged the First Defendants had agreed with the claimant she would receive a commission payment of 5% for all sales. In their draft

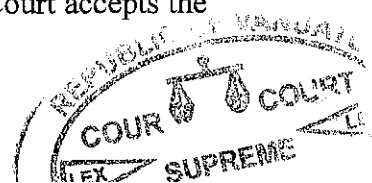


defence the Defendants admitted the allegations but say the agreement of 5% commission was conditional upon each transfer of lease being completed and 95% of transfer consideration paid to the First Defendants.

33. Mr Andrew confirmed at paragraph 2 of his statement (Exhibit D1) there was an agreement but states it was conditional upon each transfer of lease being registered. That sounds both sensible and logical but the issue does not end there. It goes further because the claimant claims, she realised 94 plots to 94 clients or customers as she claims in paragraph 8 of her claim
34. While the defendants denied paragraph 8 in their draft defence they admitted paragraph 13 and paragraph 14. At paragraph 13 the claimant claims she was requested by the First Defendant to reimburse all the 94 clients. At paragraph 14 the claimant says she made arrangements with all the 94 clients to be reimbursed when the Second Defendant purchased the whole of the subdivisions within Lease 167.
35. The claimant annexed the list of the 94 clients as Annexure JM07 to her statement (Exhibit C1). She collected a total of VT 20,081,850 collected in one year. The amount to be reimbursed is given at VT 18,989,350. The 5% commission due to the claimant is VT 1, 092,500.
36. At paragraph 6.3 Of her sworn statement (Exhibit C1), Ms Maki said she deposited all payments and monies collected directly to the First Defendants' bank account. There were times the first defendant collected cash from her office. She did not deduct any commission due to her.
37. The First Defendants have not responded sufficiently or at all to that evidence. I therefore find it difficult that they should deny the sale of 94 plots and then to claim a refund from the claimant when they were the beneficiaries of all the moneys collected by the claimant in respect of the 94 plots.
38. In paragraph 6 the claimant says on 24th September 2014 the defendants transferred and registered Esale Subdivision to one of their private local company namely Blue Mirror Limited. The defendant admitted this claim but say the sale did not complete. The issue is why was the sales were commenced but not concluded? I will return to this issue later.
39. Ms Maki annexed a certificate of renewal of a business name dated 26th September 2014 (Annexure JM06) to Exhibit C1, therefore the Defendants could not deny paragraph 6 of the claim.
40. The defendants did not plead to paragraph 7 of the claim. They have no evidence to challenge the claimant's evidence. They have no defence to this claim.



41. Paragraphs 9 and 10 of the claims were denied but the defendants did not produce any evidence from Mr Feng and Ms Zhang to rebut or discredit the claimant's evidence. The Court accepts the claimant's evidence and rejects the defendants' denials.
42. Paragraph 11 of the claim alleges that the First Defendant signed a Sale and Purchase Agreement with the Second Defendant in 2015 for the purchase of the Head Lease 167 for the sum of VT 20,000,000. The defendants did not plead to this claim. They simply have no defence. The Agreement is dated 2nd September 2015 and annexed as JM08 to Exhibit C1. It is undeniable.
43. The defendants denied paragraph 15 that to date the claimant has been paid VT 500,000 as commission with an outstanding balance of VT 7,700,000. Ms Maki gave evidence of this money in her statement of 1st February 2021 (Exhibit C2). The payment of VT 500,000 is therefore undeniable and the defendant's defence is not a good defence.
44. Paragraphs 16 and 17 including the reliefs claimed, were simply undefended as the defendants did not plead to them.
45. I return to the final issue why the sales were not completed resulting in refunds or reimbursements made?
46. Although moneys were being collected from 94 clients it was just the beginning. Presumably the next steps would have been to get the parties to enter into Sale and Purchase Agreements. Of the 94 clients only Kalkandi Jessica actually entered into a Sale and Purchase Agreement for lease title 12/0943/530. This agreement is annexed as JM02 to the statement of the claimant filed on 10 June 2020 in support of the response to the application to set aside the default judgment.
47. In paragraph 4 of her statement Ms Maki explained that no lease were created and transferred and registered because the First Defendants never surrendered the Head Lease 167. The defendants have not responded sufficiently or at all to this evidence as per Annexure JM04. Those documents show there was a surrender. The original date was 12 November 2012 but registered only on 8th May 2015, about 3 years later.
48. Be that as it may, by 2nd September 2015 the First Defendants had executed a Sale and Purchase Agreement regarding the sale of Head Lease 167 with the Second Defendants for the total sum of VT 120,000,000 payable in instalments under clause 2 of the Agreement (Annexure JM03).
49. That transaction put an end to the sales entrusted by the First Defendants to the claimant, but did not absolve their responsibility or agreement with her that she was to receive her 5% commission. Mr Feng made representations on behalf of the Second Defendant as well as the First Defendants. Despite their denials, the Court accepts the



evidence of the claimant that she was assured she would be paid her commission upon the sale of Lease 167 to the Second Defendants.

50. That sale has now been complete. The First and Second Defendants must now honour their verbal agreements to the claimant. That agreement is to pay 5% of the sale price of VT 120,000,000. Had it not been for the new agreement for sale and purchase of Lease 167 between the First and Second Defendants, the sales under the First Agreement would have continued and completed by the claimant. The defendants had breached their agreements and I so declare.

The Result

51. I find for the claimant and enter judgment in her favour. I assess her claims to be
- a) VT 6,000,000 being the balance of her 5% commission, less VT 500,000 already paid.
 - b) General damages- VT 1,200,000.
Total Damages – VT 6,700,000.
 - c) Interest of 5% per annum from the date of filing of claim to settlement.
 - d) Costs of the proceeding on the standard basis as agreed or taxed by the Master.
52. This judgment is to be executed by the First and Second Defendants within 30 days from the date hereof, failing which the case be listed for an enforcement conference. For that purpose the judgment shall be served on the Defendants personally.

DATED at Port Vila this 6th day of August 2021

BY THE COURT


OLIVER.A.SAKSAK

Judge

