IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU

(Civil Jurisdiction)

Civil

Case No. 24/251 SC/CIVL

BETWEEN: MARCELLINO PIPITE
Claimant

AND: REPUBLIC OF VANUATU
First Defendant

AND: NATIONAL BANK OF VANUATU LIMITIED
Second Defendant

Date of Hearing:	10 December 2024
Date of Decision:	30 January 2025
Before:	Justice M A MacKenzie
Counsel:	Mr C Leo for the Claimant
	Ms N Robert for the First Defendant
	Mr C Hurley for the Second Defendant

DECISION

The application

1. The Second Defendant, the National Bank of Vanuatu, has applied to strike out the claim made against them. The claim relates to an agreement between the Claimant, Mr Pipite and the First Defendant for the purchase of Mr Pipite's property. The First Defendant supports the strike out application.

2. The strike out application is opposed by the Claimant.

Background

3. The Claimant is the registered proprietor of lease title 11/OD31/058. The property is located behind the new Presidential complex in the Joint Court area. As such, the Claimant was approached by the First Defendant who wished to purchase the property. The Claimant agreed.

4. There were negotiations about the purchase price. The Claimant's initial offer of VT 50,000,000 was rejected. Three valuations were obtained, two by the Claimant and one by the First Respondent. The Claimant's valuations were VT 40,000,000 and VT 41,300,000. The First Defendant's valuation was VT 36,005,000.[1]

5. The agreed purchase price was VT 36,500,000. A document called a "*Deed of Release*" was prepared and signed by the Claimant and the First Defendant. While termed a Deed of Release, it is in effect an agreement for the sale and purchase of lease title 11/OD31/058. The salient terms of the agreement were that the settlement sum is VT 36,500,000 and that the settlement sum was to be paid as soon as possible into the Claimant's account at the National Bank of Vanuatu.

6. There was a mortgage in favour of the Second Defendant secured against the lease title. The mortgage secured loan advances made by the bank to the Claimant. On 19 December 2013, the Claimant granted a mortgage to the National Bank of Vanuatu in the sum of VT 16,000,000. On 31 December 2014, the mortgage was varied. The principal sum secured under the mortgage was increased to VT 18,820.000. This figure was the stamped amount of the National Bank's security over the property under the terms of the registered variation of mortgage, and not the amount owing under the loan.

7. The loan payout figure was in fact VT 27,897,983 because the Claimant was in default of his loan repayments.[2] It is obvious from the loan statements that he struggled to pay the repayments. For example, there was a long period of time between 2016 and 2022 where the Claimant simply did not make any repayments. In an email dated 30 October 2023, the Claimant himself acknowledged that he had struggled to pay the house loan for a longtime.[3]

8. In order for the title to be transferred from the Claimant to the First Defendant, the National Bank's mortgage had to be discharged. In breach of the Deed of Release, the sale proceeds were paid into the Claimant's Bred Bank account. The Second Defendant asked the First Defendant to intervene. The funds were frozen, and then paid into the Claimant's National Bank account. The loan was repaid so that the mortgage could be discharged.

9. The Claimant asserts that he was not aware that the outstanding loan balance was VT 27,897,983. He believed it to be VT 18,820,000. He says that the Second Defendant refused to tell him what the balance was. His position is that if he knew that it was higher than VT 18,820,000 then he would have negotiated a higher sale price.

10. Mr Dali, a representative of the Second Defendant, was present at a meeting between the Claimant and the First Defendant. The Claimant maintains that Mr Dali gave

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[1] *Refer sworn statement filed by Gordon Willie on 5 December 2024*
[2] *Refer sworn statement of Ben Dali filed on 6 September 2024*
[3] *Refer page 62 of Mr Dali's sworn statement*

information during the meeting that the mortgage was VT 18,820,000. He says that the First and Second Defendants meant to defraud him and that they intentionally stole his money. He asserts that he was lured into the agreement.

11. Although not a term of the agreement, in the recitals of the Deed of Release, it is recorded that the Claimant mortgaged his property with the Second Respondent and that the principal sum was VT 18,820,000.

The claim

12. The claim alleges that the Claimant accepted the First Defendant's offer to purchase his lease title at VT 36,500,000 on the basis that he reasonably believed that he owed the Second Defendant VT 18,820,000. Had he known that the loan amount was VT 27,987,983 he could have negotiated a higher offer given the first valuation of VT 50,000,000.[4]

13. The cause of action pleaded in relation to the Second Defendant is that the bank breached its duty of care to the Claimant, by not telling him what the loan balance was, liaising directly with the First Defendant, luring him into accepting VT 36,500,000 and soliciting to defraud him from obtaining the fair proceeds of the sale of his property.

14. The cause of action pleaded in relation to the First Defendant is that the First Defendant lured him into accepting VT 36,500,000 and solicited to defraud him from obtaining the fair proceeds of the sale of his property.

15. The Claimant seeks the following orders:

    a. An order that the deed of release was misrepresented to him and was "*never the Claimant's deed.*"
    b. Alternatively that the Second Defendant reimburse him VT 17,680,000.
    c. An order restraining eviction until resolution of the claim.

The defence

16. The First Defendant's position is that the Claimant is bound by the terms of the agreement. He agreed to the purchase, with the funds being paid into his account at the National Bank of Vanuatu. Further, that the amount outstanding under the National Bank loan is a matter between the Claimant and the Second Defendant. Further, that

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[4] *There is no evidence that there was a valuation of VT 50,000,000. Rather, that was Mr Pipite's proposal. In his sworn statement of 5 February 2024, Mr Pipite said that on 2 June 2023, he sent a letter of offer proposing VT 50,000,000 because he did not want to sell his lease and because a real estate had proposed VT 50,000,000 if he sold on the open market. It was after that letter that State Law asked him to provide two valuations, which he did.*

the sum of VT 18,820,000 detailed in the deed of release is the principal sum contained in the registered mortgage and registered variation of mortgage.

17. Finally, that the Claimant has failed to establish the circumstances that give rise to a duty of care as held in *Bulememe v Republic of Vanuatu* [2022] VUCA 10.

18. The Second Defendant asserts that bank statements were provided to the Claimant as and when requested. Their position is that the amount of VT 18,820,000 was not the loan payout figure but rather the principal amount, and the stamped amount of the bank's security under the registered variation of mortgage. The outstanding loan balance was VT 27,987,983 because the Claimant had defaulted on his loan repayments.

19. The Second Defendant denies that it breached a duty of care towards the Claimant and contends that the claim does not disclose any reasonably arguable cause of action.

Strike out application

20. On 6 September 2024, the Second Defendant applied to strike out the claim. The basis for the application is that the claim has failed to disclose any reasonable cause of action in law and that it is so clearly untenable that it cannot possibly succeed. The First Defendant supports the strike out application.

21. The application is opposed by the Claimant.

Approach to a strike out application

22. The jurisdiction to strike out a proceeding should be exercised sparingly, and only in clear cases where the Court is satisfied that it has both the material and the assistance from the parties to reach a definite conclusion.

23. The relevant principles are discussed by the Court of Appeal in *Hocten v Wang* [2021] VUCA 53. The Court of Appeal said (at paragraphs 11-13);

> *"11. There is no jurisdiction to strike out a Claim in the Civil Procedure Rules, apart from a narrow provision in rule 9.10. However, pursuant to s 28(1)(b) and s 65(1) of the Judicial Services and Courts Act [Cap 270], the Supreme Court has jurisdiction to administer justice in Vanuatu, and such inherent powers as are necessary to carry out its functions. Rules 1.2 and 1.7 of the Civil Procedure Rules give the Supreme Court wide powers to make such directions as are necessary to ensure that matters are determined in accordance with natural justice. The jurisdiction to strike out is essential and must exist to enable the Supreme Court to carry out its business efficiently, so that hopeless or vexatious claims,*

causing unreasonable costs, do not prevent the Court from hearing proper claims. Such jurisdiction was recognised by this Court in Noel v Champagne Beach Working Committee [2006] VUCA 18.

12. The basis for striking out a proceeding is recognised in jurisdictions throughout the Pacific; see the New Zealand High Court Rules, r15.1, and McNeely v Vaai [2019 WSCA 12). A pleading will be struck out:

a) if there is no reasonably arguable cause of action;

b) the claim is frivolous or vexatious;

c) it is otherwise an abuse of the process of the court.

13. The jurisdiction should be exercised sparingly, and only in clear cases where the Court is satisfied that it has both the material and the assistance from the parties required to reach a definite conclusion. A claim should only be struck out when despite this material and assistance, and the chance to amend the pleadings to reflect that material, it cannot possibly succeed".

24. Striking out any statement of a case have been described by the Supreme Court as a "*draconian remedy*". In *Hungtali v Kalo* [2024] VUSC 136, Hastings J said at paragraph 15;

> *"Striking out any statement of a case is a "draconian remedy" (Asiansky Television plc v Bayer Rosen [2001] EWCA Civ 1792). Although striking out a claim is not inherently contrary to the Constitution's guarantee of protection of the law, and equal treatment under the law or administrative action, in Article 5, the Court must nevertheless be cautious to ensure its exercise of discretion to strike out a claim does not violate those guarantees. A claim will not be suitable for striking out if it raises a serious factual issue which can only be properly determined by hearing oral evidence (Bridgeman v McAlpine-Brown [2000] LTL January 19, CA). Nor should a claim be struck out unless the Court is certain that the claim is bound to fail (Hughes v Colin Richards & Co [2004 EWCA Civ 266). In short, if a pleading raises a serious contested issue, then it should not be struck out and the issue should be determined after trial".*

25. Disputed issues of fact should be decided at trial not on an application to strike out which is normally dealt with on the basis that the facts pleaded in the claim can be proven: *Iririki Island Holdings v Ascension Limited* [2007] VUCA 13.

The claim - Second Defendant

26. The Second Defendant argues that the claim is frivolous, vexatious and/or an abuse of process because it does not disclose nay reasonably arguable cause of action against the bank. Their position is supported by the First Defendant, as noted above.

27. Mr Leo argues that the Second Defendant's duty of care is an incident of the equitable duty to act in good faith. In making that submission, Mr Leo referred to authorities which confirm a bank's duty of care when exercising a power of sale of a mortgaged property. These authorities are summarised in *Cyrel v National Bank of Vanuatu [2008] VUSC 55.*

28. Mr Leo further submitted that it is "*crystal clear*" that the Second Defendant acted fraudulently, wilfully and recklessly by sacrificing the interests of the Claimant. That is because the actual sum owing under the loan of VT 27,987,983 was never at any stage disclosed to the Claimant. Instead, the Second Defendant deceptively and cunningly supplied the amount of VT 18,820,000 to "*lure*" the Claimant to form a belief that VT 18,820,000 would be deducted from the settlement sum, which deprived him from selling at a higher price. That the Claimant only accepted the offer because he anticipated that after deduction of VT 18,820,000, he would be able to use the surplus to invest in securing his future home.

29. The first and obvious point is that the Second Defendant is not a party to the agreement for the sale and purchase of the Claimant's lease title. It is a fundamental principle that only a person who is a party to a contract can sue on it: *Tweedle v Atkinson* (1861) 1 B & S 393; *Dunlop Pneumatic Tyre Company Ltd v Selfridge* [1915] AC 847. There can be no cause of action against the Second Defendant in relation to the agreement itself given they are not a party to the agreement, the salient terms of which were the purchase price and where the funds to settle the purchase were to be deposited.

30. Mr Leo relied on *Cyrel v National Bank of Vanuatu* in support of his submission that the Second Defendant owed the Claimant a duty of care to disclose the amount outstanding under the loan. *Cyrel* does not assist in establishing whether or not there is a tenable cause of action against the Second Defendant, because the duty of care considered in that case arises in the context of a mortgagee exercising its power of sale. The Court said that the appropriate duty is to take reasonable care to obtain the best price reasonably obtainable at the time of sale. That does not apply in this case, as the present case does not involve a mortgagee sale. The Claimant agreed to sell his property to the First Defendant. In such circumstances, the Second Defendant was not required to consider whether they were sacrificing the "*interests*" of the Claimant.[5]

[5] *I am referring to paragraph 10 of Mr Leo's submissions filed on 10 December 2024*

31. The test for a duty of care has been considered by the Court of Appeal in *Bulememe v Republic of Vanuatu* [2022] VUCA 22 and *Vanuatu Ferry Ltd v Republic of Vanuatu* [2024] VUCA 17. In *Vanuatu Ferry*, the Court said (at paragraph 28):

> *"In Vanuatu, the three stage test set out in Caparo v Dickman[14] applies in considering whether a duty of care arises. The House of Lords, in that case, set out three requirements in establishing duty, first, reasonable foreseeability of harm to the claimant, second, proximity or neighbourhood between the claimant and the defendant and, third, whether it is fair, just and reasonable to impose a duty of care in such a situation."*

32. There is a dispute in the evidence as to the extent to which the Claimant was or was not provided with bank statements. As per *Iririki Holdings*, I consider the issue of whether there is a tenable cause of action on the basis that the facts pleaded in the claim can be proven, and in particular that the Second Defendant did not give him an accurate or up to date loan balance. There is no dispute that the Claimant was aware that the principal sum was VT 18,820,000. He was also aware that the recovery section of the bank was involved.[6]

33. There can be no issue with proximity because of the mortgagor/mortgagee relationship. The "*harm*" alleged by the Claimant is that the net sale proceeds were not as high as he envisaged. Unlike a mortgagee sale, the Second Defendant had no obligation or duty to ensure that the best sale price reasonably obtainable was achieved. The Claimant agreed to the sale price, and it is speculative for him to assert that he would or could have achieved a higher sale price, given the valuations. Therefore, there is no reasonably foreseeable harm, and no tenable cause of action.

34. The Court of Appeal has said that "*Claims should only be struck out if even on the best pleadings possible following amendment the claim is not reasonably arguable": Hocten v Wang. In Bulememe,* the Court said that if the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of amendment.

35. While the claim pleads a duty of care by the Second Defendant, in his written and oral submissions, Mr Leo submits that the Second Defendant failed in its duty to act in good faith, by failing to disclose that the loan balance was higher than VT 18,820,000. So, is a duty to act in good faith reasonably arguable? As already noted, *Cyrel* does not assist in the present case, because the bank is not exercising a power of sale as mortgagee. Mr Leo did not provide any authority to support his submission that the Second Defendant owed a duty to the Claimant in the context of the sale negotiations and the agreement between he and the First Defendant. It was his decision as to whether to

[6] *Refer attachment MP 5 to the Claimant's sworn statement filed on 5 February 2024*

accept or reject the offer, and notably the Second Defendant was not a party to the agreement.

36. Any cause of action asserting that the Second Defendant acted in bad faith or solicited with the government to defraud the Claimant is misconceived. The Claimant breached the agreement when he arranged for the sale funds to be paid into his Bred Bank account and not his account at the National Bank of Vanuatu, which was a term of the agreement. The sale could not be completed without the Claimant giving an unencumbered title, even if that was not an express term of the agreement. It is unsurprising that swift action was taken to remedy where the money was paid, so that the mortgage could be discharged.

37. Therefore, for the reasons set out above, even if the claim was amended, there is no reasonably arguable cause of action in relation to the Second Defendant arising in the context of the agreement entered into between the Claimant and the First Defendant.

38. One final matter is that the Claimant filed an intemperate sworn statement on 21 November 2024, primarily directed towards the Second Defendant. He should not have done so. It is inflammatory and inappropriate. Counsel have an obligation to ensure that sworn statements are not emotive and intemperate.

The claim – First Defendant

39. The First Defendant submits that the Claimant has failed to establish the circumstances that show that misrepresentation occurred. A misrepresentation is a positive statement of fact, made or adopted by a party to a contract and is untrue. It can be made fraudulently, carelessly or innocently.[7]

40. The Claimant's position is that he believed that what was owing under the mortgage was VT 18,820,000, as set out in the recitals to the Deed of Release and relied on that representation in accepting the offer. The difference between the First and Second Defendants is that there is privity of contract between the Claimant and the First Defendant.

41. The issue of the mortgage appears to have been part of the negotiations, and the First Defendant elected to include the principal sum owing to the Second Defendant in the recitals section of the Deed of Release. I accept that the Claimant's outstanding loan balance does not concern the First Defendant, but the First Defendant elected to include details of the principal sum outstanding under the mortgage in the recitals. If the First Defendant does take such a step, then it makes sense to include the actual payout figure which is what matters. The better approach is not to refer to the principal sum at all and include a condition that the seller must provide an unencumbered title on settlement.

[7] *Refer Halsbury's Laws of England, Fifth Edition, Volume 76*

42. It is arguable that there was a misrepresentation by the First Defendant by including the principal sum owing under the mortgage in the recitals to the agreement, leading the Claimant, (at least according to him) to believe that was the total amount outstanding under the mortgage. Whether that is proven or not, is a different matter. There are factual disputes about that issue that need to be ventilated at a trial.

43. Therefore, I decline to dismiss the claim against the First Defendant.

Result

44. The application to strike out the claim against the Second Defendant is granted.

45. The application to strike out the claim against the First Defendant is declined.

46. There is an order for costs in favour of the Second Defendant, as either agreed or taxed. There is an order for costs in favour of the Claimant in relation to the First Defendant, as either agreed or taxed.

DATED at Port Vila this 30th day of January 2025.
BY THE COURT

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Justice M A MacKenzie

REPUBLIC OF VANUATU COUR COURT LEX SUPREME LEX REPUBLIQUE DE VANUATU