

BETWEEN: **GRAHAM HACK**
 First Appellant

AND: **JUBILEE FARM MANAGEMENT LIMITED**
 Second Appellant

AND: **JOHN MAXWELL FORDHAM**
 Respondent

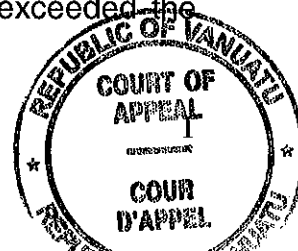
Coram: *Hon. Chief Justice Vincent Lunabek*
 Hon. Justice John von Doussa
 Hon. Justice Ronald Young
 Hon. Justice Nevin R. Dawson
 Hon. Justice Daniel Fatiaki

Counsel: *Mr James Tari for the First and Second Appellants*
 Mr Nigel Morrison for the First and Second Respondents

Date of hearing: 12th July 2010
Date of Judgment: 16th July 2010

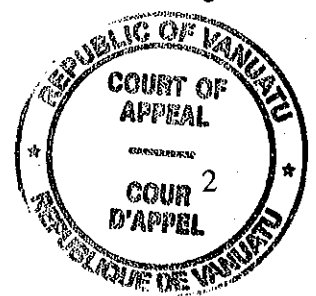
JUDGMENT

1. This is an appeal filed by the First and Second Appellants against a Judgment of the Supreme Court in Luganville, Santo, dated 25 May 2010 entered in favour of the Respondent.
2. On 1 March 2010, the primary Judge consolidated and heard together the following cases: Civil Case No.11 of 2008; Civil Case No.36 of 2008 and Civil Case No.50 of 2008 as they are inter-related and involved similar issues. They are now the subject of this appeal.
3. Civil Case No.11 of 2008 was initially started in the Magistrate’s Court (Civil Case No.36 of 2006) which was then transferred to the Supreme Court because the financial amount claimed in the Counterclaim exceeded the



jurisdiction of the Magistrate's Court. In Civil Case No.11 of 2008, the Claimant (Respondent) claimed, among other matters, against the First Appellant Vatu 1 million for repayment of loan made by him to the First Appellant.

4. In Civil Case No.36 of 2008, the Respondent claimed for the value of a Mitsubshi truck which he alleged had been given to him by the First Appellant as part payment of his debt to the Respondent, and interest calculated at 10% from 25 August 2006 and expenses incurred by him as a result of the truck being removed from his possession under an interlocutory restraining order obtained ex parte by the First Appellant from the Supreme Court.
5. In Civil Case No.50 of 2008, the Second Appellant claimed against the Second Respondent damages for conversion in the sum of VT1,320,000, as compensation for the costs of repair and maintenance of the vehicle. In the alternative, the Second Appellant sought an order that the Defendant pay VT2,000,000 to the Claimant as the price of the vehicle registered number 5899.
6. The three consolidated proceedings raise two (2) issues as noted by the primary Judge in his Judgment (at pages 3 and 4):
 - (a) Whether or not Mr Graham Hack is liable for VT1,000,000 claimed by Mr Fordham?
 - (b) Is the Mitshubishi truck registered No.5899 the subject of Civil Case No.36 of 2008 the lawful property of Mr Fordham?
7. On 25 May 2010, the primary Judge issued a Judgment and held that:
 - (a) The Claimant, John Fordham succeeds in his claims against the Defendant (First Appellant) in Civil Case No.11 of 2008 and Civil Case No.36 of 2008. Accordingly judgment is entered in his favour.
 - (b) The Defendant Graham Hack is liable to pay the Claimant John Fordham the sum of Vatu 1,000,000 including accumulating



interests of 10% in the sum of VT700,841 as at 10 February 2010 and thereafter to the date of judgment.

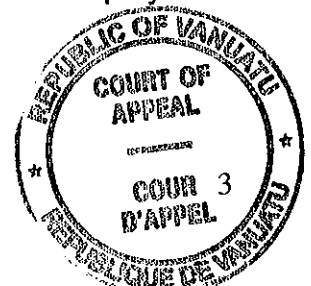
- (c) The Defendant Graham Hack be required to procure the transfer of ownership of the vehicle Reg. No.5899 into John Fordham's name within 14 days from the date of this Judgment.
- (d) Upon such transfer, the Claimant John Fordham be authorised to remove the said vehicle from the premises of the Court forthwith.
- (e) In Civil Case No.50 of 2008, the Claimant Graham Hack is unsuccessful in his claim against the Defendant John Fordham and the proceeding is hereby dismissed in its entirety.
- (f) In all these proceedings heard together, the Claimant John Fordham is entitled to his costs of and incidental to all three proceedings to be paid by the Defendant on the standard basis to be agreed or taxed by the Master.

8. It is against these orders that the First and Second Appellants file their Notice of Appeal and seek the following Orders:

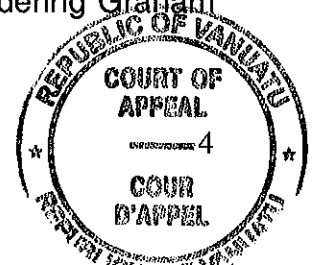
- 1. That judgment of the consolidated Supreme Court Civil Case No.11 of 2008, Civil Case No.36 of 2008 and Civil Case No.50 of 2008 dated 25 May 2010 be called up and quashed;
- 2. That the judgment for VT1,000,000 plus interest ordered to be paid by the First Appellant Graham Hack be set aside;
- 3. That the vehicle registered No.5899 continue to be registered under the name of the Second Appellant, Jubilee Farm Management Limited;
- 4. That the interest calculated at 10% is excessive;
- 5. That the Respondent pays the costs of this appeal;
- 6. Any other orders as this Court deems fit.

9. The First and Second Appellants rely on the following grounds:

- 1. That the Supreme Court erred in fact and law in relying on section 11 of the Employment Act as the legal authority in finding Graham Hack is liable for the VT1,000,000. Section 11 of the Employment

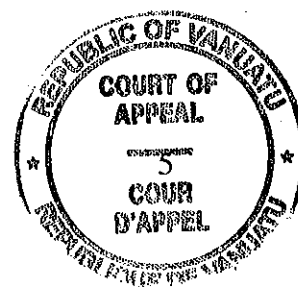


- Act only deals with transfer of a contract of employment. It does not cover a loan given to Sovereign Development Limited;
2. That the Supreme Court erred in fact and law in ordering Graham Hack to transfer Vehicle Registration No.5899 to John Fordham. The owner of the vehicle is Jubilee Farm Management Limited who is not a party to Civil Case No.36 of 2008;
 3. That the Supreme Court erred in fact and law in ordering Graham Hack to transfer Vehicle Registration No.5899 to John Fordham when there is no consent for the transfer of vehicle by the Jubilee Farm Management Limited;
 4. That the Supreme Court erred in fact and law in deciding that Graham Hack pay the costs of the three proceedings;
 5. That the Supreme Court erred in fact and law in deciding that Graham Hack pay interest on the VT1,000,000 at the rate of 10% which is excessive;
 6. Any other grounds as may be advanced by counsel.
10. The grounds of appeal will be dealt with in turn or together when it is necessary to do so.
11. As to the First ground of appeal, we agree with the primary Judge that Mr Graham Hack is liable for the loan repayment of VT1,000,000 but for different reasons than these advanced by the primary Judge. We agree with the submissions by the Appellants that section 11 of the Employment Act [CAP.160] is not applicable in this case as it does not cover loan repayment provisions. But Mr Graham Hack must be bound by his own pleadings when he admitted that a loan of Vatu 1,000,000 was made to him by Mr Fordham (the Respondent) (see paragraph 2 of the Defence filed in Magistrate's Court Civil Case No.36 of 2007 which became Supreme Court Civil Case No.11 of 2008). The first ground of the appeal fails.
12. Grounds 2 and 3 of the appeal are dealt with together. The Appellants contend that the Supreme Court erred in fact and law in ordering Graham



Hack to transfer vehicle registration No.5899 to John Fordham as the owner of the vehicle is Jubilee Farm Management Limited. Jubilee Farm Management Limited is not a party to Civil Case No.36 of 2008 and also that it did not give its consent for the transfer of the subject vehicle.

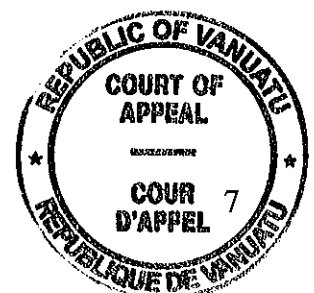
13. It is common ground that the Mitsubishi vehicle registration No.5899 was used for the purposes of a business conducted by the First Appellant (Mr Hack) since its purchase in or about early 2005. It was an asset of Santo Exports Limited until the company was struck off the Companies Register on 23rd May 2005. It was used for the purposes of "Clean and Green". The subject vehicle was in the possession of Mr Fordham (the Respondent) during his employment and when Mr Fordham's employment concluded, he retained the truck and held it against debts owed to him by Mr Graham Hack.
14. The primary Judge agreed and accepted the submissions by Counsel Mr Nigel Morrison for the Respondent that consequent upon the vehicle being retained in the possession of Mr Fordham since on or about August 2006, the vehicle had become the lawful property of Fordham.
15. We are satisfied that there is overwhelming material evidence before the Judge to make such findings. The Judge accepted the sworn statement of Terry Alick filed 21 August 2009 in support of the Respondent's claim. On or about 26 August 2006, the Respondent drove in the subject vehicle to the work premises of Mr Hack with Police Officer Terry Alick in attendance. Mr Terry's statement shows a typed schedule of factory assets and items delivered up by Mr Graham Hack to Mr Fordham and offset against their debt situation [TA1]. Mr Terry's statement exhibited a further handwritten list [TA2] prepared by Mr Graham Hack. The handwritten list included the subject vehicle with the value agreed at Vatu 2,000,000. It is noted that on the right hand column beside that vehicle was a credit value of Vatu 2,000,000 to Mr Hack for providing the truck in part settlement to Mr Fordham.



16. There were also 4 other items on the handwritten list none of which have led to dispute between the parties within the Court proceedings. On 26 August 2006, the Respondent took the handwritten list from the First Appellant and drove away with the subject vehicle and in the company of Police Officer Terry Alick. There was no evidence of opposition or dispute from the First Appellant. There was clear evidence of offer and acceptance from the conduct of the First Appellant and the Respondent.
17. The sworn statement of Mr Fordham which was accepted by the Judge shows that on or about 25 October 2007, Mr Fordham placed an advertisement in the Daily Post Newspaper in an effort to sell the vehicle which had been in his possession since before the August 2006 meeting. As the facts show, it was then that the First Appellant filed a cross-claim through his lawyer in the Magistrate's Court in Civil Case No.36 of 2007 (which later became Supreme Court Civil Case No.11 of 2008 on the 26 October 2007) claiming the subject vehicle belonged to Santo Exports Limited. The First Appellant has subsequently disregarded such a claim and changed his case to assert that the vehicle is an asset of the Second Appellant and belonged to the Second Appellant.
18. The First Appellant was the sole shareholder in Santo Exports Limited, and is the sole shareholder in the Second Appellant. It is clear on the evidence that the First Appellant treated the vehicle as his property, and even if at some stage the vehicle was registered in the name of the Second Appellant it was at all times within his power to deal with the vehicle.
19. Based on the above evidence, the law to be applied in the present case is the basic law of contract of offer and acceptance. The First Appellant provided the handwritten offer to the Respondent to reduce his debt by Vatu 2,000,000 by delivery of the Mitsubishi vehicle registration No.5899. The Respondent by his conduct accepted that offer and drove away in the vehicle. [See Law of Contract 8th New Zealand Edition at pages 35 to 63 inclusive].



20. We are satisfied that the Respondent had become the lawful owner of the subject vehicle registration No.5899 by the agreement and conduct of the parties on 26 August 2006.
21. We are also satisfied that the Judge was right in rejecting the First Appellant's claim of a liability for rental monies and/or costs of repairs and maintenance as it was not established by the evidence. For the first period claimed, the Respondent was using the vehicle with the First Appellant's consent in the course of the First Appellant's business. During virtually the whole of the second period claimed, the Respondent was the owner of the vehicle. Further, the evidence failed to provide a basis for quantifying the amounts claimed.
22. We are further satisfied that the Judge was right in rejecting the evidence and submissions arising from the claim that ANZ Bank have a charge over the Mitsubishi vehicle registration No.5899. The First Appellant attached to his sworn statement one page document headed up ANZ Details of Facilities. We note the document is undated; it is far from complete being only 1 page of probably a substantial document; it is unclear who the customer is; it is only an offer of finance and it is unclear as to whether that offer was ever accepted; it was not corroborated by any registration of charge evidence; it is not corroborated by any known activity by ANZ Bank to protect what the First Appellant alleges as the Bank's security and this despite evidence from the First Appellant that ANZ Bank are familiar with the existence of the subject proceedings. We are therefore satisfied that grounds 2 and 3 cannot stand. They are dismissed.
23. The last two grounds relate to the orders for costs and interests of 10% awarded in favour of the Respondent. We are satisfied that the Respondent is entitled to his costs in the Supreme Court and in this Court. We are further satisfied that the Judge was correct in awarding interest of 10% on the total loan of VT1,000,000 as this rate was agreed to by the First Appellant and the Respondent.



24. We confirm Orders (a), (b), (c), (e) and (f) made by the Judge. As to order (d) we express our concern that an Interlocutory injunction was made restraining the use of the vehicle registration No.5899 for a period of 12 months. The vehicle's condition will have deteriorated. There was no undertaking as to damages made before the grant of such an order, and in any event the Appellants could have been adequately compensated by an award of damages. The interlocutory restraining order should not have been made. The order is now discharged and the Respondent is entitled to take immediate possession of the vehicle and remove it from the Court premises.
25. The appeal is dismissed with costs against the Appellants at the standard rate.

DATED at Port-Vila this 16th day of July 2010

BY THE COURT


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Chief Justice Vincent LUNABEK


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Justice John von DOUSSA


.....
Justice Ronald Young


.....
Justice Nevin DAWSON


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Justice Daniel FATIAKI

