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

CIVIL APPEAL NO. 17 OF 2013

BETWEEN: **FRANK AND LUCIENNE GALLO**
Appellant

AND: **GUY BENARD**
First Respondent

AND: **CANDICE BENARD**
Second Respondent

AND: **MARIE CELINE CHANE SI LIN**
Third Respondent

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Raynor Asher
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Robert Spear
Hon. Justice Dudley Aru

Counsel: Ms E N Roberts for the Appellants
The First Respondent in person for all Respondents

Date of Hearing: Monday 15 July, 2013

Date of Judgment: Friday 26 July, 2013

JUDGMENT

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1. The appellants, Frank and Lucienne Gallo, appeal against a summary judgment entered against them in the Supreme Court on 23 May 2013 for Vt 13 million pursuant to rule 9.6 of the Civil Procedure Rules No 49 of 2002 in favour of the second and third respondents. The amount of Vt 13 million was the purchase price paid under a contract of sale and purchase of the vessel Baby Blue, which contract was later rescinded on the ground that the vessel

did not meet the contract description. The proceedings in the Supreme Court were brought to recover that sum.

2. The statement of claim pleads that the second and third respondents are respectively the daughter and wife of the first respondent (Benard). He was one of the claimants in the proceedings in the Supreme Court but he is not a party to the judgment under appeal. Benard and the third respondent are 50% shareholders in a local company Trident Holdings Ltd (THL) which carries on a fishing operation in Vanuatu. THL was also a claimant in the court below but is not a party to this appeal.

3. In a sworn statement that was before the Supreme Court Benard deposed that in October 2012 he and THL were looking to acquire a vessel to supplement the operation of two other vessels already operated by THL. On 3 October 2012 Frank Gallo, one of the appellants, visited Benard and advised him that a vessel, Baby Blue, then situated in Noumea, New Caledonia, was available for purchase at Vt 13 million. That vessel, as described by Frank Gallo, met the needs of THL. An agreement was reached for the purchase of Baby Blue. The purchase price was advanced by the second and third respondents and paid to the appellants. However after payment of the purchase price, and when delivery of the ship was to be taken in the Noumea, it transpired that the Baby Blue was a *"wreck"* – certainly not in the seaworthy condition that had been represented – and the ship was rejected.

4. The dispute between the parties in the Supreme Court and on this appeal centres on who are the parties to the contract of sale and purchase of Baby Blue and, in turn, who are the proper parties to sue and be sued.

5. The grounds of appeal contend that the appellants, who were the defendants in the Supreme Court, were not the vendors of Baby Blue and that the second and third respondents were not the purchasers: in short none of them were parties to the contract, and the summary judgment was wrongly entered. The appellants contend that the second and third respondents had no standing to sue for the purchase price, and that the appellants were merely agents for the disclosed owner of Baby Blue, SAS Baby Blue, which was the vendor.

6. The application for summary judgment was decided on the pleadings and sworn statements. Having considered the papers, the judge below noted that the appellants in their defence admitted that the sum of Vt13 million was paid into their account with the ANZ bank by the second and third respondents on 31st of October 2012, and that the appellants did not deny that the money was advanced by the second and third respondents in payment of the purchase price for Baby Blue. The judge noted that the defence advanced by the appellants was that they paid the sum of Vt 13 million into the account of

"SAS Baby Blue". Without further reference to additional pleadings in the defence or discussion about facts contained in sworn statements the judge said that the appellants had not filed any sworn statement setting out the reasons why they have an arguable defence. Being satisfied that the appellants had none, the judge entered judgment in favour of the second and third respondents.

7. It is not clear from the ruling whether the judge had regard to a sworn statement by Frank Gallo made on 23rd of April 2013 in support of the defence, or whether the judge considered the facts deposed to in it could not give rise to an arguable defence; that is, did not raise a real prospect of successfully defending the claim. It will be necessary to refer later to Frank Gallo's sworn statement.

8. On an application for summary judgment the plaintiff must satisfy the court that the defendant has no real prospect of successfully defending the claim: rule 9.6(7). The defendant need not establish on the merits that a proposed defence will necessarily succeed. The defendant need only show that there is a realistic chance that a ground of defence raised by the pleadings and the material before the court could constitute a good defence to the claim.

The Pleadings

9. The statement of claim it seems was drawn by Benard. It pleads in detail facts surrounding the sale and purchase transaction but characteristic of a pleading drawn by a lay person it fails to clearly identify the cause or causes of action relied upon. We consider the best view of the pleading is that the claimants seek the return of the money paid under the contract of sale and purchase upon the ground that the contract has been rescinded as the goods were not of the standard required by the contract.

10. Besides seeking *"reimbursement"* of the purchase price, the remedies sought include compensation for lost revenue and lost opportunities and *"common law damages"*. The statement of claim does not plead fraud, deceit or misrepresentation against the appellants as a basis for the damages claim. The summary judgment was for the fixed sum of Vt 13 million. No question of damages to be assessed was raised in the application for summary judgment.

The contract alleged – who was the vendor?

11. The statement of claim pleads that Baby Blue was owned by *"the so-called New Caledonia Company 'SAS Baby Blue' of which Mr Gallo presented himself as a shareholder and the official agent."* The pleadings allege that the appellants were engaged in business in New Caledonia and Vanuatu as marine brokers, and that they were commissioned by the company that owned Baby Blue to find a potential customer. The defence also pleads that the appellants

are not the owners of Baby Blue. The sworn statement of Benard dated 20 March 2013 annexes correspondence with Frank Gallo which he says was *"for establishing the principles of the sale – purchase conditions for F/V 'Baby Blue' with the ship broker acting for and on behalf of the vendor"*.

12. In his sworn statement dated 23rd of April 2012 Frank Gallo says that: *"I am only the agent for the seller; SAS Baby Blue."* He attached correspondence which added support for this assertion.

13. As to the payment of the purchase price, which all parties agree was paid to the appellants, Frank Gallo in his sworn statement says that the purchase price upon receipt was paid to the account of SAS Baby Blue.

14. Benard argued before this Court that there is no evidence that the appellants paid the purchase price into the account of SAS Baby Blue, and submitted that the court should infer that the appellants' retained the money themselves. There was no positive evidence before the judge to support this proposition which is contrary to the sworn statement of Frank Gallo. Whether the appellants retained the money, and whether this would be supportive of a case against them, is a matter that could be explored at a trial, but the material before the court on the application for summary judgment was that the appellants had paid over the money to their principal, the contracting party SAS Baby Blue.

15. Benard also argued before this court that the sale and purchase of Baby Blue should be governed by French law. He submitted that under French law an agent in the situation of the appellants would be personally liable under a contract of sale and purchase if the goods are not of the description required by the contract, even though the agent is acting for a disclosed principal. It is not clear to us whether these arguments were raised in the court below.

16. As we understand the argument, it is not made on the basis that the law of New Caledonia applies as the proper law of the contract, but on the basis that the applicable French law was part of the law inherited by Vanuatu at Independence under Article 95 of the Constitution. As the vessel was registered and present in New Caledonia, and SAS Baby Blue is a New Caledonian company it is argued that French law is the appropriate law to apply. (We note in passing that this argument is inconsistent with the claim made for *"common law damages".)*

17. Benard does not dispute that under the common law an agent, generally speaking, is not liable under a contract negotiated by him for a disclosed principal.

18. We are not satisfied to the degree required for summary judgment that French law is the proper law of the contract. In any event, we have considered the provisions of the French Civil Code to which Benard has referred this Court. Upon the translations he has given the Court, the principles of French law are very similar to those of the common law. We do not think the provisions he has cited in his submissions establish the general proposition which he asserts. They do establish, as is the case also under the common law, that an agent may be personally liable for fraudulent conduct and misrepresentations made by the agent. However the case presented on the pleadings is not one which raises fraudulent misrepresentation or other fraudulent conduct as the basis for the claim made against the appellants personally. The claim before the court was confined to one for reimbursement of the purchase price because the ship did not meet the description and condition required under the contract.

The contract alleged – who was the purchaser?

19. The statement of claim pleads that the second and third respondents are 50% shareholders in THL. At the time Frank Gallo approached Benard, THL was completing a joint venture agreement with the Mr Jerome Brandt for him to assume subcontract fishing operations for THL. It is pleaded that: *"as a consequence the second and third (respondents) on behalf of THL had agreed to personally lend the amount of 13 million to Mr Jerome Brandt... for him to purchase the supply vessel 'Baby Blue' and then to bare boat charter the ship to THL for its operations"*

20. When the Baby Blue was discovered not to be in order to sail, and to be a *"wreck"*, it is pleaded that the Jerome Brandt and his crew went to the local police station in New Caledonia to lodge a complaint against the sellers of Baby Blue. In consequence of the failure of the purchase, it is pleaded that the second and third respondents lost Vt13 million without receiving anything from the appellant's, and that Jerome Brandt lost the benefit of the contract he had signed with Torba Province to collect the catches of a local fisherman.

21. A sworn statement from Jerome Brandt said that the deal was that the second and third respondents would lend him the money for the purchase of Baby Blue. He was to mortgage the ship in favour of the lenders, the second and third respondents. The sworn statement dated 23rd of April 2013 from Frank Gallo exhibits the bill of sale executed for the sale of Baby Blue, which shows Jerome Brandt as the purchaser.

22. The clear picture emerging from the material before the Court is that Jerome Brandt was the purchaser, and that the second and third respondents were financiers. In that situation the proper party to sue on the contract was Jerome Brandt, not the second and third respondents. On this ground also the appellants had a realistic prospect of successfully defending the claim.

23. Benard argued before this Court that the terms of the joint-venture between the claimants were such that the second and third respondents would have standing to sue as co-owners of Baby Blue. However the material before the Supreme Court did not establish this, and did not exclude the prospect that the claim could be successfully defended on the ground that the second and third respondents did not have standing to bring the action.

24. This deficiency in the claim could be cured by the respondents joining Jerome Brandt as a claimant, but that was not the situation when the court considered the application for summary judgment. The deficiency in the substantive claim against the appellants could be cured at trial by a pleading against them being added to plead deceit and fraudulent misrepresentation, but such a claim was not pleaded and in any event would have been difficult to pursue by way of summary judgment.

25. For these reasons the court could not be satisfied on the pleadings and statements before it that the appellants did not have a real prospect of successfully defending the claim. The application for summary judgment should have been refused.

26. The appeal must be allowed. The judgment and incidental orders in favour of the second and third respondents against the appellants made on 25th of May 2013 are set aside.

27. The matter is returned to the Supreme Court.

28. The second and third respondents must pay the appellants' costs of this appeal on the standard basis.

Dated at Port Vila this 26th day of July, 2013

ON BEHALF OF THE COURT

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

Chief Justice Vincent Lunabek