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

Civil Appeal
Case No. 17/997 CoA/CIVA

BETWEEN: Alan Cort

First Appellant

David Cort

Second Appellant

AND: Paul Savenkov

Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd
Hon. Justice Paul Geoghegan

Counsel: *Mr Dane Thornburgh for the Appellants*
Mr Garry Blake for the Respondent

Date of Hearing: *Monday 10th July 2017*
Date of Judgment: *Friday 21st July 2017*

JUDGMENT

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1. This is an appeal from a Supreme Court judgment that held that the respondent Mr Savenkov was entitled to recover the sum of AUD$ 500,000 from the defendants, that sum having been paid to them as a deposit on a purchase of an

interest in real estate through the structure of a corporate entity or as otherwise to be agreed between the parties. The purchase did not eventuate. The Judge found that there had been a complete failure of consideration on the part of the defendants which justified that conclusion.

2. That decision is now appealed by the appellant Alan Cort on the following grounds:-

   a) That there had been an express concession by counsel for Mr Savenkov that emails which bore the name of Mr Cort were actually authored by his father Mr David Cort, without Alan Cort's knowledge or consent. It is submitted that the trial Judge's findings were expressly against the concession made during the trial, a course which the trial Judge was not entitled to take and which resulted in a breach of procedural fairness owed to Mr Cort and the wrong conclusion on the part of the trial Judge.

   b) That the Judge was wrong to find that there was a total failure of consideration and that there was a contract between the parties which provided in clear and ambiguous terms that the AUD$ 500,000 paid by Mr Savenkov was non-refundable.

   c) That the agreement between the parties was actually an agreement between a company known as Aljan Ltd and Mr Savenkov.

Background

3. In or about June 2007 the Corts entered into discussions with Mr Savenkov with a view to joining together in a business enterprise involving the acquisition and development of real estate in Vanuatu.

4. There were a number of e-mails exchanged between the parties as to the precise form any investment by Mr Savenkov would take, however there were specific references to the acquisition of a leasehold title for Aese Island.

5. On June 29th 2007 the Corts sent to Mr Savenkov an agreement for sale and purchase of shares in a company. That agreement provided for a company known as Palm Bay Corporation to purchase 50% of the shares in four companies, Aljan International Ltd ("Aljan"), Bedell International Ltd, Bokissa International Ltd and Watansa Holdings Ltd. The recitals of the agreement provided that those companies:-

> *"Are the proprietors or will at completion be the proprietors of the leasehold titles as set out and referred to in schedule 1."*

6. Schedule 1 of the agreement listed a total of ten leasehold titles which included the title for Aese Island.

7. Aljan and the other companies referred to in paragraph 5, were controlled by the Corts who own 100% of the shares in those companies.

8. The purchase price set out in the agreement was AUD$ 11 million, which was to be paid by payment of a deposit of AUD$ 500,000 on June 29th 2007 *"such payment to be non-refundable notwithstanding anything contained within this agreement"*, with the balance being met by payments of AUD$ 2 million on September 21st 2007 and AUD$ 8,500,000 before June 30th 2008.

9. The agreement was never signed by the parties but on July 4th 2007 Mr Savenkov transferred AUD$ 500,000 to a bank account nominated by the defendants.

10. On or about June 21st 2007, Aljan agreed to purchase the leasehold title to Aese Island. A transfer of that lease was registered on August 14th 2007. In separate proceedings it was subsequently alleged that Aljan had acquired the leasehold interest by fraud and that the register should be rectified in order to register an entity known as the Valele Trust as the proprietor of the leasehold interest. In a Court of Appeal decision determining the issue[1], the Court of Appeal held that Aljan could not be regarded as a bona fide purchaser for value of the lease, that it had obtained a registered title as proprietor of the lease by fraud and that it was to hold the lease as a constructive trustee for the trustee for the Valele Trust.

11. Accordingly, while Mr Savenkov paid the deposit as requested, no title to Aese Island was ever lawfully obtained.

The Supreme Court Judgment

[1] Colmar v. Rose Vanuatu Ltd [2011] VUCA 20

12. It was essential to the case presented by the Corts that the AUD$ 500,000 paid by Mr Savenkov was paid pursuant to the agreement for the sale and purchase of shares.

13. The trial Judge held that Mr Savenkov's payment was not made pursuant to the *"deposit clause"* in the agreement. He referred to it being clear that Mr Savenkov had concerns about the draft share purchase agreement and sought answers and assurances from the defendants about the various terms of the agreement and what *"security"* was being provided for any monies which Mr Savenkov paid.

14. After carefully analyzing the email exchanges between the parties the trial Judge stated:-

> *"32. I am satisfied from having carefully considered the emails exchanged by the parties that while there was an unsigned draft share purchase agreement sent by the defendants to the claimant on 27 June 2007, the defendants immediate concern as "...the registered holders of 100% of the share capital of the company" was not so much in finalizing and executing the share purchase agreement, but in obtaining payment of the sum of AUD$500,000 from the claimant personally so that it could be paid over to the vendor of Aese Island by way of a deposit for the purchase of Aese Island.*
>
> *33. Needless to say in such circumstances, I am unattracted by questioning relating to "privity of contract" and the "identity of the*

parties" to the share purchase agreement. In my view so long as the share purchase agreement remained unexecuted, there was no valid or binding contract in existence that could bind the named companies. Equally, I am satisfied that until that event occurred, all negotiations were done by the claimant and defendants in their personal capacity and as majority/sole shareholder(s) of the companies named in the share purchase agreement.

34. In other words the share purchase agreement provides a backdrop in context within which the transfer of the AUD$500,000 was made "in trust and good faith" by the claimant personally at the direction of the defendants into a bank account nominated by the defendants whose own company "Aljan (Vanuatu) Ltd" had already entered into an agreement to purchase the lease of Aese Island on or about 21 June 2007 from "Rose Vanuatu Ltd" of which the principal was Dinh Van Than."

15. Having determined that the contract was one between the parties personally the trial Judge went on to hold that there had been a total failure of consideration and stated that:-

"46. In the present case I am satisfied that the defendants had promised to acquire the lease of Aese Island for all their benefits and the performance of their agreement with the claimant (not the share purchase agreement) and under which the claimant paid over the sum of AUD$500,000. I am also satisfied that the defendants did not fulfil their promise and that there has been a complete failure of

consideration. Accordingly the claimant is entitled to recover the AUD$500,000 he paid to "Aljan Enterprises Pty Ltd" at the defendant's direction".

Grounds of Appeal

16. The first ground of appeal was that there had been an express concession made by counsel for Mr Savenkov, that David Cort had written emails regularly in the name of Alan Cort without Alan Cort's knowledge and that Alan Cort had no ability to write emails until approximately 2 to 3 years ago. It was submitted that the trial Judge's findings in respect of Alan Cort's liability completely ignored this concession and that the trial Judge was wrong to do so.

17. This ground may be easily disposed of. There is no reference in the judgment, the Judge's trial notes or any other document, to such a concession. Mr Blake as counsel for Mr Savenkov strenuously denied that such a concession had ever been made.

18. Given Mr Thornburgh's inability to establish the making of any such concession this ground must fail and Mr Cort is simply bound by the Judge's findings as to his credibility, namely, findings that categorically rejected Mr Cort's claims that his father had acted without his knowledge and/or consent, that Mr Cort was not part of the crucial negotiations regarding the payment of AUD$ 500,000 and that for that reason he should not be liable to repay that sum to Mr Savenkov.

19. As to the second ground of appeal, it was submitted on behalf of Mr Cort that the finding by the trial Judge that the non- signing of the share transfers meant that the agreement was not performed was in error and that accordingly the AUD$ 500,000 was paid pursuant to the share agreement as a non-refundable deposit.

20. That submission must fail. Firstly, the draft agreement sent to Mr Savenkov was never signed by the parties. Secondly, there was no evidence which establishes any agreement between the parties that they would be bound by the term of the agreement which provided that payment of the deposit would be non-refundable. On the basis of the evidence before the trial Judge he was correct in his conclusion that the parties had not agreed to be bound by the terms of the draft share purchase agreement and that the payment of AUD$ 500,000 by Mr Savenkov was one made *"in trust and good faith"* between the parties on the basis that it would be used for the acquisition of a leasehold title on Aese Island.

21. It must also be said that even if there had been agreement that the deposit was a non-refundable deposit there was a complete failure of consideration and in those circumstances a claim by Mr Savenkov for repayment of that sum would be irresistible.

22. The third ground of appeal submitted by Mr Thornburgh was that it was clear from the evidence placed before the Court that the agreement was not one between the Corts and Mr Savenkov but one between Aljan and Mr Savenkov.

Accordingly there was no privity of contract. The basis for this submission was that it was common ground that the monies were transferred from Mr Savenkov's bank account to an Australian account in the name of Aljan and that it was never established by Mr Savenkov that the monies were paid to Mr Alan Cort.

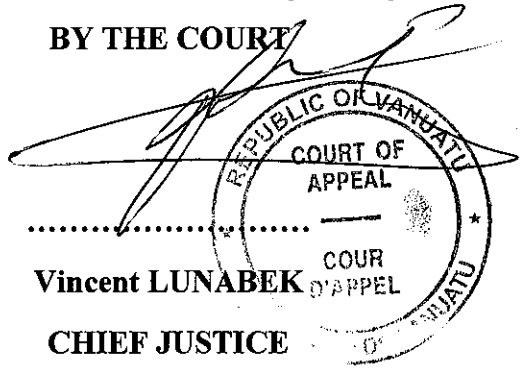
23. There is nothing in this ground. Quite apart from the fact that the trial Judge was right to conclude that the contract was one between the Corts and Mr Savenkov, it does not matter that the funds were not received by Alan Cort and that they were paid into the account of a third party. Clearly, the funds were paid into the account of a third party at the direction of Mr Cort and in those circumstances, the issue of privity of contract does not arise.

24. For these reasons the appeal is dismissed.

25. Costs on the appeal are awarded in favour of Mr Savenkov against Mr Alan Cort on a standard basis, to be agreed or determined.

DATED at Port Vila this 21st day of July, 2017

BY THE COURT



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Vincent LUNABEK

CHIEF JUSTICE