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

Civil Appeal
Case No. 17/241 CoA/CIVA

BETWEEN: SALING STEPHENS

Appellant

AND: CREDIT CORPORATION (VANUATU) LIMITED

Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice Oliver A. Saksak
Hon. Justice Ronald Young
Hon. Justice John Mansfield
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd
Hon. Justice Mary Sey

Counsel: ***Mr Saling Stephens for the Appellant***
Mr Garry Blake for the Respondent

Date of Hearing: ***4th April 2017 @ 9:00 am***

Date of Judgment: ***7 April 2017 @ 4:00 pm***

JUDGMENT

1. This appeal complains of a judgment of the Supreme Court dated 12 December 2016.

2. The Supreme Court gave summary judgment to the respondent for VT1,495,165 in relation to principal and interest outstanding under a loan agreement and directed the appellant to deliver up possession of the car, and for the proceeds of its sale first to be applied to the costs of the sale, secondly to payment of the judgment debt (and

further accrued liability under the Bill of Sale) and finally any surplus was to be paid to the appellant.

3. For the reasons set out below the appeal against those orders is dismissed. The appellant is to pay to the respondent its costs of the appeal fixed at VT50,000.

BACKGROUND

4. In November 2012 the appellant decided to by a Mazda Vehicle costing VT4.7 million. He had a deposit of VT1.715 million, so he needed to borrow money to complete the purchase. He arranged the finance through the respondent.

5. The agreement between the appellant and the respondent was made by a letter of offer of 14 November 2012 by the respondent, and it's acceptance by the appellant on the same day. The lending agreement, after allowing for the deposit, was for VT3,044,700, made up of the purchase price less the deposit plus a loan establishment fee of VT59,700. The term of the loan was 36 months. The interest payable (unless there was default in making the monthly payments to repay principal and interest) was calculated at VT1,461,456 so the total of principal and interest was VT4,506,156. The 36 monthly repayments were at VT125,171 per month.

6. The respondent as lender took security by a Bill of Sale dated 16 November 2012.

7. As sometimes happens, the appellant did not make all the monthly repayments in time, and sometimes he missed monthly payments

or made payments less than the full monthly payments. During the periods of default, the respondent calculated the interest payable at a higher rate as specified in the agreement.

8. Ultimately, the respondent brought proceedings claiming the outstanding principal and interest based on the ongoing default, and for possession of the vehicle under the Bill or Sale to sell it and apply the proceeds of sale to payment of its debt.

9. The Supreme Court judgment accepted those claims. It also rejected the appellant's counterclaim that:

   (a) he should be given credit or further credit for the deposit of VT1.715 million he made forwards purchase of the vehicle; and

   (b) he should be given credit for the accessories the had added to the vehicle, at his own cost and for which he had paid VT824,160.

10. It said that, as the vehicle had initially cost VT4.7 million and the deposit had been taken into account when fixing the amount of the loan, he should not get credit again for the deposit. It also said that the new accessories, if they had increased the value of the vehicle, would be reflected in the sale value to the benefit of the appellant. The appellant did not claim that he had added the accessories with the express approval of the respondent, or on the basis that the respondent would either give him credit for what he paid or would reduce his debt by the amount he had paid for the accessories.

11. Finally the Supreme Court rejected arguments by the appellant that summary judgment should not be given because the case in favour of the respondent was not clear enough under Rule 9.6(7) of the Civil Procedure Rules, or because the form of the summary judgment application did not completely satisfy Form 15 as required by Rule 9.6(3) and (4) of the Civil Procedure Rules as the hearing date for the application was missing. That irregularity was excused because the appellant was fully aware of the hearing date in ample time before the hearing.

The Grounds of Appeal

12. There are 10 grounds of appeal, which can be grouped into three groups:

(1) procedural flaws alleged;
(2) challenges to the merits of the judgment;
(3) challenges to the disposition of the counterclaim.

13. They will be addressed under those sub-headings.

Consideration

(a) Procedural flaws alleged

14. As a starting point, it is important to note that the Overriding Objective of the Civil Procedure Rules in Rule 1.2 is to ensure cases before the Court are dealt with justly, fairly, and efficiently. Rule 1.5 obliges the parties to a proceeding to help the Court to act in accordance with that objective.

15. The complaint (not made in the grounds of appeal) that the claim was transferred from the Magistrate Court to the Supreme Court, when the claimed arrears exceeded the jurisdictional limit of the Magistrate Court is, in that light, of no consequence. The alleged defect in the application for summary judgment would be important if the appellant did not have knowledge of the hearing date in ample time to prepare for the hearing. But he did know of the hearing date in ample time. The claim that Rule 4.2(1)(a), (b) and (c) of the Civil Procedure Rules required more detail in the statement of the case are quite hollow when the appellant knew what the claim was for, and the application for summary judgment was supported by a detailed sworn statement of the collections officer of the respondent with the necessary supporting documents. The fact that the appellant had filed a defence disputing his indebtedness is not to the point. The claim was a liquidated claim, based upon the agreement, and the filing of a defence disputing what was claimed about the operation of the agreement does not change its character. The fact that the judgment was, in precise terms, greater than the money claim at the time it was made, is not an error because the claim when made included the ongoing accumulating debt because of ongoing non-payment of the monthly repayments.

16. In all those respects, the appellant was not able to point to any impairment of the way he was able to prepare to present a case on the summary judgment application. In effect, both before the primary judge (as is recorded in the judgment as [17] and [19] of the Supreme Court judgment), and on this appeal, he accepted that he knew the case he had to meet in ample time to prepare for the summary judgment application, and he was given a proper opportunity to present his case.

17. There is nothing of substantive merit in the alleged procedural flaws.

(b) Challenges to the merits of the judgment.

18. The appellant had said to the primary judge that he had been unwell for significant periods leading up to the summary judgment application, which had made it difficult for him to keep up with the payments under the agreement. Naturally, the primary judge was, and the judges on the Court of Appeal are, sympathetic to the problems facing the appellant.

19. In the grounds of appeal, that circumstance had evolved into an (unpleaded) defence of "force majeure". That is really an unmeritorious ground of appeal. As noted, it was not pleaded. There is no evidence of facts which (if pleaded) might be relied upon. In fact, "force majeure" is a reference to a clause in a contract which provides that, in certain specified circumstances, the parties are no longer to be bound by the contract, or their obligations under the contract are suspended. There is no such clause in the agreement or the Bill of Sale. See generally Chitty on Contract, Vol 1, General Principles at 14 – 137 ff (2004 Edition).

20. There was no meaningful argument presented by the appellant that the agreement was not enforceable, that the appellant had not maintained the monthly payments, or that the amount of the judgment was wrong. Nor was there any meaningful argument that the Supreme Court was wrong to order the possession of the vehicle

should be given to the respondent, or about how the vehicle should be sold or about how the sale proceeds should be applied.

21. The ground of appeal that it was wrong to order interest and costs as covered by the agreement was not pursued on the appeal. It is clear correct. If the agreement provides for the consequences of default, they must be given effect.

(c) Challenges to the disposition of the counterclaim.

22. There are two grounds of appeal on this topic.

23. The first is that the Supreme Court refused to address the counterclaim in its merits. That is an inappropriate contention. The merits of the counterclaim (both the credit claimed for the deposit, and the credit claimed for the value of the accessories) were clearly addressed by the primary judge.

24. The claim based on the deposit is also clearly without merit. There is no entitlement to double counting. The agreement records how the amount borrowed from the respondent was calculated, namely the value or price of the vehicle less the deposit plus the establishment fee. On its face, it gives credit for the deposit.

25. The claim that the establishment fee was not agreed to is also clearly wrong. The offer of 14 November 2012, including the establishment fee, was accepted in writing by the appellant on the same day.

26. The claim that direct credit should be given by the respondent for the cost of the accessories purchased by the appellant and added to the vehicle is also plainly wrong. The respondent did not agree to that. Nor was there any evidence that the value of the vehicle was increased by the accessories, either by a specific amount or at all. The primary judge was correct to observe that, if the accessories had increased the value of the vehicle, that increased value would be available to the benefit of the appellant when the vehicle is sold. Depending on the value realised, any increased value by the accessories will either reduce the appellant's indebtedness towards satisfaction of the outstanding liability he has to the respondent, or if there is a surplus, that surplus will be returned to him.

CONCLUSION

27. For the reasons given the appeal is dismissed. The appellant must pay to the respondent costs of the appeal which are fixed at VT50,000.

DATED at Port Vila this 7th day of April, 2017.

BY THE COURT

Vincent LUNABEK

Chief Justice

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