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

Civil Appeal
Case No. 19/2553 CoA/CIVA

BETWEEN: BRIAN FISHER and PAM FISHER
Appellants

AND: CORNELIA WYLIE and DECEASED ESTATE OF BOB WYLIE
First Respondents

AND: GEOFFREY GEE AND PARTNERS
Second Respondent

Coram:	***Hon. Chief Justice V. Lunabek*** ***Hon. Justice J. Mansfield*** ***Hon. Justice J. Hansen*** ***Hon. Justice D. Aru*** ***Hon. Justice V. M Trief***
Counsel:	***Mr G. Melick and Mr R Sugden for the Appellants*** ***Mr C. Wylie appeared in person for First Respondents*** ***Mr P. Finnigan and Ms S. Motuliki for Second Respondent***
Date of Hearing:	***10th February 2021***
Date of Judgment:	***19th February 2021***

JUDGMENT

Introduction

1. This appeal arises from a judgment of the Supreme Court which dismissed all the claims of the Appellants against both the First and Second Respondents. The judgment was given on 20 August 2019 and the Reasons for Judgment published on 5 August 2020. The reasons for judgment are lengthy simply because the claims of the Appellants were so extensive.

2. Since the relevant transaction giving rise to the claims, Mr Wylie has deceased. It is common ground that his role in the relevant events, on behalf of the First Respondents, was a minor one compared to that of Mrs Wylie. It is convenient to refer to the respective parties as the Fishers, the Wylies and GGP unless the context requires a more specific description.

3. The following is based largely on the uncontested findings of the primary judge.

4. The Wylies had run a 'gardening business' for many years. In 2007 they separated the business into 3 parts. One was a nursery and ornamental plants business through Rainbow Gardens Ltd

(RGL), and the others were a food export/import and processing business run through Vanuatu Direct Ltd and a home operated market garden.

5. In 2008, they decided to sell the RGL business. They were also prepared to sell the sublease from which it operated, but that element did not occur. In 2009, the Fishers became interested in purchasing RGL but the negotiations did not progress then to completion. Nevertheless, they decided to move to Vanuatu, and they purchased a residential property. Later in 2009, their interest in purchasing RGL revived.

6. On 15 September 2009, the Fishers and the Wylies entered into a Sale and Purchase Agreement (the Agreement) for the sale of the shares in RGL and for the purchase of its business as a going concern. The price was VT 70 million, with VT 55 million to be paid forthwith and the balance of VT 15 million to be financed by the Wylies as vendors and to be paid on 30 September 2010 that is one year after settlement of the Agreement or 5 days after the contract became unconditional by the securing of VIPA approval. It is common ground that it became unconditional on 1 October 2009, so effectively the balance was payable on 30 September 2010.

7. From 1 October 2009, the Fishers began to operate the business. Mrs Wylie was available for assistance and advice, and the Fishers availed themselves of the assistance and some advice from time to time. The business did not thrive. There are a number of reasons for that canvassed in the evidence. It is not necessary to note them in detail. The Fishers from about mid 2010 tried to sell the RGL business, but they were not successful. The Fishers did not maintain the rental payments due to the Wylies under the sublease or the service payments in respect of the unpaid purchase price of VT 15 million provided as vendor finance.

8. On 27 September 2010 the Fishers purported to repudiate the Agreement, and claimed return of the price paid of VT 55 million and damages. There were numerous breaches of contract asserted by them, relating to the communications made before the Agreement was entered into, to the conduct of the Wylies and in particular Mrs Wylie in the year or so after the Agreement was settled relating to the running of the RGL business, and to the conduct of the Wylies in relation to the Fishers' attempts to sell the business. The Fishers in those circumstances did not pay the outstanding amount of VT 15 million.

9. On 1 October 2010 Mrs Wylie resumed the operation of the business to try and preserve it as an ongoing concern, but ultimately, she did not succeed, and in 2015 following Cyclone Pam the business lapsed.

10. The Fishers then commenced proceedings against the Wylies on 12 October 2010, and not surprisingly was met by a counterclaim for payment of the outstanding vendor finance of VT 15 million, and with other claimed losses. GGP was joined as a defendant, alleging that it had failed to act according to the Agreement in securing and holding the share transfers in RGL, and in failing to remove the Wylies as directors and replacing them with the Fishers. GGP in turn sought indemnity from the Wylies in the event that they were found liable to the Fishers. The pleadings were amended from time to time. When the claims came to trial, the allegations against the Wylies included allegations that they had made fraudulent misrepresentations about the profitability of RGL.

11. GGP had acted as solicitors for both the Wylies and the Fishers in the dealings leading up to the settlement of the Agreement and were the solicitors responsible for ensuring the contractual

arrangement relating to the transfer of share, the appointment of directors and the holding documents in escrow. The allegations against that firm were for its alleged breach of contract and negligence in failing to give the Fishers proper advice before they entered into the Agreement, knowing that RGL was unprofitable, and somehow for some the breaches of contract by the Wylies, including in the documentation for the change of shareholdings and directors. They fortified their claims against GGP by asserting that it had, at all times, a conflict of interest which caused them loss. On the evidence, on the legal aspects of the transaction the Wylies were advised by Mr Gee and the Fishers were advised by Mr Thornburgh. He was a solicitor employed by GGP and left its employment about the time they purported to repudiate the Agreement. The advice they received in relation to taking that step was given by another lawyer, as the letter of 27 September 2010 was under the letterhead of a different solicitor. It is not said that Mr Thornburgh was engaged to give advice about, or involved in, that step. On other evidence, it was found that Mr Thornburgh ceased advising the Fishers when it emerged that there might be a dispute between the Fishers and the Wylies about failure to maintain regular rental and servicing costs on the vendor finance.

12. Without going into the details, the hearing proceeded on complex and detailed issues, relating to a lengthy period of time and conduct both before and during the Agreement. The claim of the Fishers was clearly escalated beyond the reasonable. For example, they claimed the cost of moving to Vanuatu and establishing themselves in Vanuatu and their potential earnings had they remained in Australia as part of their compensatable losses. That is plainly not correct, as on their own evidence, they incurred those expenses independently of any representations or conduct of the Wylies. That claim, when exposed as unmaintainable during her evidence, was abandoned during the hearing.

13. Shortly after the completion of the hearing, on 20 August 2019 the primary judge made orders in relation to the claims. The claims of the Fishers against the Wylies and against GGP were dismissed. On the counterclaim of the Wylies, judgment was entered for the vendor finance of VT 15 million plus interest. They had decided not to pursue the balance of their counterclaim. It was not necessary to address the claim for indemnity by GGP against the Wylies.

14. Costs were awarded in favour of both the Wylies and GGP, with submissions to be made about their quantification. That process has not been completed. It has been deferred pending the outcome of this appeal. As noted, reasons for the judgment were given on 5 August 2020.

15. From this point, we shall refer to the reasons for judgment as the judgment.

The Judgment

16. The necessarily lengthy judgment addresses the evidence of each of the witnesses in some detail.

17. Mr Fisher was the first witness.

18. He gave evidence that the Fishers had consulted several accountants in Australia to receive advice about the purchase of RGL and its business. That advice included that the business looked 'pretty good', and that it would support the proposed debt servicing. Apart from his evidence of the level of stock at the time of the Agreement, his evidence contained a number of complaints which the primary judge thought was either petty or unrealistic because they could have been resolved by the Fishers by taking better advice or by observing what was to be observed (such as the age and

quality of the office equipment.) He sought to pass the blame for the decisions relating to the acquisition of the business on to Mr Thornburgh when that was unrealistic: about the cash flow, the stock levels, the quality of the office equipment and the decision to acquire the business at all. He could not reconcile his evidence with the documents recording the satisfaction of the Fishers with what they had acquired in the months following the taking possession of the business. He subsequently recanted form the suggestion that he was entitled to, or sought, financial advice from GGP. His evidence about where the responsibility lay for certain decisions was not consistent with the Agreement itself. He could not explain to the satisfaction of the primary judge why the optional expenditure by the Fishers after they took over the running of the business did not play a big part in their cash flow problems. That expenditure included developing and operating a café with borrowed funds. The primary judge was not impressed with his evidence about why it was only in late September 2010 that the alleged deficiencies in the Agreement and the events leading up to it were raised. The difficulty of getting legal advice, the excuse proffered was not persuasive.

19. The primary judge noted that he could not explain the claimed losses meaningfully, and that it was 'contortionist [at para 66] to attribute their financial problems to the purchase of the business without regard to their external financial commitments. His claims of loss were misconceived, including the claims related to their movement from Australia [subsequently abandoned during Mrs Fisher's evidence].

20. That is a short precis of some of the observations of the primary judge. The conclusion that Mr Fisher's evidence was not believable unless confirmed by compelling confirmatory evidence is easily understood.

21. The primary judge took a similar view of the evidence of Mrs Fisher, after an extensive recording and analysis of her evidence.

22. It will be necessary to refer to parts only of that analysis when turning to the focus of this appeal. It had much of the same deficiencies as that of Mr Fisher. Broadly speaking, there were a number of her assertions which were contradicted by documents or her own conduct, and parts which did not accord with other facts or seemed unreasonable. She acknowledged in her cross examination other factors which may have contributed to the poor performance of the business during 2009/2010. The primary judge decided that it was unsafe to rely on her evidence except where it was supported by independent evidence.

23. There were other witnesses called on behalf of the Fishers. Their evidence did not directly relate to the critical factual issues, except to the extent that they produced documents which the primary judge took into account.

24. The primary judge then addressed the evidence of the First and Second Respondents.

25. He regarded Mrs Wylie as a 'compelling witness' – at [167]. It was consistent with contemporary documentation and made concessions where such material would have suggested them.

26. The other witnesses called for the First Respondents were brief, and the primary judge did not think they were of much significance.

27. Mr Gee gave evidence for GGP. The primary judge regarded him as an honest and reliable witness.

28. GGP also called another solicitor Mr Nalyal, and a New Zealand solicitor Mr Darlow. Each gave what might be called expert evidence about the responsibilities of a solicitor in relation to a transaction such as the process of entering into the Agreement, and then preparing and maintaining the documents it specified. The primary judge accepted each of them as an honest witness. It is not necessary to refer to their evidence in any detail. It was not used by the primary judge in any way which could advance the prospects of the Fishers succeeding on their appeal. The sworn statement of a surveyor Mr Phung was also tendered. It too did not have significance to the outcome of the appeal.

29. It is at this point in the judgment that the Fishers through their counsel identified what was said to be two serious errors of law.

30. The evidence of the Fishers included evidence of some things which (they said) Mr Thornburgh had said to them during the course of the retainer. The statements were said to advance the negligence claim against GGP. The judgment records that statements of Mr Thornburgh related to how things were done in Vanuatu generally, and the procedure of GGP in preparing and holding share transfers and resignations and appointments of directors, the holding of the deposit of VT 55 million, and related matters.

31. The primary judge remarked that Mr Thornburgh was a 'hugely important witness' for the Fishers, on those matters and on him having given advice on other matters discussed in evidence. At [216], the primary judge said that an adverse [to the Fishers] inference was available because he was not called to give evidence by the Fishers. He inferred at [218] that Mr Thornburgh's evidence would have undermined the claim and supported the defence of GGP, and to a lesser extent would have supported the defence of the Wylies. He said at [219] that the failure of the Fishers to call Mr Thornburgh to give evidence 'was a material factor in my ability to fairly determine the issues between the parties'. He noted that Mr Gee had indicated a willingness to call Mr Thornburgh but for Mr Thornburgh's refusal to provide a sworn statement. At [220], the primary judge said that the failure weakened the case of the Fishers and was 'one factor in my overall assessment of the claimants' case'.

32. Counsel for the Fishers submitted that that section of the judgment misapplies what was said in *Jones v Dunkel* [1959] HCA 8.

33. The other error concerned the primary judge's application of the Rule in *Browne v Dunn*. That case applied the common-sense proposition that it is important to put to a witness significant matters that contradict the evidence of that witness so that the witness has an opportunity to respond to it.

34. The context of the asserted error is the evidence of Mr Fisher and Mrs Fisher about what Mr Thornburgh had said to them [briefly referred to above]. In passing, it is observed that the primary judge described that evidence of the Fishers as 'hearsay' but in context that is not given as a reason to reject that evidence. It clearly was not hearsay evidence, but direct evidence of what the employee of one defendant said to them in the course of providing the professional services of GGP to them.

35. The evidence of Mr Fisher and Mrs Fisher on that topic was not challenged in cross-examination by counsel for GGP at the trial. Counsel for the Fishers at the trial submitted that the failure to

cross-examine them about their evidence of what Mr Thornburgh said was a matter which should boost the reliance of the primary judge on the evidence of the Fishers on that evidence.

36. The primary judge at [225] indicated that his adverse assessment of the evidence of both Mr Fisher and Ms Fisher meant that he would not bolster the weight that could be attached to their evidence 'in this regard'. It is not clear whether that refers to their evidence generally by giving greater weight to their evidence about their discussions with Mr Thornburgh or is limited to that specific evidence.

37. Finally, there are sections of the judgment which commented on the 'moveable feast' of the Fishers' amended claim from time to time, its extent, and the withdrawal after their evidence of certain of their claims, and the acknowledgement in closing submissions on their behalf that GGP owed no duty to advise the Fishers on financial matters, having cross examined Mr Gee to the contrary effect. The primary judge remarked that it was probably the omnibus approach of the Fishers to the claim – throwing in every allegation in the hope that something sticks and only conceding where absolutely necessary: at [231]. He said that approach undermined that genuineness of their claim.

38. On the appeal, counsel for the Fishers made no attack on those observations.

39. Then the primary judge identified the specific matters on which he had to make conclusions of finding. He made those findings adversely to the Fishers and dismissed their claims.

Consideration

40. The Fishers commenced their appeal by endeavouring to put the history of events in a somewhat different context. It was intended to submit that, by a review of all the facts, a different conclusion should have been reached.

41. Having regard to the findings about the respective credibility of the Fishers and of Mrs Wylie, such a general revisitation of the facts could not possibly succeed in its objective. The approach was not pursued.

42. Focus turned to the specific grounds of appeal.

43. First, the omnibus approach was abandoned, and the focus was upon one particular factual issue. That is the asserted representation about the viability of the RGL business, and in particular that in the Profit and Loss statement provided to the Fishers there was an item: Natural increase in stock...VT 17, 789, 158. The claim was that this representation was fraudulently made and was not accurate.

44. The primary judge did address this claim and rejected it. A number of reasons for doing so emerge from the judgment. Underlying them all is the conclusion that the Fishers understood what the item refers to and did not rely on it. Nor did he accept that it was misleading.

45. As an item in the Profit and Loss account, it must be read with what Mrs Wylie told the Fishers it represented. They were told that it was an estimate and did not represent a figure arrived at after a specific count and valuation of the stock. That is reflected in the Agreement, in particular clauses 7 and 13. Clause 7 says that the Fishers had been provided with accounts, had inspected them

and were satisfied with them for the purposes of the purchase and the price. Clause 13 says that the schedule of stock was only a general outline and that there had been no valuation of it. The Fishers were given the right to inspect the stock prior to completion. They made no attempt to do so.

46. Moreover, the Fisher sought independent advice from accountants in Australia and said they were told that they could proceed with the purchase of the business in the light of the Profit and Loss. It is a matter of common sense that any such adviser would have examined the Profit and Loss statement, pointed out items which might be queried and what should be done about them. It is clear that the issue of adequate cash flow was discussed with them. The detail of that advice, or of what was told to the accounts was not explored. No accountant was called to give evidence. Mrs Fisher's evidence that the entry was entirely fictitious was not accepted. That is a matter which one would have expected to be apparent promptly on taking over the business, if not before, and to then have been the subject of expert investigation and specific and vigorous complaint. Neither occurred, at least on the evidence.

47. The primary judge noted that Mrs Fisher in her evidence acknowledged that the accounts for RGL for the period October 2009 to July 2010 showed a natural increase of stock to VT 65, 593, 858. How that could be reconciled with the complaint was not satisfactorily explained.

48. In our view, it is clear that the primary judge considered the complaint and rejected it in part because in the context it was an estimate as explained by Mrs Wylie, and in part because the Fishers had their own financial advice, and in part because it is not shown to have been misleading. Those findings largely flow from the assessment of the evidence. There is no reason shown that the rejection of it involved any error on the part of the primary judge.

49. The submissions of the Fishers then address the contention attacking the finding of the primary judge that there was no basis for repudiating the Agreement in late September 2010, shortly before the vendor finance was due to be repaid. The proposition involves a close analysis of the precise documentation prepared by GGP and the particular obligations under clauses 3 and 4 of the Agreement.

50. We do not consider it necessary to fully pursue that analysis. The documentation prepared by GGP and held by them makes it clear that, had the vendor finance been repaid on 1 October 2010, the Fishers would have been formally appointed as directors of RGL and would have become its shareholders. The documents executed and held in escrow included the documents necessary to effect that outcome. If that did involve a breach of clause 3 of the Agreement, it is not a breach which would have entitled the Fishers to repudiate the contract. We do not need to explore the submissions about whether there is any inconsistency between clauses 3 and 4, and if there is then which takes priority.

51. We have noted the submissions about the application of the *Jones v Dunkel* principle above. The primary judge's reasoning on the topic is also set out there.

52. In our view the criticisms of the judgment in that regard are made out.

53. In this instance, the evidence of what Mr Thornburgh said to Mr Fisher and Mrs Fisher is both relevant and admissible. They were not cross-examined on that part of their evidence by counsel

for GGP at the trial. In the normal course, and subject to the effect of the overall assessment of creditworthiness, that evidence would be accepted.

54. It is not so obvious as to warrant the conclusion the primary judge drew that the Fishers should have called Mr Thornburgh to give evidence. His position was that he was, at the relevant time, employed by GGP. What he did and said was on behalf of GGP. If the evidence were significant and disputed, it might have been expected that GGP would call him to give evidence. In that event, if he were not called by GGP, it might be inferred that his evidence would not have assisted the case of GGP. [In that case, as there was an explanation for GGP not calling him to give evidence that inference might not have been drawn adversely to GGP].

55. His relationship with the Fishers does not, in our view, make available an inference adverse to them that his evidence would not have supported the evidence of the Fishers and have undermined their case. To the contrary, if there was a material dispute about their evidence, and he was not called, it might have been inferred that his evidence would not support the case of GGP. In any event, such an inference does not operate so as to amount to affirmative proof of facts.

56. It is necessary to address the significance of that matter. There was considerable debate in submissions about the significance of the error. After reviewing all the findings of the primary judge, we have no doubt that he would have reached the same conclusion about the creditworthiness or more accurately the lack of creditworthiness of the evidence of both Mr Fisher and Mrs Fisher. There were so many indications of unreliability that were noted by the primary judge that no other conclusion is available. The structure of the judgment, and the progressive accumulation of matters that contributed to the conclusion, makes it so apparent that the primary judge, despite this error, would have reached the same result.

57. In the particular circumstances of this case, we conclude that the demonstrated error in the reasoning of the primary judge does not lead to any order that the appeal should succeed.

58. We turn to consider the further error contended for by the Fishers relating to the application of the Rule in *Browne v Dunn.*

59. Again, this is a Rule involving common sense. There was no reason from the failure of GGP to cross-examine Mr Fisher or Mrs Fisher about their conversations with Mr Thornburgh to treat the case of GGP as weakened in some way, or to treat the evidence of the Fishers generally as more credible than it would otherwise would have been treated. As we have said, the fact that they were not cross examined on that evidence leaves it specifically unchallenged, and so in the normal course it would be accepted. That does not make the overall assessment of their evidence any less proper or effective.

60. So, in the present circumstances, unless the particular conversations with Mr Thornburgh (as deposed to by them) would have the realistic potential to make the assessment of credit overall by the primary judge different, the comments complained of have no real significance.

61. In our view that is the case. We do not see how the acceptance of the relevant conversations as deposed to by the Fishers, if accepted in their entirety, would or could have made any difference to the assessment of credit by the primary judge. So, the claim against the Wylies would have failed in any event. Nor would it, or could it, have made any difference to the result of the case against GGP. We have concluded that such breach of the Agreement [if there was any] by the

conduct of GGP in the form of the paperwork it prepared and had executed and held in escrow would not have entitled the Fishers to repudiate the Agreement as and when they purported to do so.

Conclusion

62. The primary judge has made some provisional comments about the costs of Mrs Wylie in defending the proceedings at first instance. We were invited to make either a ruling or some comment about those observations. As the decision on that aspect has not been made and will be the subject of further submissions, we decline to accept that invitation.

63. We also note the application at the commencement of the hearing of the appeal for it to be adjourned for further preparation and the potential for an application of further evidence. We refused that application. The basis for the potential of further evidence becoming available is speculative, and there is no sound reason to suspect it is probable. Moreover, there is no reason shown why in the interests of justice, that this appeal – at that point with whatever the outcome might involve - in its presentation on the part of any of the parties might be to their detriment in other putative proceedings.

64. For the reasons given, in our view the appeal is to be dismissed. We so order.

65. The Appellants are to pay to GGP their costs of the appeal. The appeal involved very extensive preparation and was accompanied by lengthy and complex written and oral submissions. In the circumstances, we fix those costs at VT 100, 000. As Mrs Wylie appeared in person there is no order for costs in her favour.

DATED at Port Vila this 19th day of February, 2021

BY THE COURT

Hon. Chief Justice
Vincent Lunabek

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