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

Civil Appeal
Case No. 22/3092 CoA/CIVA

BETWEEN: **Pacco Siri**
Gloria Siri
Appellants

AND: **National Bank of Vanuatu Limited**
First Respondent

AND: **Wanfuteng Bank Limited**
Second Respondent

Coram: ***Hon Chief Justice V Lunabek***
Hon Justice J Hansen
Hon Justice R White
Hon Justice O Saksak
Hon Justice D Aru

Counsel: *T. Harrison for the Appellants*
C. Hamer for the Respondent

Date of hearing: *7 February 2023*

Date of Decision: *17 February 2023*

JUDGMENT OF THE COURT

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1. In the final documents filed by the appellants, the first respondent had disappeared from the intituling. This was clearly an error, as the first respondent remains a party to these proceedings and has an outstanding application before the Court to strike out the appellants' claim.

2. The appellants sued both the first and second respondents in negligence. The appellants were clients of the second respondent bank, but had no direct dealings with the first respondent.

3. In October 2020 the appellants determined to buy a motor vehicle, and to assist in that purchase they approached the second respondent and requested a loan facility to allow them to purchase a motor vehicle. The second respondent agreed to advance a loan facility of VT 1,470,500 to the appellants. By letter of offer dated 21 October 2020, the second respondent relied for security on a first and exclusive letter of charge over the appellants' term deposit account. The second respondent deposes that they provided the facility to the appellants on the basis the full purchase price of the vehicle was VT 2.3m in accordance with an invoice from the seller, a Mr Jon[illegible] provided by the appellants.

4. We note there was already in place an existing facility of VT 1,656,849.

5. The loan offer also had a Condition Precedent that stated the appellants were to provide a Certificate of Insurance for the motor vehicle that noted the bank's as an interested party. Given the vehicle was not a required security it is unclear why the bank would make such a request. However, nothing turns on this as it was not mentioned in the Pleadings, the Strike Out decision, the Notice of Appeal or the submissions on appeal.

6. Central to this case is the ownership book, colloquially called the "*red book*". Apparently the seller, Mr Jonni, owed money to the first respondent, secured by the motor vehicle and it held that book as part of its security.

7. The appellants instructed the second respondent to pay funds to the first respondent and this was facilitated by a bank cheque dated 20 October 2020. At the direction of the appellants the respondents delivered the cheque to the first respondent.

8. As a consequence, the appellants obtained custody of the vehicle and shipped it to Santo. A dispute then arose with the seller, who claimed he had been underpaid. The seller, who then was in possession of the "red book" enlisted the police to assist him to recover possession of the vehicle. Ultimately, the vehicle ended up back with the appellants. Then a relative of theirs took the vehicle and sold it on the basis that its purchase was causing too much trouble within the family. Apparently, there are other proceedings in this Court. In the first the seller obtained a judgment on a counterclaim for VT 700,000 against the appellants. This is subject to appeal to this Court. There are also proceedings against the relative just mentioned. All of this is irrelevant for present purposes.

9. The appellants took the view that it was the responsibility of the second respondent to obtain the "red book" for the vehicle when they forwarded the cheque.

The pleadings

10. The appellants allege negligence against the second respondent, saying they owed a duty of care and they breached that by negligently failing to obtain the "red book" at the time of the delivery of the cheque to the first respondent which, as noted, was at the direction of the appellants.

The strike out

11. The second respondent applied to have the claim against them struck out on the grounds it was frivolous, vexatious and/or an abuse of process because it did not disclose any reasonably arguable cause of action against the second respondent.

12. The strike out came before Goldsborough J in October 2022. In his decision, the Judge noted that the second respondent did not require security over the motor vehicle for its loan, which would have been the only basis upon which they would have required the "red book". He also noted that the Road Traffic (Control) Act imposes a mandatory obligation on sellers and purchasers to register the transfer of ownership with the licencing authority within 7 days, and on the purchaser to furnish the "red book" to the licencing authority for that purpose.

13. The Judge concluded that the appellant's statement of claim failed to disclose a cause of action.

The appeal

14. It is unnecessary to list the individual grounds of appeal. Suffice to say, the appellants maintain that the Judge was wrong to conclude that the second respondent did not owe them a duty of care. Furthermore, they say that duty was discharged negligently, leading to the losses they claim.

15. Before turning to the submissions, it is necessary to address one point relating to the matter contained in Appeal Book A. At page 68 of that document is a sworn statement of the second-named appellant, which is said to be in response to the application to strike out filed by the first respondent on 17 November 2022. This document was sworn on 16 December, nearly two months after the Judge's decision. No application for leave to file this document in the appeal has been made, and it does not meet the test for the calling of new evidence in any event. Leave to file the document in the Supreme Court case is not needed because it relates to the first respondent's strikeout. The problem is that in the course of submissions Ms Harrison made extensive reference to matters contained in this sworn statement, to support her submissions. The document had no place in the Appeal Book. This document is not admissible for the purposes of the appeal, and we set it to one side. We would only add the comment that the second-named appellant apparently is employed in the banking industry, and much of the sworn statement contains matters that belong as legal submissions. Those have no place in a sworn statement in any event.

The submissions

16. In submissions, Ms Harrison maintained that the second respondent owed a duty of care to her clients to ensure they received the "red book" when they handed over the cheque. She went further and said the second respondent were the agents of the appellant for the purposes of the sale and purchase transaction.

17. Ms Hamer supported the reasoning of the Judge in the strikeout application, and submitted that clearly there had been no duty established, and in any event there was no negligent action by the second respondent.

Discussion

18. There is no pleading of agency, nor was Ms Harrison able in the course of her submission to put forward any basis upon which it could be established that the second respondent was the agent of the appellants for the purchase of the motor vehicle. It is quite clear the second respondent was simply a financier who was requested to advance money to enable the purchase of a motor vehicle. They agreed to advance a loan, and the only security required was a charge over the appellants' term deposits. The motor vehicle was never required as security. It seems to us that underlying Ms Harrison's submissions was the view that as the loan was for the purchase of a motor vehicle, somehow it became part of the security. That is fanciful.

19. Perhaps this submission arises from the first named appellant's Sworn Statement. This is the high point of the appellants' case and was sworn on 26 September 2022. Paragraph 5, states:

> *"I confirm that Wanfuteng Bank did promise me to issue the cheque to the seller's bank, and in return my wife and I expected the red book to be given to the Wanfuteng Bank in exchange for the cheque."*

20. The appellants did not allege that the expectation to which the first appellant referred had been communicated to the second respondent, let alone that it had agreed to take possession of the "red book" on their behalf.

21. The appellants" foreshadowed evidence falls well short of establishing any duty on the second respondent to obtain the "red book". Furthermore, the first-named appellant goes on to say that the sales transaction took place in Port Vila and he paid and made arrangements for the vehicle to be shipped to Santo. He confirmed that he received a copy of the "red book" from the seller, but not the actual book itself. He does not allege any effort was ever made by him or his wife to fulfil their obligations under the Road Traffic (Control) Act.

22. The first named appellant then stated at 11:

> *"I was never asked to attend Customs Department for the registration of the red book as stated by Marianne for the second defendant in her sworn statement. In fact legally in common sense the title remains with the second defendant until my wife and I fully complete our loan repayment. At the time we were still paying the loan."*

23. Frankly that is a nonsensical statement. It would only make sense if in fact the vehicle was security for the loan. It was not. His stance is confirmed again later, at 15, where he again maintains that the title to the vehicle remained with the second defendant until the loan was paid out.

24. The second telling point is that S: 40 of the Road Traffic (Control) Act places a mandatory obligation on the seller and purchaser to register the transfer of a motor vehicle within seven days of the sale being completed:

> ***"40. Notification of change of ownership***
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> *When the ownership of a motor vehicle changes the last owner and the new owner shall, within 7 days of such change of ownership, give notice thereof to the licensing authority stating the name and address of the new owner. The latter shall, within the same period, furnish the licensing authority with the registration book for registration of the change of ownership and shall pay the transfer fee prescribed by the Minister by Order."*

25. There seems to be no provision that would allow a seller and a buyer to transfer that obligation to a financier or someone else. In any event, there is no evidence to suggest that that could even be contended for in this case.

26. In the course of submissions we asked to Ms Harrison how this case satisfied the three-stage test required to found a duty of care in negligence, which was established in the decision of *Caparo Industries PLC v Dickman* [1990] 2 AC 605, [1990] 1 All ER 568, [1990] UKHL 2. She was unfamiliar with the authority and it did not feature in the Strike Out proceedings. That case has been applied and is part of the law of Vanuatu. (*Bulememe v Republic of Vanuatu* [2022] VUCA 10; *Coconut Oil Production (Vanuatu) limited v Terry* [2007] VUCA 17).

27. What was established in *Caparo* is that there is a three-stage conjunctive test to found a duty of care in negligence. That test is:

    1. Was the damage to the plaintiff reasonably foreseeable?, and,

    2. Was the relationship with the plaintiff and the defendant sufficiently proximate?, and,

    3. Is it just and reasonable to impose a duty of care in such a situation?

28. The second respondent was no more than a financier for the purchase of this motor vehicle. They delivered the cheque at the direction of the appellants. The sale and purchase of the vehicle was negotiated between the appellants and the seller. The second respondent played no part in any of this, and as already noted did not require security over the motor vehicle. We add to that the mandatory requirement in Vanuatu for sellers and buyers to register change of ownership within seven days under the Road Traffic (Control) Act. In those circumstances, the damage subsequently said to have been occasioned to the appellants by the actions of the seller and their relative cannot be said to be reasonably foreseeable.

29. We accept it may be reasonably arguable that the relationship between the appellant and the second respondent was sufficiently proximate, although that is marginal as well. We need say no more about it.

30. Finally, the third limb as to whether it would be just and reasonable to impose a duty of care in such situations, has to be answered in the negative. The relationship between these parties was as banker and client. That is a relationship governed by contract. In the circumstances of this case, it is impossible to say it would be just and reasonable, in addition to any contractual

obligation, to impose a duty of care on the second respondent for what occurred. They were approached for a loan, it was approved without recourse to the motor vehicle as a security, and the "red book" that was so critical to all of Ms Harrison's submissions was not required in any way by the second respondent. Indeed, it is difficult to see what right the second respondent would have to request or demand the "red book". That is particularly so in the light of the provisions of s 40 of the Road Traffic (Control) Act we mentioned above.

31. The three-stage test in *Caparo* requires each limb to be satisfied. In this case it is clear that limbs 1 and 3 are not even arguable.

32. In those circumstances we are satisfied that no reasonable cause of action has been made out in the pleadings, and we are also satisfied that there was nothing in the submissions of Ms Harrison to suggest that any amendment to the pleadings could save the situation. The Judge was right to strike out the proceedings, and the appeal is dismissed.

33. This was a hopeless claim. Nowhere did it show a proper foundation to create a duty and nor were the limbs of *Caparo* made out. We find it hard to understand why the appellants would attempt to continue to sue the two banks in negligence given the real issue appears to be with the seller and the family member mentioned above. In those circumstances there will be indemnity costs on the appeal to the second respondents.

34. For completeness we note that at paras 15 and 16 of the judgment, where orders and costs are dealt with the judge used the term "applicants". As is made clear at his para 1 the only applicant is the second respondent. As a consequence the orders made only extend to the second respondent.

Dated at Port Vila this 17th day of February 2023

BY THE COURT

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL

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Hon. Justice Hanson J