IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 226 of 2011

BETWEEN: PAUL SAVENKOV
Claimant

AND: ALAN CORT
First Defendant

AND: DAVID CORT
Second Defendant

Coram: ***Justice D. V. Fatiaki***

Counsels: *Mr. D. Yawha for the Claimant*
Mr. M. Hurley for the Defendants

Date of Decision: *4 October 2013*

RULING

1. This is an opposed application for "*security for costs*" based upon a disputed claim filed on 28 November 2011. The application follows the filing of the pleadings but precedes any sworn statement or discovery by the parties.

2. The claim is based on a payment of **$AUD500,000** by the claimant into an Australian bank account nominated and controlled by the defendants. The amount was paid following representations and inducements made by the defendants and after agreement was reached by the parties. In brief, the claimant seeks a refund of the money or an accounting and/or a declaration of a constructive trust and equitable compensation for breach of trust. The principal basis for the claim is an asserted "*complete failure of consideration*" on the defendant's part.

3. In particular, the claimant pleads *inter alia* in his claim:

> *"3. In or about June 2007, the 1st and 2nd Defendants (jointly and severally referred to as the "Defendants") entered into discussions with the Claimant with a view to joining together in a business enterprise involving the acquisition and development of real estate in Vanuatu, with specific projects to be determined and agreed upon.*
>
> *4. In the course of those discussions, the Defendants induced the Claimant to remit to an account of their Australian Company Aljan Enterprises Pty Ltd ("Aljan"), at the direction of the Defendants, the sum of AU$500,000 by falsely and misleadingly representing to the Claimant that:-*

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> (a) *the consideration for the payment of AU$500,000 was the acquisition by the Claimant of an interest in real property in Vanuatu; and*
>
> (b) *that documentation to reflect the acquisition and ownership of the said interest would be produced by the Defendants in terms acceptable to the Claimant for signing by the Claimant.*
>
> 5. *In reliance upon the aforementioned representations and inducements, on or about 4 July 2007, the Claimant transferred AU$500,000 (the "payment") to an account in the name of the Aljan as nominated by the Defendants which account was held with the Hong Kong Bank, Brisbane City Branch, BSB 344-031, Account Number 203193-071.*
>
> 6. *Prior to making the payment, the Defendants advised the Claimant that the payment would be was used as a payment of a deposit on the purchase of a property in Vanuatu known as Aese Island.*
>
> 7. *Some months later, the Defendants advised the Claimant that the purchase of Aese Island had run into difficulties and that the payment would instead be used for a different joint business enterprise namely for the subdivision and development for sale of leasehold title land on leasehold titles 04/2621/008 and 04/2621/030 (the "leasehold titles") owned by Dolphin Resort Limited, a company which the Defendants represented to the Claimant was owned and controlled by the Defendants. The Defendants agreed to prepare documentation for the proposed arrangement and to submit it to the Claimant for his consideration."*

Certain things are immediately clear from the above – (1) the dealings between the parties was <u>not</u> a loan <u>or</u> a straight-forward agreement to purchase land in Vanuatu; (2) there were at least two different sets of dealings or negotiations between the parties <u>both</u> before and after the claimant paid over the money; <u>and</u> (3) the monies were paid into an Australian bank account. The claim however is <u>not</u> supported or verified by a sworn statement from the claimant.

4. Although the defendants are residents of Vanuatu and the real estate mentioned in the claim is located in Vanuatu, nevertheless, the Court remains unclear as to whether it is the proper venue to bring this claim for the refund of the claimant's money which was paid in Australian dollars, into an Australian bank account, <u>and</u> presumably, remains in Australia.

5. Be that as it may, in their defence the defendants deny making false and misleading representations and say in answer to **paragraph 4** of the claim:

> "(b) *<u>The consideration for the payment of AUD500,000 was in respect of the proposed acquisition by a purchasing entity known as "Palm Bay Corporation" (and not the claimant), pursuant to an Agreement for Sale and Purchase of Shares</u> between Aljan International Limited, Bedell International Limited, Bokissa International Limited and Watansa Holdings Limited (collectively called 'the Vendors') and Aljan*

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(Vanuatu) Limited, Bokissa Limited (collectively called 'the Companies') and Palm Bay Corporation ('the Purchaser'), whereby the Vendors agreed to sell 50% of their shareholding in each of the Companies to the Purchaser.

Particulars

The defendants seek leave to rely on the terms of the Agreement for Sale and Purchase of Shares between the Vendors, the Companies and the Purchaser as if the terms of it were set out in full herein, ('the Agreement').

(c) the terms of the Agreement included clause 2 (a) by which the Purchaser agreed to pay the sum of AUD500,000 to the Vendors upon 29 June 2007 'such payment to [be] non-refundable notwithstanding anything contained within this Agreement';

(d) the Agreement was forwarded by the First Defendant to the Claimant by email dated 27 June 2007;

(e) On or about 4 July 2007, a telegraphic transfer was made by Gail Savenkov in the sum of AUD500,000 to Aljan Enterprise Pty Ltd to give effect to the Purchaser's obligation in clause 2 (a) of the Agreement;

(f) the Purchaser failed to complete the terms of the Agreement, including, the payment of the balance of the purchase price;"

(my underlining)

6. In his Reply to the above the claimant states:

"6. As to the whole of paragraph 4 and to the related allegations concerning the Agreement, the Claimant denies that he ever accepted the terms of the Agreement or any other contractual documentation submitted by the Defendant or that any enforceable agreement was concluded with the Defendants reflecting any consideration for the payment of AU$500,000 and further repeats his claim that the consideration for the payment of AU$500,000 has wholly failed."

7. It is sufficiently clear from the foregoing that there is serious disagreement between the parties not only as to the nature and terms of any contract or agreement under which the money was paid, but also, as to who are the correct parties to the agreement.

8. **Part 15 Division 2** of the **Civil Procedure Rules** deals with Security for Costs and for the purposes of this application **Rules 15.18**; **15.19 (d)** and **15.20 (a)** and **(h)** relevantly states:

"Security for costs

15.18 (1) On application by a defendant, the Court may order the claimant to give the security the court considers appropriate for the defendant's costs of the proceeding.

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(2) The application must be made orally, unless the complexity of the case requires a written application.

When court may order security for costs

15.19 The court may order a claimant to give security for costs only if the court is satisfied that:

(a) the claimant is a body corporate and there is reason to believe it will not be able to pay the defendant's costs if ordered to pay them; or
(b) the claimant's address is not stated in the claim, or is not stated correctly, unless there is reason to believe this was done without intention to deceive; or
(c) the claimant has changed address since the proceeding started and there is reason to believe this was done to avoid the consequences of the proceeding; or
(d) **the claimant is ordinarily resident outside Vanuatu**; or
(e) the claimant is about to depart Vanuatu and there is reason to believe the claimant has insufficient fixed property in Vanuatu available for enforcement to pay the defendant's costs if ordered to pay them; or
(f) the justice of the case requires the making of the order.

What court must consider

15.20 In deciding whether to make an order, the court may have regard to any of the following matters:

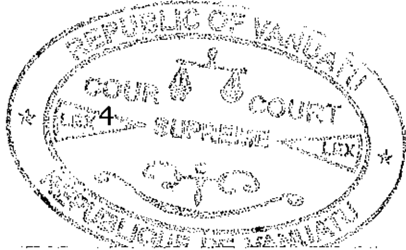
(a) **the prospects of success of the proceeding**;
(b) whether the proceeding is genuine;
(c) for rule 15.19 (a), the corporation's finances;
(d) whether the claimant's lack of means is because of the defendant's conduct;
(e) whether the order would be oppressive or would stifle the proceeding;
(f) whether the proceeding involves a matter of public importance;
(g) whether the claimant's delay in starting the proceeding has prejudiced the defendant;
(h) **the costs of the proceeding**."

(my underlining and highlighting)

9. In light of the above **Rules** certain general observations may be made –

(1) Only a defendant to a proceeding may seek an order for "*security for costs*";

(2) An order for "*security for costs*" is a matter within the Court's discretion ("*may order*");



(3) The applicant has a heavy burden to discharge in an application for security for costs ("*... only if the Court is satisfied ...*");

(4) **<u>Rule 15.19</u>** limits the "*grounds*" upon which the Court can order security for costs to five (5) enumerated disjunctive ("*or*") instances <u>and</u> a general ground as "*... the justice of the case requires ...*";

(5) **<u>Rule 15.20</u>** sets out eight (8) non-exhaustive "*matters*" to which the Court may have regard in deciding an application for "*security for costs*" <u>including</u> the parties relative "*prospects of success*", the genuineness of the claim and whether an order "*would be oppressive*";

Finally although a failure to provide security when ordered has a suspensory effect on the proceedings, the Court retains the power to set aside or vary its order for "*security for costs*" (<u>*see:*</u> **Rule 15.23**).

10. In summary, the Court of Appeal in **Awa v. Colmar** [2009] VUCA 37 described the Court's power to order "*security for costs*" as follows:

> "*... (as) ... a power intended to protect the rights of the other parties to the litigation. The discretion to award security for costs recognized by the Rules of Court is a discretion to be exercised fairly having regard to the competing interests of the parties.*"

11. Defence counsel submits that the application for "*security for costs*" is brought on the basis that "*the claimant is ordinarily resident outside Vanuatu*" <u>and</u> as to quantum, on the basis of the defendants "*costs of the proceeding*", in particular, "*the sum of VT1,4 million being approximately two thirds of estimated solicitor/client costs of VT2,389,364 rounded down.*"

12. Claimant's counsel for his part, whilst conceding that the claimant is "*ordinarily resident outside Vanuatu*", nevertheless, opposes the application on the basis of the claimant's "*... prospects of success of the proceeding.*"

13. In this latter regard counsel submits that the claimant has very good prospects of success in that he had paid over AUD500,000 to a company controlled by the defendants and has received nothing of value in return <u>nor</u> has the money been refunded despite a written demand. As for the quantification of the amount of security sought, counsel noted that the estimated solicitor/client costs is based on an hourly rate of VT35,000 which is contrary to established authority (<u>*see:*</u> **Hurley v. Law Council** [2000] VUCA 10).

14. In response, defence counsel highlights 3 defences in the defendants' pleading including (1) the lack of "<u>*privity*</u>" on the claimant's part to the

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agreement sought to be sued upon; (2) the existence of an express "*non-refundable*" clause in the relevant agreement; and (3) the failure of the contracting corporation (not the claimant) to complete the terms of the agreement.

15. In the absence of any sworn statement from the claimant, defence counsel also submits that the Court need not concern itself with the "*matter*" enumerated in **paragraphs (b)** to **(g)** of **Rule 15.20**. I agree.

16. After careful consideration of the competing claims and counsels written and oral submissions and mindful that the defendant/applicant have effectively conceded this court's jurisdiction to try the claim as pleaded, in the face of the court's serious doubts, I am not satisfied that this is an appropriate occasion to order "*security for costs*".

17. Accordingly the application is dismissed with costs in the cause.

DATED at Port Vila, this 4th day of October, 2013.

D. V. FATIAKI
Judge.