

Background

[2] Under the contract for sale and purchase, the respondents agreed to sell the vessel to Mr Herd.³ The vessel was registered in Vanuatu and the contract was subject to the law of Vanuatu.⁴ The consideration ultimately payable was set out in cl 2.1(b) of the contract. That clause provided for the payment of AUD 400,000 cash plus the transfer of “AUD\$400,000 worth of land (as per Vanuatu registered bank panel mortgage valuer valuation) with the preferred Land being Palikula Beachfront or waterfront property”. The transaction was to be settled on 19 May 2013.

[3] In April 2012, Mr Herd validly took possession of the vessel, but under the contract title would not pass until the consideration was paid. Rhumba Holdings (a company controlled by Mr Herd) provided security for the transaction in the form of a registrable mortgage over land in Vanuatu.

[4] On settlement date, Mr Herd failed to tender either the cash or any transfer of land. On 26 August 2013, Mr Haines issued a notice of default under the contract requiring Mr Herd to rectify his default. After Mr Herd failed to rectify within the 30-day period specified, Mr Haines repossessed the vessel and sold it at a loss.

[5] The respondents’ action to recover their losses from Mr Herd was brought on the basis Mr Herd had breached the contract.⁵ Mr Herd’s response was that his obligation to tender the consideration had not arisen for a number of reasons, such that he was not in breach. The High Court rejected Mr Herd’s arguments, including arguments that the contract was void for uncertainty and unenforceable because of a lack of adequate identification of the land to be transferred. The Court also rejected

³ The initial contract was varied. The parties proceeded under the varied contract and it was the varied contract that gave rise to the appeal to the Court of Appeal. We accordingly refer to the varied contract as “the contract” throughout.

⁴ The High Court heard expert evidence about the law of contract in Vanuatu. Lang J accepted the evidence of Professor Corrin, the Director of Comparative Law in the Centre for Public, International and Comparative Law at the University of Queensland, that in practice the Vanuatu courts look to the English common law of contract: HC judgment, above n 1, at [26].

⁵ The respondents sought to recover the shortfall between the price ultimately obtained for the vessel and the amount payable under the contract; the interest payable under the contract for the period during which Mr Herd had possession of the vessel; and costs incurred in maintaining and selling the vessel: HC judgment, above n 1, at [8].

Mr Herd's arguments about the parties' respective obligations under the contract. Accordingly, the High Court found for the respondents.

[6] The Court of Appeal dismissed the applicants' appeal. The Court found that, as Mr Herd owned the land to be transferred, the natural meaning of cl 2.1(b) was that Mr Herd would select the land and Mr Haines would have to accept it provided it satisfied the description as to value. Mr Haines was not required to identify the land to be transferred. The Court also took the view that Mr Haines was taking the transfer of land to a specific value solely for business purposes and as a proxy for money.⁶

[7] Mr Herd argued that cl 11 of the contract provided the mechanism for reaching agreement as to the identity of the land to be transferred. Clause 11 provided for the parties to "do and execute ... all such acts, things," and so on, "as may be necessary, desirable or reasonably required ... to perfect or give effect to the transactions or agreements contemplated or contained in [the contract]". The Court did not accept that cl 11 had the effect contended for. That was because, first, there was no gap necessitating a process to facilitate agreement as to the identity of the land to be transferred. Second, the Court did not consider there was any apparent linkage between the two clauses that suggested an intention that cl 11 supplement rights and obligations created by cl 2.1(b).

[8] The Court also considered that the parties' respective obligations were sequential, which meant that Mr Herd was required to pay the consideration and, once he had done that, title would pass and the respondents would have to execute the documents to release the mortgage. This part of the case turned on cl 7.3 of the contract, which provided that "[u]pon" Mr Herd paying the consideration, Mr Haines was to do various things including releasing the mortgage security documents. On its ordinary meaning, "upon" indicated something happening "immediately after or following on from" and both the structure of the clause and the contract as a whole reflected that construction.⁷

⁶ This finding was in response to arguments raised about land holdings in Vanuatu. In Vanuatu, land capable of disposition is owned by the indigenous "Custom owners" with only leasehold interests capable of being sold. Mr Herd argued both parties would have expected Mr Haines to be satisfied about the conditions of the underlying lease but on the approach to interpretation adopted, Mr Haines would have no opportunity to do so.

⁷ CA judgment, above n 2, at [39].

[9] Finally, the Court rejected the submission that the contract required Mr Haines to enforce the security interest before looking to Mr Herd personally for the shortfall on the sale of the vessel.

The proposed appeal

[10] The applicants wish to raise a number of issues on the proposed appeal. For present purposes, it is sufficient to summarise the key points, which are as follows:

- (a) Was the contract sufficiently certain and complete?
- (b) Did the Court of Appeal's interpretation rely on irrelevant contextual factors?
- (c) Did cl 11 of the contract provide a mechanism to fill the gaps in cl 2.1(b)?
- (d) Did Mr Haines have to identify the land to be transferred and/or engage in reasonable dialogue about it?
- (e) Was Mr Haines ready, willing and able to settle at settlement date?
- (f) Did Mr Haines give valid notice before cancelling the contract (and was he ready, willing and able to perform during the notice period)?

[11] In developing the submissions on these points, the applicants maintain, amongst other matters, that the contract did not meet the requirements for certainty because all of the essential matters were not present, and that the Court of Appeal incorrectly interpreted the parties' respective obligations under the contract. While there are some suggestions that aspects of the proposed appeal, such as the approach to cl 11, raise questions of general or public importance or commercial significance,⁸ the primary submission is that the Court of Appeal's resolution of the issues identified has given rise to a miscarriage of justice.⁹

⁸ Senior Courts Act 2016, s 74(2)(a) and (c).

⁹ Section 74(2)(b).

Our assessment

[12] The proposed appeal would reprise arguments in this Court that were addressed in the Court of Appeal. We accept the submissions for the respondents that this would not involve consideration of any matter of general or public importance or commercial significance. That is because there is ultimately no real dispute as to the principles applicable to contractual interpretation in Vanuatu as applied by the lower Courts. Rather, determination of the proposed appeal would require consideration of fact-specific questions about the parties' particular contractual arrangements.

[13] Further, nothing raised by the applicants gives rise to the appearance of a miscarriage of justice in the Court of Appeal's assessment of the facts, as that term is used in the context of civil appeals.¹⁰ In particular, the Court did not eschew the requirement of certainty. Rather, the Court considered that because cl 2.1(b) clearly set out what Mr Haines was to receive as consideration, there was no "gap" that necessitated a process to facilitate agreement, nor any need for a further provision for the contract to be complete.¹¹ On this analysis, the arguments the applicants wish to make about the role of cl 11 in the contract as a mechanism to fill the "gap" in cl 2.1(b) fall away. We add that we see the other arguments that the applicants wish to make about the parties' respective obligations, Mr Haines' readiness, willingness and ability to perform, and the effect of Mr Haines' mistaken interpretation of the notice provisions, as having insufficient prospects of success to justify a grant of leave.

Result

[14] The application for leave to appeal is accordingly dismissed. The applicants must pay the respondents costs of \$2,500.

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¹⁰ *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369.

¹¹ CA judgment, above n 2, at [21].