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

CIVIL APPEAL CASE No.20 OF 2009

BETWEEN: **ASCENSION LIMITED**
Appellant

AND: **IRIRIKI ISLAND HOLDINGS LIMITED**
Respondent

Coram: *Chief Justice Vincent Lunabek*
Justice Bruce Robertson
Justice John von Doussa
Justice Oliver A. Saksak
Justice Daniel Fatiaki

Counsel: *Mr Robert Sugden for the Appellant*
Mr Juris Ozols for the Respondent

Date of hearing: *19th April 2010*
Date of Judgment: *30th April 2010*

JUDGMENT

1. This is an appeal from an interlocutory decision of a judge of the Supreme Court which answered in the affirmative the question posed by one of the parties "is there a contract" between the parties.

2. The Respondent operates a resort hotel on Iririki Island. In the principal proceedings the Respondent as plaintiff seeks orders to enforce rights of access over to an allotment of land on the mainland referred to in the pleadings as "the Mainland Title", being leasehold title 11/OC22/009.

3. Prior to 2001, both the leasehold title to the resort on Iririki Island (the Resort Title) and the Mainland Title were held by one company, now known as Resorts Limited. In 2001, the Resort Title was sold to Andrew Spinks, but Resorts Limited continued to hold the Mainland Title. Prior to 2001, Resorts Limited used

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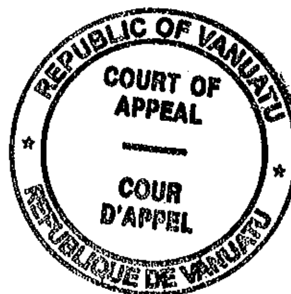
the Mainland Title as a ferry terminal from which guests and supplies for the Resort were conveyed by ferry to Irirlki Island.

4. The Agreement for sale and purchase of the Resort Title (the Resort Title Sale Agreement) recognised the importance of the Mainland Title to the continued operation of the resort. Clause 4.4 of the Resort Title Sale Agreement provided:-

> *"4.4 **Access***
>
> *The Vendor is the registered proprietor of the Mainland Title as defined herein which Title is not included in the Total Assets sold to the Purchaser pursuant to this contract. Nevertheless, the Vendor acknowledges the critical importance to any operator of the Business of a right of carriage and access through the Mainland Title for the purpose of access by guests of the Business to and from Iririki Island and the delivery of supplies and other items used in the Business.*
>
> *The Vendor undertakes and agrees that it is an important pre-condition to the Purchaser's willingness to complete the purchase of the Business and the total Assets, that its continued rights of carriage and access over the Mainland Title are maintained, notwithstanding any subsequent sale or development of the Mainland Title, so as to ensure:*
>
> *(a) continued adequate access for buses and motor vehicles to drop off and pick up guests at and from what is currently known as the Iririki Wharf.*
>
> *(b) reasonable signage space available to the Purchaser as agreed.*
>
> *(c) continued adequate access to permit delivery to the Iririki wharf of all supplies to the Business and including but not limited to all fuel and gas requirements of the Business*
>
> *provided that all or any cost of utilities in provision of such access and space shall be met by the Purchaser on a pro rata basis in accordance with their general use.*



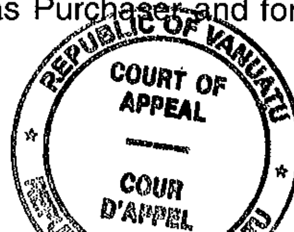
The Vendor covenants and undertakes to accommodate and in due course once any development plans for the Mainland Title are finalised which provide for a fixed and permanent right of carriage for the Purchaser and if deemed necessary by the parties to better secure the position for both taking into account the intent of this Clause, document by way of easement such minimum requirements of the Purchaser and in furtherance thereof the Vendor acknowledges that the Purchaser may lodge a Caution over the Mainland Title to protect the benefit of such right of carriage over the Mainland Title and the rights granted to it under this Clause and the Vendor further undertakes to grant to the Purchaser a right-of-first refusal in respect of any proposed sale of the Mainland Title, such that the Purchaser shall be entitled to match any offer made for the purchase of the Mainland Title and to proceed to the acquisition of the Mainland Title on terms no less favourable than those offered to the Vendor by any such third party purchaser.

The responsibility and cost for the upkeep of the access area is entirely the Purchasers obligation save and except where the Vendor alters the agreed access route at which time the Vendor is responsible for ensuring prior to any development that the new access is both of a size for Direct Vehicle access and constructed to the same standard currently maintained at that time by the Purchasers."

5. The Statement of Claim pleads that Andrew Spinks entered into the Resort Title Sale Agreement as Agent for the Respondent. The Respondent claims to be entitled to the benefit of Clause 4.4.

6. The Statement of Claim further alleges that in 2005 Resorts Limited sold and transferred the Mainland Title to the Appellant pursuant to a written Agreement for Sale and Purchase (the Mainland Sale Agreement) and that pursuant to Clause 11 of that Agreement the Appellant is obliged to allow the Respondent the rights of access granted under Clause 4.4.

7. The Respondent's case is that the Mainland Sale Agreement was constituted by a document first executed by the Appellant as Purchaser and forwarded as an



offer to Resorts Limited as intending Vendor on or about 7th July 2005. The Respondent says that the offer was accepted by Resorts Limited on 14th October 2005 when the Mainland Sale Agreement was executed on behalf of Resorts Limited by its duly authorised Directors, Regent Limited and Satellite Holdings Limited.

8. The Mainland Sale Agreement is expressed to be subject to 4 special conditions which read:-

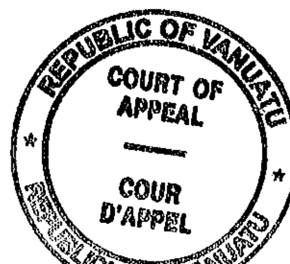
"10. *This Contract is conditional upon the waiver in writing of a right-of-first refusal granted by the Vendor to Iririki Holdings Ltd such waiver to be obtained within 7 days of the signing of this Contract and in the event Iririki Holdings Ltd takes up such right-of-first refusal then this Contract shall be at an end and any monies paid over by way of a deposit herein shall be refunded in full to the Purchaser.*

11. *At completion the Vendor will provide a Title clear of all encumbrances thereon excepting the right of access maintained under Caution in favour of Iririki Holdings Limited which the Purchaser acknowledges and is accepted by it provided that the Vendor shall at completion hand over the Consent of Iririki Holdings Limited as a Cautioner to the registration of the Transfer of Lease to the Purchaser.*

12. *The Directors of the Purchaser Company other than Christiane Brunet upon execution herein do hereby guarantee the performance on completion of the obligations of the Purchaser Company under this Contract.*

13. *If settlement of this Contract has not been taken place by 15 September 2005 the Vendor shall be entitled to terminate this Contract by giving written notice to the Purchaser or its solicitors terminating this Contract. The Vendor shall not be obliged to provide any reason for it's termination of this Contract other than the non-completion of this Contract by 15 September 2005."*

9. It is Clause 11 that the Respondent relies on to protect its entitlement to access rights in respect of the Mainland Title. The reference to Iririki Holdings Limited,



in clause 11 is a misdescription of Iririki Holdings Limited, and Andrew Spinks was the Cautioner named in the Caution.

10. It is clear from the evidential material before the Court that after the Appellant executed the Mainland Sale Agreement in July 2005, steps were taken to obtain a waiver of the right-of-first refusal referred to in Clause 10, and a waiver was granted. There was also discussion between Resorts Limited and the Respondent as to the terms of guarantees which would be necessary to meet the requirements of Clause 12. Whilst these events occurred Resorts Limited did not accept the Appellant's offer. During this time the parties were also negotiating about other aspects of the proposed Sale and Purchase.

11. Time passed, and by early September 2005 it seems that Resorts Limited and the Appellant were no longer in communication. The Agreement for Sale and Purchase had not been accepted by Resorts Limited and no deposit had been paid.

12. In late September 2005, communications between Resorts Limited and the Appellant resumed. These communications occurred between the controlling Director of the Appellant, Mervyn John Copperwaite, and Robin Holt on behalf of the Respondent. It is common ground that on 14th October 2005 the last of 3 payments was made by the Appellant to Resorts Limited for the Mainland Title. In all, the payments totalled AUS$975,000 with additional small amounts for fees. It is also common ground that a Transfer of Lease executed on behalf of Resorts Limited by Regent Limited and Satellite Holdings Limited was thereafter delivered to the Appellant and ultimately registered on 3rd January 2007 after the caution that had been placed on the Land Lease Register in respect of access rights under clause 4.4 of the Iririki Sale Agreement was removed by the Director of Land Records.

13. It is the Respondent's case that following the communications in late September 2005 between Mr Copperwaite and Mr Holt, Resorts Limited appointed Regent Ltd and Satellite Holdings Limited as its Directors and authorised them to execute the Mainland Sale Agreement on 14th October 2005. This the Directors did, and the Mainland Sale Agreement was then carried into effect.

14. Whilst the Respondent contends that the sale and purchase took place pursuant to the terms of the Mainland Sale Agreement (and was therefore expressly subject to the rights of access referred to in Clause 11), the Appellant contends that the Mainland Sale Agreement was not accepted by Resorts Limited. On the contrary the Appellant contends that the offer made to the Respondent in terms of the Mainland Sale Agreement in July 2005 was by implication rejected in the course of continuing negotiations or lapsed not later 15 September 2005.

15. The Appellant alleges that in direct oral communications and correspondence between Mr Copperwaite and Mr Holt a fresh agreement was reached that was wholly separate from the terms and conditions incorporated in the Mainland Sale Agreement. In particular, there was no term as to access rights. In support of this contention the Appellant argues that the consideration ultimately paid for the Mainland Title was AUS$975,000 whereas the Mainland Sale Agreement by its terms provided for consideration of AUS$950,000, and further the Mainland Sale Agreement provided for interest to be paid if there was delay in settlement, and no interest was ever claimed or paid. The question posed for the primary judged is to be understood as asking whether the Mainland Sale Agreement constituted the relevant contract between the parties.

16. At trial, the Mainland Sale Agreement was produced by Mr Geoffrey Gee. It bears the date 14th October 2005 and appears to have been regularly executed on behalf of Resorts Limited by Regent Limited and Satellited Holdings Limited. Mr Gee gave evidence of the due execution by the Directors on that date. However, his evidence was challenged by the Appellant who asserted that the Mainland Sale Agreement was signed much later in a dishonest attempt to support the Respondent's reliance on Clause 11.

17. The primary Judge accepted without reservation the evidence of Mr Gee and rejected as unreliable the evidence of Mr Copperwaite to the extent that it conflicted with Mr Gee's evidence.

18. Before this Court counsel for the Appellant repeated the arguments addressed to the primary Judge to the effect the Respondent had failed to prove that the

Mainland Sale Agreement was the operative contract pursuant to which the transfer of the Mainland Title occurred. As an alternative argument the Appellant contended that the decision of the primary Judge should in any event be set aside as the primary Judge failed to give adequate reasons for his decision.

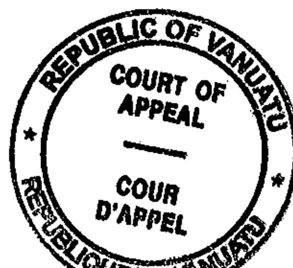
19. The contention that the reasons of the primary Judge were inadequate must be rejected.

20. The Judge gave reasons why he accepted the evidence of Mr Gee and for his conclusion that the evidence by Mr Copperwaite was unreliable. The acceptance of Mr Gee's evidence provided the reason for finding that the Mainland Sale Agreement was executed on 14th October 2005, and constituted the agreement between the parties.

21. The primary Judge in expressing his reasons said: *"This in my view is a straight forward sale of land transaction with the Agreement clearly identified at all stages".* Further reference to the evidence would have been helpful for the ease of understanding by others not familiar with the evidence, but in the context of the evidence placed before the Court and debated by the parties the Judge's statement indicates his acceptance of the Respondent's case at trial. In short that case was that whatever may have happened between the parties between July and mid-September 2005 in late September 2005 the Appellant through Mr Copperwaite made clear its position that the offer was still on foot.

22. Mr Copperwaite by fax wrote to Mr Holt as follows:

"Dear Robin,
I have not been able to find your phone number so this fax is to confirm that we are genuinely wanting to proceed with the sale of the Iririki Access land and that we have the funds. We have spoken with one of our banking groups who have our funds and they are only able to make a bank check for account holders outside the US at this time so we have told them that is not suitable. We have a gold reserve that we are liquidating to a new US bank account that we are currently opening and this will be ready to transfer by mid next week.



We have $100,000AUD that we could transfer now from the US to show you our good faith while the others is cleared.

Thanking you for your time.

Regards,

Mervyn."

23. In an exchange of faxes that followed the Respondent agreed to extend the date of settlement to 10am on 14th October 2005 in return for a payment of an additional AUS$25,000.00. This agreement was recorded in a fax from Mr Holt to Mr Copperwaite on 29th September 2005 which read:

"Mervyn,

I write to confirm our discussion of this morning.

We are prepared to grant a once only extension of 14 days to your company to settle the Waterfront Land in Vanuatu on the following basis:

- *$AUD100,000 is paid today 29th September into the Trust Account of Corrs provided to you on Wednesday.*
- *Geoff Gee is instructed to release AUD$25,000 from funds held in his Trust accounts as an additional amount payable above the purchase price to ort entity today (29th September).*
- *Settlement is to occur on or before 10.00hrs Vanuatu time on Friday 14th October 2005.*

Please confirm receipt of this advice today (29 September).

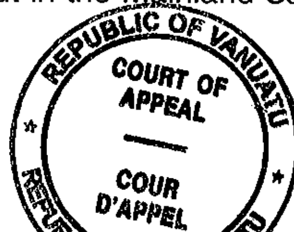
Yours faithfully

Robin Holt

CC: Richarld Holt Corrs, Rick Graham"

24. That this exchange of faxes occurred was not in issue between the parties. Nor was the evidence that the Appellant took steps to have a total of AUD$975,000 paid to the Respondent with the final and substantial part of this sum being transferred to Mr Gee just before the stipulated deadline on 14th October 2005.

25. On the evidence before the primary Judge the only conclusion reasonably open to him was that Mr Holt's fax on 29th September 2005 was to operate as an addendum to the terms and conditions set out in the Mainland Sale Agreement.



The evidence discloses no other agreement or potential agreement for sale and purchase that could be varied by extending time for settlement. Nor is there the slightest hint in the evidence of any other agreement in writing that identifies an offer to purchase the Mainland Title for AUS$950,000. The finding that the Mainland Sale Agreement was executed by Resorts Limited on 14 October 2005 after Resorts Limited agreed to extend time for settlement means that there was no delay in settlement that would attract interest on the purchase price under the Mainland Sale Agreement.

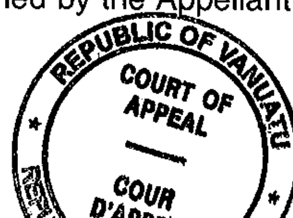
26. The Judge's description of the evidence as indicating a straight forward sale of land transaction was amplified by findings that the Mainland Sale Agreement executed by the Appellant in July 2005 was relied on by all parties and ultimately executed by the Respondent. In our opinion this was the only conclusion open on the evidence.

27. The learned primary Judge also added as further reason for his conclusion the improbability that Mr Copperwaite would make payment of such a purchase price without there being a written contract on which he could rely to enforce by specific performance the sale if the Vendor failed to do anything after receiving the purchase price.

28. The acceptance of Mr Gee's evidence that the Mainland Sale Agreement was executed by the Resorts Limited on 14th October 2005 disposed of an argument made on the Appellant's behalf that there was no valid consideration to support the Mainland Sale Agreement. This argument was premised on the Mainland Sale Agreement being executed not on 14th October 2005 but much later, and well after the purchase price had been accepted by the Respondent.

29. In our opinion there is no substance in any of the arguments advanced by the Appellant, and the appeal must be dismissed.

30. We have so far dealt with submissions put to this Court by the Appellant's counsel. We now turn to consider issues that were not addressed by the Appellant's counsel. The matter came before the Court of Appeal on the previous occasion challenging an order obtained by the Appellant to striking out



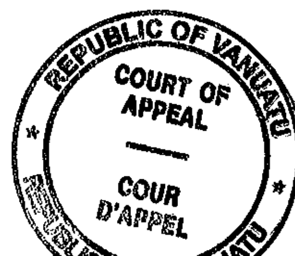
the action on the ground that the pleadings did not disclose a cause of action. The pleadings by the Respondent at that stage alleged that by clause 4.4 of the Resort Title Sale Agreement the Respondent held a right that was protected by s.17(g) of the Land Leases Act. That subsection protects unregistered rights of persons in actual occupation of land. The Court of Appeal at [15] and [16] observed:

[15] "That clause (i.e. Clause 4.4 of the Resort Title Sale Agreement) clearly, in the view of this Court, sets out rights such as could result in an easement. It does not, in the view of this Court, establish a right to occupy the Mainland Title or any part of it. ... To the extent that the claim relied upon a right of occupation rather than an easement it is the view of this Court that the trial judge was correct in his analysis of the claim and therefore correct to determine that, through that route, the Appellant (i.e. the present Respondent) did not then demonstrate a serious issue to be tried.

[16] What has not been decided, it seems to this Court, is whether the [Respondent is] entitled, as between these parties, to exercise any rights arising from the provisions of Clause 4.4 and the subsequent contract between Resorts Limited and Ascension Ltd..."

As there remained this issue to be decided the appeal was allowed, and the action was reinstated to allow the Respondent to amend its pleadings to raise this issue.

It will be noted that the views of the Court of Appeal in [15] are based on Clause 4.4. The rights of access asserted by the Respondent arise under clause 4.4. Even if the contract between the Respondent and the Appellant did not contain an express clause to the effect of Clause 11 of the Mainland Sale Agreement the Appellant would still be obliged to recognise those rights as the Appellant had notice of them when it agreed to purchase the Mainland Title. It was a simple case of the Appellant purchasing property subject to an equitable interest held by a third party of which the Appellant had notice. In short, the arguments put to the primary judge and this Court were pointless as the



Appellant was obliged in any event to grant the Respondent the rights granted under Clause 4.4.

31. The Court of Appeal in the earlier appeal noted that the rights of access granted under Clause 4.4 might not be wide enough to cover all traffic now accessing Iririki Island, and that there were issues to be resolved about the area of the Mainland Title that would be the subject of the access rights. Regrettably those matters have still not been tried, although they are now raised by the pleadings. The attempts to date by the Appellant to prematurely end the proceedings without addressing these matters have only caused delay and expense. The sooner the real issues in the case are addressed the sooner the rights of the parties will be determined.

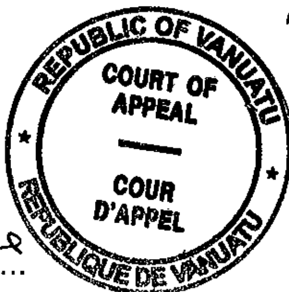
32. The formal Order of the Court is that the appeal is dismissed with costs against the Appellant both in this Court and in the Court below.

DATED at Port-Vila this 30th day of April 2010

BY THE COURT

Vincent LUNABEK CJ

Bruce ROBERTSON J



John von Doussa J

Oliver A. SAKSAK J

Daniel FATIAKI J