IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction) **CIVIL APPEAL CASE No.47 OF 2014**

BETWEEN: **JOSES LAAU & OTHERS**
Appellant

AND: **SOVEREIGN DEVELOPMENT LTD**
First Respondent

AND: **GRAHAME HACK**
Second Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice Stephen Harrop
Hon. Justice Mary Sey

Counsel: *Mr Nigel Morrison for Appellants*
Mr Silas Hakwa for Respondents

Date of Hearing: *4 May 2015*
Date of Judgment: *8 May 2015*

JUDGMENT

Introduction

1. The appellants say that somewhere between 2000 and 2002, Sovereign Development Ltd by verbal agreement sold to each of the appellants either a five hectare or 2.5 hectare block of land. The appellants claim that Sovereign financed these purchases. Each of the appellants were in turn to grow food on the land, sell the produce and repay the loans. The appellants says there were other terms, express and implied to this oral agreement. A second agreement detailed

how the land was to be farmed including the crops to be grown and claimed guaranteed prices for the appellants.

2. The appellants' case in the Supreme Court was that the leasehold titles had not been transferred to them by Sovereign in breach of the oral agreement. Numerous other breaches of the agreement were alleged. The appellants sought the transfer of the leasehold titles and damages.

3. Sovereign's case was that it had not sold the leases outright to the appellants. Sovereign said that the agreement provided the leasehold interest in the blocks of land would only be transferred to individual appellants once they had paid for the block in full. The appellants would have to pay for the land by instalments from the proceeds of the crops grown on the land and a bank loan if necessary. Sovereign's case was that none of the appellants had shown interest in growing and selling crops to pay the purchase price of the land. As a result the purchase prices had not been paid in full. Eventually, Sovereign had given the appellants trespass notices to remove them from the land. These notices triggered these proceedings when the appellants refused to leave the land.

4. In the Supreme Court the Judge found that the appellants had a mere licence to occupy the land and no right to leasehold titles. These licences were determined when the appellants were served with the trespass notices. The Judge also rejected Sovereign's claim for unpaid rent on the land and the value of crops. He said the appellants had paid various sums from crop sales to Sovereign through another company and that Sovereign had failed to account to the appellants

for these payments. The appellants had continued to occupy the land after they had been given trespass notices. Sovereign's claim for damages arising from this continued occupation was rejected by the judge on the basis that no evidence had been given to establish any loss. He concluded these was a broad set off between the damages claimed by Sovereign and the appellants.

This Appeal

5. Both the appellants and respondents appeal against the Supreme Court judgment. The appellants say that there was evidence from which the judge should have found that the appellants and Sovereign had agreed on an unconditional purchase of the leasehold interest. Further the judge wrongly dismissed the proceeding by several of the appellants because they were not present at the trial and had not filed evidence before the hearing. Finally the appellant said the judge erred in concluding the evidence of Morris Horry and John Fordham was inadmissible.

6. The respondents' cross-appeal alleged the judge wrongly failed to award mesne profits and other compensation when there was clear evidence the appellants were trespassers on the land and Sovereign was entitled to the profits from the land during this time.

7. After hearing from this Court counsel for the respondent accepted that their appeal from the dismissal of their claim for mesne profits and other damages could not succeed. Before the Supreme Court there was no evidence called to support the quantum of any damages sought by Sovereign.

8. The first question for the Supreme Court and for this Court on appeal was and is; what were the terms of the oral contract between the appellants and Sovereign with respect to the purchase of the leasehold land?

9. If we find the oral contract was for the unconditional sale of the land by Sovereign to the appellants then questions of enforceability of the contract arises. Given this would be an oral contract for the sale of an interest in land can it be enforced if there is no written contract? *(section 40 The Law of Property Act 18,25 UK)*. Even if the appellants overcome that hurdle the contract cannot be specifically performed as the appellants sought because the blocks of land "purchased" by the appellants do not have individual leasehold titles.

10. Once the contractual terms are identified issues of damages claimed by both appellants and respondents will need to be resolved.

Further background facts

11. It is common ground that with the consent of Sovereign the appellants each occupied a 5 or 2.5 hectare block of land between 2000-2002. Sovereign and the appellants agree that it has their intention that Sovereign would sell and each appellant buy a block of land. The intention was that each appellant would grow crops on the land, sell the crops and use the money to buy the land. The price to be 2.5h blocks was 1.1 Million Vatu and the 5h blocks 2.0 Million Vatu.

12. There was also an agreement relating to the management of the farming of the crops. Only certain crops could be grown, prices were agreed and a company called Clean and Green Ltd associated with Mr Hack would buy the produce. The appellants would be helped with management of their land and machinery would be provided at cost by Sovereign. The purchase price of the blocks was initially to be paid for by the sale of crops by each appellant. The essential point of dispute between the parties was when did the appellants become owners of the leasehold interest of each block.

13. The appellant's case was that Sovereign agreed to finance their purchase of the land by providing 100% finance. They said Sovereign through Mr Hack agreed that once the appellants, collectively, had planted 10,000 stumpas then each appellant was entitled to have the leasehold interest transferred to them. They would then pay the purchase price through the sale of produce from their land.

14. Grahame Hack gave evidence for Sovereign. His evidence was that the arrangement with the appellants arose from a scheme developed by him to give Ni Vanuatu farmers an opportunity to lease and farm land. He said that none of the appellants were to own the leasehold interest until they had each paid the purchase price in full. He said the agreement allowed the appellants to occupy the land, to farm the land and to grow crops and use the profits from that land to pay the purchase price.

15. Mr Hack said however that after the first year of occupancy the appellants showed little or any interest in selling produce to reduce their outstanding balance of the purchase price. Eventually, he

became concerned that the appellants were living on the land, enjoying and making use of it but not making any payments towards the purchase price as had been agreed. He said that he tried to encourage the appellants to grow crops on the land for sale but they did not do so.

16. Eventually, Mr Hack said he gave notice to each of the appellants that they were trespassers. His evidence was that none of them took any notice of the trespass notice and continued to reside on the land and use the land to grow crops, primarily for their own use. His evidence was that he did not have any records from Clean and Green which showed the sales of crops by each individual appellant. He said the appellants agent, Mr Fordham had removed most of the records of Clean and Green.

Discussion

17. We are satisfied that the Judge in the Supreme Court was correct and the appellant's did not establish at trial that there was an unconditional agreement with Sovereign to buy the leasehold blocks of land.

18. Each of the appellants who filed sworn statements in the Supreme Court gave similar and in many respects identical evidence about the terms of the oral contract. They said that sometime between 2000 and 2002 they had become aware that Sovereign through Mr Hack were offering the 2.5 and 5 hectare blocks for sale exclusively to Ni Vanuatu at the purchase prices identified. Each sworn statement by an appellant says Mr Hack "offered me a verbal contract to purchase

his block". The sworn statements each state that during 2000 and 2002 Sovereign offered a detailed set of conditions to the contract (at least thirteen) The appellants claim these conditions were agreed upon. They are primarily farm management contract terms.

19. Two conditions were particularly important to the sale and purchase of the land. The first condition said to be agreed was that "titles to the said lots will be transferred to JIF's names (the collective name of the appellants) after the JIFs planted ten thousand Fiji Taro". And further that Sovereign had financed the purchases by the appellants and the Sovereign loan was to be serviced by the proceeds from the harvested crop.

20. There was no evidence from the appellants as to when, where or precisely between whom the discussions took place relating to the claimed oral contract. It seems clear that by late 2001 most of the appellants were occupying the blocks of land. It also seems clear that all parties to the transaction had agreed that a written contract providing for the sale and purchase of the land would be signed.

21. In late 2001 a "draft contract" in writing was sent by Mr Hack to the appellants. It contained as relevant to the purchase the following conditions (as it related to the 2.5 hectare blocks of land:)

- purchase price 1.1 Million Vatu
- deposit nil
- plus VAT 12.5% - 137,000 Vatu is applicable
- contract to be signed during the first two weeks of December 2001

- first six months no interests
- second period 10% (12 months)
- settlement fee 7% (77.000 Vatu to be paid within the first 12 months)
- VAT to be paid first 18 months
- the purchaser agrees to settle the land at the end of the 18 months and obtain finance from a bank or similar to payout any outstanding, which is not covered by the sale of produce.
- settlement date – 1st June 2003

22. There were other issues covered in the draft which are not directly relevant to this aspects of the case. They relate to the management of the land contract.

23. A written contract for the sale and purchase of the land was not signed in the first two weeks of December 2001. A further meeting between the appellants and Mr Hack was held in July 2002. Mr Laau exhibited a note of this meeting to his sworn statement. It contained the agenda and his hand written notes of aspects of the meeting. Part of the agenda of the meeting was to discuss "Contracts and Agreements" His notes indicated that a contract had yet to be signed and that there were a number of fees to be paid by the appellants relating to the land purchase. Further his note records in his handwriting "10,000 cuttings to sign this contract". The note further said all purchasers should work under Jubilee Management (a company set up by Mr Hack) to manage the farming of the land.

24. The appellants' evidence was that all appellants except Mr Laau were presented with and signed a written contract and returned it to Mr Hack. Mr Laau agreed he had received a written contract but said he did not return the contract to Sovereign. Mr Hack denied he had been sent any signed contracts by the appellants other than by Mr Laau. The written contract sent to Mr Laau provided for payments of the whole of the purchase price by June 2003 as the draft contract had provided. Possession of the leasehold interest under the contract was to be given when the purchase price was paid in full. There was nothing in Mr Laau's contract to suggest that the leasehold interest was to be transferred to him before the purchase price had been paid in full.

25. We consider that the evidence establishes that Sovereign and Mr Hack offered to sell the relevant blocks to the appellants at the prices identified sometime between 2000 to 2002. We are satisfied that the appellants occupied the relevant blocks with the agreement of Sovereign. However, we do not consider that the appellants have established the terms of any contract for the sale of the land with sufficient certainty to conclude that the parties agreed the leasehold interest was transferred to each appellant prior to payment of the purchase price of each block.

26. The parties had agreed to sign a written contract for the sale and purchase of the land. Presumably these written contracts were to reflect any orally agreed terms. The draft written contract provided by Sovereign to the appellants in December 2001 details a number of terms and conditions relevant to both the sale contract and the management contract. The appellants did not claim this draft did not

reflect the oral agreement between themselves and Sovereign. The December 2001 draft contract does not provide for an unconditional sale and purchase of the land by the appellants. It requires the purchaser to pay for the land within 18 months (by June 2003) either by the sale of produce or by a bank loan or by both. There is nothing to suggest the purchaser was entitled to the leasehold title before payment of the purchase price. And the reasonable inference from the draft contract is that they were not.

27. At the July 2002 meeting Mr Laau noted that when 10.000 cuttings were planted then the contract could be signed. The appellant's claimed once the cuttings had been planted the leasehold interest would be transferred to them. By itself signing the contract would not assist the appellants. The terms of the written contract to be signed set out in the draft in December 2001 did not entitle registration of leasehold interests until all of the purchase price was paid.

28. There were also real uncertainties about the terms of the appellants' claimed contract to buy the leasehold interests. As we have noted the blocks apparently purchased did not have individual leasehold titles. The contract alleged by the appellants did not provide for any date for final payment of the purchase price. Payments were to be made from sales of crops but with no minimum payment each year. In fact Sovereign claimed that with some appellants the sales of crops did not even meet interest payments on the purchase price. And so payment of the purchase price was unlikely to ever occur in that situation.

29. We consider that the weight of evidence favoured the terms of the contracted claimed by Sovereign for reasons we have given. The evidence did not establish on balance an unconditional sale of the leasehold titles to the appellants.

30. We agree therefore with the Supreme Court Judge that he could not be satisfied that there was a contract for the sale of each leasehold title which entitled the appellants to registration of the title.

31. We agree with the Judge therefore the appellants occupied the land as licensees. While they continued to comply with the terms of the license to occupy they were entitled to farm on the land.

32. One further matter arises from these findings and the appellants' submissions. As we have noted some of the appellants did not file any statement of evidence and did not personally appear at the hearing. The Judge in the Supreme Court said at *"p.18 – Mr Hakwa took issue also with Counter-claims of Joseph Salong, Raynold Bori, Lorin Statham, Mark Kalotap, Jude Tabi and Henry Alvea because they were not in Court for trial hearing and had not given any authority to the defendants present to act in their behalf. I accept his submissions that they have not given any express authority to the defendants present to represent them in respect of their counter-claim. Further as none of these named defendants filed any counter-claims they might have, the Court concludes that Joseph Salong, Reynold Bori, Lorin Stathem, Mark Kalotap, Jude Tabi and Henry Alvea have no claims and/or counterclaims against the claimants. Accordingly the claimants must succeed in their claims against these defendants"*

33. Counsel for the appellant at trial Mr Morrison told the Judge he was appearing for all the appellants. He was entitled to do so whether an individual appellant had filed a statement of evidence or not and whether an individual appellant appeared or did not appear for the hearing. Mr Morrison was entitled to have the court accept the fact, as he said, that he represented all of the appellants at the hearing.

34. Nor was the fact some appellants did not give evidence in this case necessarily fatal to their claim. This was a collective claim by the appellants. Either all succeeded or all would fail on the primary issue of the terms of the contract. The claims by these appellants should not therefore have been dismissed because of their absence.

The Supreme Court Orders

35. The appellants' appeal against the finding that they were occupying the land as licensees only must therefore fail. We note that the Judge made several orders relating to this finding in his judgment of 16 December 2014. We wish to refer to those orders because we do not consider all are justified.

36. Order one provided that the appellants should vacate the land within 30 days from the date of the order of the Supreme Court. We confirm that the order was correctly made. To ensure an orderly vacation of the land we now direct that the order of the Supreme Court is not to be subject to any enforcement for 30 days from the date of this judgment. This will give the appellants the chance to leave the land in an orderly way.

37. As to Order Two of the Supreme Court this was an enforcement of Order One. It involved both the Sheriff and the Police. We do not consider it was appropriate that such an order was made immediately after entering judgment. Order one makes it clear that the appellants are trespassers. It gives them a time within which they must leave the land. If they did not abide the Court order and leave the land within that time it was for the respondents to consider appropriate enforcement action. Police involvement would only arise if they were called upon to assist the Sheriff in the exercise of any enforcement function. At the time of the Supreme Court judgment there was no evidence that the appellants would not abide the order of the Supreme Court. We therefore quash Order two. Orders three and four are appropriate.

Damages Claim

38. In addition to the leasehold claim, the appellants also claimed damages for breaches of express and implied terms of the contract between the parties.

39. The appellants' counterclaim alleges the following breaches of express or implied terms.

a) Sovereign over charging for machinery hire.
b) Sovereign failing to provide accurate records of expenses and income of the appellants.
c) Sovereign improperly charging a levy.

d) Sovereign failing to buy crops they were ready to harvest at the agreed prices and buying crops from other suppliers thus reducing the appellants' ability to sell crops.

e) Sovereign improperly charging compensation for food grown on the land for the appellants.

f) Sovereign failing to give the appellants the benefit of foreign aid money they were entitled to.

g) Sovereign failing to provide water for the farmers.

h) Sovereign closing the Clean and Green factory thereby reducing the capacity of the appellants to sell their crop.

40. Whatever the merit of these claims there was no evidence to establish what, if any, loss was suffered by the appellants. As the judge noted there was no proper record kept by either Sovereign or the appellants of the value of the crops sold by the appellants to Clean and Green or Sovereign. Nor was any detailed evidence given about the sale price of crops, harvesting of crops and the purchase of those crops by Clean and Green. As to the allegation relating to aid money the appellants called evidence from John Fordham at trial to support this claim. Mr Fordham at the trial said that aid money intended for the appellants was kept by Sovereign. The judge found that evidence was not admissible as hearsay. We agree Mr Fordham's evidence on this aspect of the claim was no more than speculation and was inadmissible.

41. We agree with the Judge that there was inadequate evidence to prove the appellants claims for damages arising from alleged breaches of the management contract. Even if the breaches could be

established and we do not consider they have been (save for one aspect) there was no evidence to establish what if any loss was suffered.

42. The one aspect of the appellants' claim which has substance is the claim for payment of the sale of crops by the appellants to either Clean and Green and or Sovereign. There has never been an accounting to the appellants for the value of the crops they sold. However it seems such an accounting is not now possible. There are no records of sales. And who had the sales records is the subject of dispute. The records required would need to identify sales by each individual appellant to either Clean and Green or if appropriate to Sovereign. Clean and Green is no longer trading and has not done so for many years and we understand, may have been struck off the register of companies. And so any loss that could be identified may not be able to be collected. There is no evidence of what sums may have been paid by Clean and Green to Sovereign on behalf of the appellants from crop sales. We accept there is real unfairness to the appellants in this situation but without evidence of loss we agree with the judge this claim must fail.

43. Finally we turn to the claim by the respondents against the appellants for damages. Mr Hack's evidence was that on behalf of Sovereign in September 2008 he gave each of the appellants who occupied the land a trespass notice. He said he did so because each of the appellants were licensees, they had not complied with the agreement and he considered they had no intention of trying to purchase the land. They were no longer attempting to grow crops on the land nor making any attempt to pay the purchase price of the leasehold land.

44. None of the appellants took any notice of the trespass notices. They did not leave the land. The appellants still occupy the land. Mr Hack said that because he was not able to occupy the land and use the land he had suffered loss and damage. In addition the appellants had continued to profit from the use of the land. Sovereign and Mr Hack therefore claimed damages of firstly 14.4 Million Vatu. This was based on an assessment of damages at 25.000 Vatu per month per farmer for each 2.5 Hectare block. They occupied the land unlawfully for some 48 months and so the damages sought from each defendants was 1.2 Million Vatu and totalled against the twelve appellants, 14.4 Million Vatu. Sovereign also sought damages for loss of quiet enjoyment of the land at 8.590.375 Vatu.

45. We agree with the judge on the Supreme Court that there was simply no evidence to establish either of these claims for damages. The Supreme Court Judge correctly dismissed that claim. Counsel for Sovereign and Mr Hack was correct to recognise this aspect of the appeal could not succeed.

In Summary

46. (a) The appeal by the appellants against the Supreme Courts findings that they occupied the land as licensees is dismissed.

(b) The Order requiring the appellants to leave the land will not be enforced for 30 days from 8 May 2015 to allow the appellants time to leave the land.

(c) The appellants' and respondents' appeals against the Supreme Court's refusal to award damages are each dismissed.

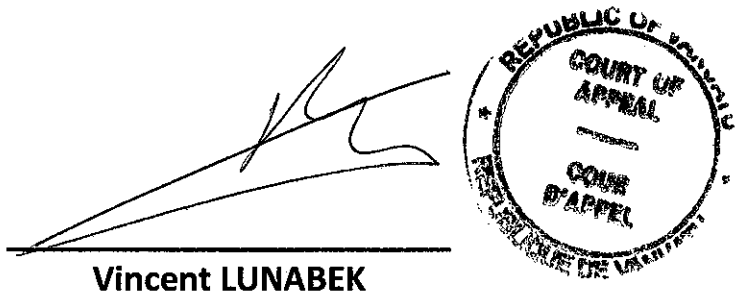
(d) Order 2 of the Supreme Court judgment of 16 December 2014 is quashed.

Costs

47. Given both parties have both failed and succeeded we make no order as to costs.

DATED at Port-Vila this 8th day of May, 2015

BY THE COURT



Vincent LUNABEK
Chief Justice