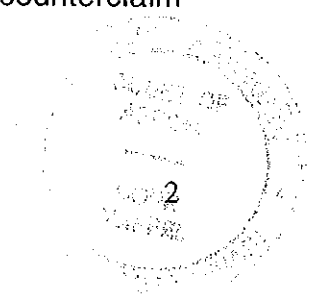


Before this Court, counsel for Mr Awa advanced three grounds of complaint. First, he contended that the Order for security for costs should not have been made as the Order infringed Mr Awa's constitutional right to the protection of the law as it denied him the right to a fair hearing (Notice of Appeal, grounds (i) and (ii)). Secondly, counsel contended that the award of damages as fair rental was wrongly calculated (Notice of Appeal, ground (iii)). Thirdly, he contended that the Court below failed to determine Mr Awa's claim that the respondents were in breach of an agreement with Mr Awa which would otherwise have cancelled out the counterclaim on which the judgment under appeal was entered (Notice of Appeal, ground (iv)).

It is convenient to deal with the third ground of complaint first. In the amended Statement of Claim filed on 23rd September 2004 Mr Awa alleged that he was the legal owner of the land which he had leased to Valele Trust and that the rental payable by Valele Trust was to be paid to the Bank. Mr Awa alleged that Valele Trust, in breach of the agreement, had failed to pay rent since December 2001. The amended Statement of Claim also alleged that the Bank had caused Valele Trust to breach the agreement by entering into an alternative agreement with Valele Trust which dealt with Mr Awa's title to the land without his consent. The third ground of complaint to this Court seeks to agitate this allegation. Even though Mr Awa's claim was struck in the Court below before trial, we address these allegations as they appear to be the foundation of the other grounds of complaint raised by Mr Awa before this Court.

It is now common ground that whilst the land was owned by Mr Awa before 2001, it was mortgaged to the Bank; Mr Awa fell into arrears under the mortgage; and on 25th May 2001 the Bank obtained from the Supreme Court an Order authorising it to take possession of the land and to sell and transfer the land as mortgagee. Sometime in 2002 the Bank agreed to sell the land to Valele Trust. Completion of that transaction occurred on 28th January 2003. On that date the Bank transferred the right to immediate possession of the land to Valele Trust. However Mr Awa was still in physical possession and refused to vacate. He has remained in occupation ever since, hence the Order made on the counterclaim that he deliver up and vacant possession.



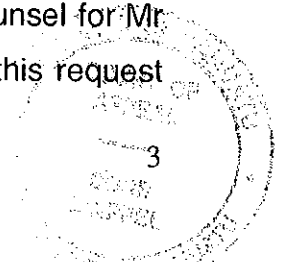
Upon completion of the contract of sell to Valele Trust on 28th January 2003, the transfer documents were lodged for the Minister's consent and for registration. Registration of the transfer did not occur until 26th September 2005.

On these facts it is clear that Mr Awa's present complaint and his amended Statement of Claim reflect a misunderstanding of the situation. He was not the beneficial owner of the land once the Bank took possession under its mortgage, and it was for that reason that Valele Trust ceased paying rent to him in late 2001. For present purposes however it is not open to Mr Awa to agitate those matters as his claim was struck out in the Court below on 12th February 2007.

There was an underlying premise to the submissions made by Mr Awa's counsel that there had been some undefined "unfairness" because Valele Trust obtained title from the Bank in breach of some arrangement between Mr Awa and the first respondent. There is no foundation for such a position. The Bank obtained title pursuant to an order of the Supreme Court. That order authorised the Bank to sell the land, and the Bank could do so to whom ever the Bank chose. Counsel informed us that the Bank called for tenders and Valele Trust was the successful tenderer.

It was the failure to provide security that led to Mr Awa's claim being struck out by the primary Judge. Mr Awa did not seek leave to appeal against that Order. Strictly speaking, issues relating to the Order for security for costs are not issues which are open to this Court to review. However as the Notice of Appeal complains about the Order on the basis that it is inextricably linked to the outcome of the litigation in the Court below, we also address these issues.

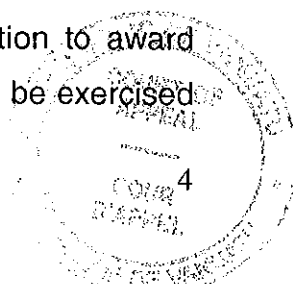
Whilst the Order for security was described as one for security for costs it was not an Order for security for costs in the traditional sense. The terms of the Order say expressly that the security was to be paid as a condition for the grant of an adjournment of the trial of the action sought by Mr Awa. The trial was first listed for hearing on 5th December 2005. A number of adjournments then followed to meet the convenience of one or other of the parties or the Court. On 7th April 2006 a trial date was set for 28th June 2006. However on 9th June 2006 counsel for Mr Awa sought to have the trial further adjourned. The Court accepted this request



and a new hearing date for 11 September 2006 was fixed. On 31st August 2006, by letter to the Court, counsel for Mr Awa sought to have the trial further adjourned as counsel had a conflicting engagement in another Court. This request caused the defendants on 5th September 2006 to file and serve an application for security for costs pursuant to rule 15.19(f) of the Civil Procedure Rules which provides for the making of an Order for security for costs where "the justice of the case requires the making of the Order". When the matter came on for hearing on 11th September 2006 there was no appearance of counsel for Mr Awa. The primary Judge heard the application for security for costs. The defendants sought security as a condition for granting a further adjournment of the trial. The delay was keeping Valele Trust out of possession of the land. The defendants argued that the claim against them was based on a misunderstanding of the facts as, contrary to the allegations in the amended Statement of Claim, Mr Awa had not been the beneficial owner of the land since 2002, and the Bank had lawfully effected a sale of the land pursuant to an Order of the Supreme Court. The defendant sought VT1 million as security, but the primary judge fixed security at a lesser amount of VT600,000.

As documentary evidence placed before the primary Judge about the circumstances of the sale of the land by the Bank made it appear that the claim was without merit, we consider that the primary Judge was entitled to exercise his discretion to order security as a condition of the adjournment.

The argument that the Order breached Mr Awa's constitutional right to the protection of the law is misconceived. The Order did impose a condition on Mr Awa's right to have a trial of the issues raised by the amended Statement of Claim but such a condition is not inconsistent with the constitutional right to protection of the law where the condition is imposed in accordance with law. The constitutional right to protection of the law provided for in Article 6(d) of the Constitution is subject to the overriding limitation imposed by Article 6 that the fundamental rights enshrined in Article 6 are "subject to respect for the rights and freedoms of others and the legitimate public interest in defence, safety, public order, welfare and health". The power of the Court to order security for costs is a power intended to protect the rights of the other parties to the litigation. The discretion to award security for costs recognised by the Rules of Court is a discretion to be exercised



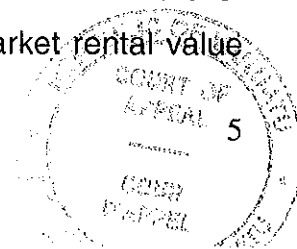
fairly having regard to the competing interests of the parties in a case. So long as the discretion is properly exercised having regard to those interests, the order will not be inconsistent with the right to protection of the law.

After the Order for security was made, Mr Awa applied to the Court to have the Order set aside. One of the grounds for the application was that he had not been heard in opposition to the making of the Order. On 2nd November 2006 the primary Judge heard counsel for both Mr Awa and the defendants and the Order for security was reconsidered. On this occasion Mr Awa tendered sworn statement material. The primary Judge refused to set aside the Order, publishing reasons for that decision, but varied the Order by extending time for compliance by further three months. It is note-worthy that the material which Mr Awa placed before the primary Judge did not address his means or assert an actual inability to provide the security.

Counsel for Mr Awa again complained to this Court that the Order for security for Costs was made without Mr Awa being given a sufficient opportunity to oppose the making of the Order. This complaint is unjustified. Although Mr Awa and his counsel had not taken up the opportunity to respond initially to the application for security, they had the full opportunity of doing so at the hearing on 2nd November 2006, and did so.

No application was made for leave to appeal against either the Order requiring security for costs, nor, as earlier noted, against the Order made on 12th February 2007 striking out the claim for non payment of the security. In so far as the Order for security for costs and its consequences could be relevant to the outcome of this appeal, we consider that the complaints made about them are without substance and must be dismissed.

The striking out of the claim left the counterclaim to be dealt with. The trial of the counterclaim, after a number of further adjournments took place on 12th November 2008. The primary Judge held that the sale of the land by the Bank to Valele Trust was completed between the parties on 28th January 2008. Valele Trust sought damages by way of fair rental value from that date at the rate of VT40,000 per month. There was valuation evidence that the market rental value



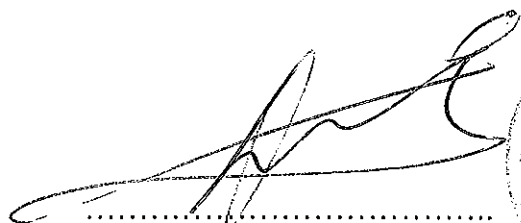
of the land was VT50,000 per month, but Valele Trust sought only the lesser amount. The primary Judge found that on 28th January 2003, the first respondent through its agent had given a period of two months grace to vacate the land, and for that reason assessed the damages at VT40,000 from 28th March 2003. Before this Court Mr Awa contends that the fair rental should have been assessed only from 26th September 2005 when Valele Trust was actually registered as the leaseholder of the land. Mr Awa argues that until then he remained the registered owner of the land, and that he was the person entitled to rent. This argument is based on the same misunderstanding of the facts as the amended Statement of Claim. Once the Bank became entitled pursuant to the Order of the Supreme Court to possession as mortgagee Mr Awa ceased to be the beneficial owner of the land. Upon the Bank completing the sale of the land and transferring the right to possession to Valele Trust, Valele Trust became entitled to receive the rental value of the land.

The period over which the fair rental was to be assessed was correctly identified by the primary Judge. No complaint is made about the monthly rental value of VT40,000 used to arrive at the judgment sum. In our opinion no error in the assessment of damages under the counterclaim has been demonstrated.


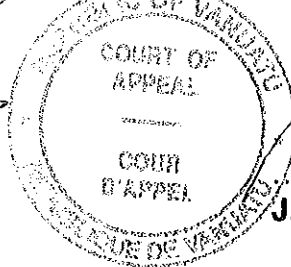
For these reasons the appeal must be dismissed. Mr Awa must pay the respondents' costs of the appeal.

DATED at Port-Vila this 16th day of July 2009

BY THE COURT



Vincent LUNABEK CJ



J. Bruce Robertson J



John von Doussa J



Nevin Dawson J