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

CIVIL APPEAL CASE NO. 02 OF 2014

BETWEEN: **SOCIETE DE SERVICES PETROLIERS S.A**
Appellant

AND: **VALERIE RAYNAUD**
First Respondent

AND: **STATION CENTRE VILLE LIMITED**
Second Respondent

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

Counsel: Mark Hurley for the Appellant
Dane Thornburgh for the Respondents

Date of Hearing: Tuesday 25 March, 2014

Date of Judgment: Friday 4 April, 2014

JUDGMENT

---

1. This is an appeal brought as of right from a decision of the Supreme Court made on a counterclaim.

Proceedings in the Supreme Court

2. The appellant, Societe De Services Petroliers S.A (SSP), is effectively the owner of a service station business in Central Port Vila which it leased (or, more strictly, subleased) to the second respondent Station Centre Ville Limited (SCVL).

3. The proceedings in the Supreme Court were commenced by SCVL against SSP seeking damages for loss caused by alleged malfunction in the calibration mechanism of the petrol pumps which comprise part of the subject matter of the lease. The malfunction was alleged to have under- recorded the volume of petrol being dispensed to customers.

4. Within a few months of the issue of proceedings, SSP served a notice to quit (or as will later appear several notices to quit). By counterclaim SSP sought an order for immediate possession alleging that SCVL had been in occupation of the service station as a monthly (periodic) tenant which came to an end on the expiration of the period of notice. SCVL denied that it was only a monthly tenant and said it was a tenant for a term of years under a written lease agreement executed by the parties.

5. The parties agreed that the counterclaim should be tried first as they considered the matter of damages could be resolved by agreement once SCVL's right to continuing occupancy of the service station was resolved.

6. The issue at trial therefore concerned the validity of a notice to quit given by SSP to SCVL, and that question turned on whether SCVL was only a monthly tenant. It was not disputed that the notice given sought possession on the first business day after the expiration of one month's notice.

7. The trial judge in a reserved judgment delivered approximately two years and five months after the completion of the trial accepted the contention of SCVL that the notice to quit was given whilst a 3-year term of the lease was still running, and held that the notice to quit was not valid. However he also held that by the time of the trial (which took place between 29th August and 6th September 2011) the term of the lease had expired and SCVL had become a monthly tenant under the holding over provisions of the lease and s. 37 of the Land Leases Act [Cap. 163].

The Appeal and Cross Appeal

8. SSP now appeals from that decision seeking a declaration that on the date that the notice to quit was given SCVL was a monthly tenant, that the notice to quit was validly given, and that SSP became entitled to immediate possession on the expiry of the notice to quit.

9. The respondent cross-appeals seeking an order that it remains a tenant for a term of years, and quashing numerous findings made by the trial judge concerning issues as to the credit of Ms Raynaud and Mr Russet and facts relevant to the issue of damages which SCVL contends were not issues before the Court on the trial of the counterclaim.

Collateral Issues

10. Before addressing the central issues raised by this appeal it is necessary to refer to two issues argued at length at trial that are no longer issues of continuing importance, at least to the outcome of this appeal. There was uncertainty at trial about the correct identity of the tenant, whether it was the first respondent Valerie Raynaud, or Ms Raynaud and David Russet, in either case trading as Station Centre Ville or the company SCVL. The Supreme Court proceedings were commenced in the name of Valerie Raynaud but later amended to include in the alternative SCVL. At trial Ms Raynaud gave evidence that she intended the lease relied on to be in her name but the formal written contract was in the name of SCVL. The uncertainty was compounded by SCVL being struck off the Register of Companies on 7th February 2008, and later reinstated to the Register on 8 February 2011. The trial judge held that under s. 335(4) of the Companies Act [Cap. 191] the reinstatement resulted in the company being *"deemed to have continued in existence as if its name had not been struck off"*. There is no appeal against this finding and the appeal has proceeded on the footing that SCVL has at all times been the tenant of the service station. The correct identity of the tenant is no longer an issue.

11. The other matter argued at trial and initially in this Court was the effect of non registration under the Land Leases Act of the formal sublease document executed by the parties. The trial judge considered that this was an unimportant issue. We agree that the consequence of non-registration was not relevant to the outcome of the issues the Court was to decide. The formal sublease executed by the parties was in registerable form but for reasons which were not clarified at trial it was never registered. The document wrongly recorded the number of the lease which would have prevented registration in any event.

12. At trial the appellant argued that under s. 22 (2) of the Land Leases Act non-registration meant that the lease was *"ineffectual"* with the consequence that SCVL could not be a tenant for a term of years. The trial judge rejected this argument saying that whilst the non-registration meant that SCVL may have had no interest in the registerable lease, the parties were bound contractually by the terms of the lease document they had executed. This conclusion is undoubtedly correct and in the course of argument before this Court counsel for SSP conceded that this must be so. S. 22 (5) specifically provides:

"Nothing in this section shall be construed so as to prevent any unregistered instrument from operating as a contract".

Background to the Appeal

13. Prior to 2006 the service station business was owned by Mobil Oil which leased (or rather subleased) it to SCVL. In 2006 Ms Raynaud and Mr Russet purchased the shares of SCVL. In 2007 Mobil Oil sold its interest in the service station to SSP. In the latter part of 2007 Mr Vallette for SSP gave Ms Raynaud a draft document for a new lease from SSP to SCVL. Ms Raynaud initially gave evidence that the draft was never executed but she agreed in cross-examination that it was executed in 2007. The executed document (the first contract) provided for an initial term of one year commencing on 1st December 2007 with two rights of renewal, each for a term of three years exercisable on notice to SSP given not more than three months nor less than one month before the expiration of the current term.

14. It is common ground that before the expiration of the one year term on 30th November 2008 no notice was given exercising the option to renew. Therefore, from 1st December 2008 SCVL became a monthly tenant under holding over provisions.

15. In about the latter part of 2008, probably influenced by the Global Financial Crisis, the wholesale price of petrol fluctuated and the profitability of the service station came under pressure. This was discussed between Mr Vallette and Ms Raynaud and it was agreed that the contractual relationship would be amended in relation to the pricing structure. Mr Vallette provided a draft contract to Ms Raynaud for consideration of SCVL. Mr Vallette's evidence was that the draft was simply a copy of the first contract but with an amended schedule which altered the pricing structure. He said there was no other alteration to the terms of the contract. Although Ms Raynaud gave evidence that she intended that she would become the tenant under the new lease, the draft clearly named SCVL as the tenant. The redrafted contract, like the first contract, provided that the initial term of the lease commenced on 1st December 2007 for one year, with two rights of renewal for three years terms.

16. SSP also leased another service station to a different tenant at Tebakor under similar terms as to price to the first contract with SSP. The tenant of the Tebakor station was also involved in discussions with Mr Vallette and Ms Raynaud over the terms of the new pricing structure.

17. Mr Vallette's evidence was that the draft contracts with the amended pricing structure were returned to him by Ms Raynaud and the tenant of the Tebakor station without any alteration to the redrawn schedule, and without further comment. The redrawn contract

was shortly afterwards executed by both SSP and SCVL on 2nd September 2009 (the second contract).

18. Much later it came to Mr Vallette's attention that another amendment had been made to the redrawn contract that was not brought to his attention by Ms Raynaud or the tenant from Tebakor. In precisely the same font as the draft redrawn contract a clause in the following terms had been inserted into the lengthy provisions of clause 3.5 (k):

> *"Whatever is the cause of termination or lapse of this sublease, the sublessor shall pay to the sublessee an indemnity amounting to ten percent of the aggregate amount of the turnover of the sublease in the last three years".*

19. By 2nd April 2009 the stated first year term in the first contract had already expired on 30th November 2008. The central issue between the parties was whether, as Mr Vallette maintained throughout his evidence, the second contract was merely a reconsideration of the pricing structure with the terms of the first contract continuing to otherwise define the contractual relationship of the parties, or whether as Ms Raynaud asserted was her intention, the second contract operated as an entirely new lease which ran from 2nd April 2009 with an initial term of one year from that date and with two rights of renewal for three years for terms which would run from 2nd April 2010 to 1st April 2013, and then from 2nd April 2013 to 1st April 2016. On this issue the trial judge said:

> *36. It is difficult to understand how this second contract could have any currency unless either:*
>
> *a. The second contract was understood by the parties to commence on 2 April 2009 (as is contended for by SCV/SCV Ltd) and that the contract should accordingly be rectified to correct that typographical or mutual error.*
>
> *b. Alternatively, that the intention was (as Mr Vallette contended) to amend the first contract just as to the new pricing structure retaining the commencement date of 1 December 2007.*
>
> *37. I find that the second contract was just an amendment of the first contract for the purpose of revising the pricing structure. That is the date on the second contract and there has been no claim for rectification."*

20. Having made the finding that the second contract was just an amendment to the first contract for the purposes of revising the pricing structure, the trial judge went on to say:

"38. I am then drawn favourably to Mr Thornburgh's submission that SSP cannot now assert that the second contract effectively operated as if the option has not been taken up by SCV/SCV Ltd to extend for the first available period of three years from 1 December 2008. The parties conducted themselves as if the option to take the first extension had been taken up. What would have been the point of redrafting the second contract in this way if the first one year term had already expired and SCV/SCV Ltd was merely a periodic tenant. Mr Thornburgh argues that SSP should be estopped from denying that the contract term has been extended in this way and I accept that this must be so."

21. As the trial judge accepted that the first three year renewal term was running, it followed that a notice to quit on one month's notice could not be validly given. That three year term however had expired on 30th November 2011, and no notice had been given within the time prescribed to exercise the second renewal of the lease. Hence it was held that SCVL was continuing in occupation as a monthly tenant.

The Issues on Appeal

22. The appellant seeks to uphold the finding that the second contract was merely an amendment of the first contract made for the purpose of reviewing the price structure, but contends that the finding in paragraph 38 of the judgment is wrong. The appellant says that Mr Thornburgh made no submission about waiver and, further, the evidence does not disclose any conduct by the parties that could support the finding of waiver. The appellant also referred the Court to authorities which he argued establish that principles of estoppel against a landlord are not applicable in this type of case. In light of conclusions we reach below, it is not necessary for us to consider these authorities.

23. The respondents also challenge the finding made in paragraph 38. They too say no such submission was made by Mr Thornburgh and it has always been the respondents' case that from 30th November 2008 until the second contract was executed SCVL was merely a monthly tenant. In light of the respondents' position the finding in paragraph 38 cannot stand. Moreover, we agree with the appellant that the evidence fails to establish a course of conduct by the parties that could support a finding of waiver, even if that were a legally possible outcome. The conduct of the parties is entirely consistent with SCVL being a monthly tenant holding over after the expiration of the first term.

24. The next question is whether that situation was changed as the respondents allege on 2nd April 2009 by the creation of an entirely new lease operating from that date. This contention failed before the trial judge, but is renewed before this Court by the respondent under their cross-appeal.

25. The respondents in support of this contention, and separately in support of the balance of their cross-appeal that numerous findings of the trial judge should be set aside, argue that many very damaging findings against the credit of Ms Raynaud and Mr Russet, and about the clause inserted in paragraph 3.5 (k) were not matters before the Court on the counterclaim. For this reason they say evidence that the respondents could have called relevant to these questions was not called, and the respondent's outstanding claim for damages (which presumably they now intend to amend to include a claim for indemnity under clause 3.5 (k)) will be severely prejudiced. Those adverse findings include findings that Mr Vallette had nothing to do with drafting clause 3.5 (k) which was a fraudulent attempt made at least with the knowledge of Ms Raynaud to introduce by stealth a contractual provision that is unquestionably to the advantage of SCVL, and which is nothing short of a penalty payment.

Discussion

26. Counsel for the respondents contends that the finding that the second contract was simply an amendment to the pricing schedule should be set aside as it depends, at least substantially so, on the adverse view which the trial judge took about Ms Raynaud's credit. He argues that all the complaints made in the cross-appeal become relevant when considering the appellant's argument that the finding about the second contract should be upheld.

27. The difficulty for SCVL about this submission is that the Judge's finding about the second contract is not based on, and does not depend on the credit of the witnesses Mr Vallette and Ms Raynaud. The reasons for the finding appear at paragraph 40 of the judgment:

> *"However, it is difficult to see how the plain wording of the contract can be departed from. Again, no attempt was made to seek rectification of the contract. SCV Ltd was the legal entity that operated the service station under contract with SSP from the outset and that continued to be so with both the first contract and the second contract. Notwithstanding that SCV Ltd was struck off, it was reinstated by order of this Court and by operation of law is deemed never to have been struck off. Of perhaps greater significance is that neither Ms Raynaud nor Mr Russet nor anyone else on their behalf indicated to SSP that the business had been taken over or adopted by Ms Raynaud and Mr Russet through their trading entity SCV notwithstanding that that might well have been their intention."*

28. Neither Ms Raynaud nor Mr Russet gave evidence that they informed SSP that the business was not to continue as before or that there was to be any change in the identity of the tenant. Ms Raynaud gave evidence that this was her intention, but her subjective intention not communicated to SSP is not admissible evidence on the construction of the contract.

29. The second contract is clear in its terms. It commenced to operate from 1st December 2007, and it governed the relation of the parties from that date. A consequence of this, presumably favourable to the respondents, is that when damages come to be assessed the new pricing formula will be applied from 1st December 2007 in calculating the loss of profits from the "lost" volumes of fuel not recorded. The relationship of the parties had apparently worked satisfactorily on a monthly tenancy, apart from the pricing formula, from 1st December 2008 until the second contract was executed. The evidence discloses no compelling reason for the parties to convert this relationship to one for a term of years. The evidence did not explore possible reasons why either side might have desired to do so.

30. In our opinion there is no substance to SCVL's attack on the finding of the trial judge about the second contract.

31. Counsel for SCVL relied strongly for support on the fact that various formal documents emanating from SSP, including the pleadings, referred to the date of the contract which governs the relationship of the parties as being 2nd April 2009. We consider the reference to this date is entirely neutral. It is the date shown on the second contract, and it is the correct date to use to describe the operative contract between the parties.

32. Once it is accepted that there was no new contract which operated afresh from 1st April 2009 the contention of SCVL that it had a one year lease to 1st April 2010 fails, and even if it gave notice to exercise the first three year option in early March 2010, the purported exercise achieved nothing as there was no new contract. Whether such a notice was given was hotly disputed at trial, and the finding to the contrary by the trial judge depended on findings of credit now challenged in the cross-appeal.

33. In our opinion the appeal by SSP should succeed. Several notices to quit were given, first on 30th December 2010 and then on 9th March 2011. The notices given on 30th December 2010 showed the wrong title reference and were later replaced by the second notices. Besides notices to SCVL there were notices given to Ms Raynaud separately, and also to Ms Raynaud and Mr Russet jointly. The notice given on 9th March 2011 to SCVL is the operative one. The appellant is entitled to an order that the notice to quit served on 9th March 2011 ended the monthly tenancy of SCVL on 3rd May 2011 and that SSP on that date became entitled to immediate possession.

34. We were addressed briefly on the significance of continuing rental payments which have been made throughout the period whilst this matter awaited judgment in the Supreme Court and then through the appeal process. Acceptance of rent after the expiry of a notice to quit can amount to a waiver by the landlord of the right to immediate possession. Whether it does depends on all the circumstances including the intention of

the parties: see generally Halsbury, 3rd edition, Vol 23 at 528 – 529. In argument reference was made to s. 37 (2) of the Land Leases Act, but that provision is directed to a somewhat different issue, namely consent to a holding over after the termination of a lease. However, in this case there can be no estoppel or consent to holding over after the notice of quit expired as the continuing rental payments were required by order of the Supreme Court made on 22nd December 2010 as a term of an order that SSP not act on its notices to quit pending the outcome of litigation. The parties have proceeded since then on the footing that the order continues to operate in respect of the notice to quit served on 9th March 2011.

35. The appeal therefore succeeds.

36. The cross-appeal identifies many findings of fact and as to credit adverse to SCVL and its witnesses. At the outset of his oral submissions to this Court, counsel for SCVL expressed concern that these adverse findings would carry through to the trial of the claim, and severely prejudice the assessment of SCVL damages. For this reason it was important that the findings be attacked at this stage through the cross appeal.

37. If these adverse findings were to carry through to the next trial, the position in which SCVL would find itself is the result of there being split trials. This is not an uncommon situation where split trials occur, and it is the reason why Courts, and frequently parties, will not agree to the separate trial of particular issues in a matter, especially where issues of fact will be involved.

38. In this case we consider the concerns of SCVL are misplaced for the reason that the Commission of the trial judge has expired and the claim for damages, if not settled, will be tried before a different judge. The issues on the claim will be very different in many respects to those in the counterclaim. Proof of the malfunction of the petrol pumps, and the quantification of the "lost" sales is likely to depend mainly if not wholly on expert witness. The actual decision of the Court on the counterclaim is not dependent on the adverse findings which now concern SCVL, and for this reason those findings are not transported into the trial of the claim. The new Judge hearing the claim will be required to form his or her own assessment of all the witnesses, and the documents received. It will be the judicial duty of the Judge to do so, and not be influenced by observations made in other proceedings where the issues are quite different.

39. After this Court explained these reasons for considering that the expressed concerns of SCVL were misplaced, counsel did not continue with detailed argument, finding by finding, as to why this Court should overturn them. The written submissions of SCVL give as a general reason for doing so that:

"the trial Judge was not asked to determine the same and was dealing only with the counterclaim and this was not a live issue before the parties at the hearing of the counterclaim or relevant to the hearing of the same."

40. We have considered the criticism of the challenged findings made in the written submissions. We are not persuaded that the trial Judge fell into error in the ways alleged. The topics discussed by the trial Judge which led to the adverse findings were topics that were raised by the witnesses in their evidence and were the subject of cross-examination without objection as to relevance. Moreover, the question of fact whether or not a notice was given in March 2010 by SCVL to exercise the renewal option under the *"new contract"* which SCVL propounded turned solely on the evidence of Ms Raynaud. Her credit was the central issue. The findings now challenged were relevant in deciding a fact in dispute before the trial Judge.

41. SCVL submits that another substantial reason for overturning the adverse findings is the very long delay between the completion of the trial and the delivery of judgment.

42. The delay in this case was extreme and most regrettable. This Court has discussed the consequence of long delay in Swanson v. Public Prosecutor [1998] VUCA 9 and Dawson v. Public Prosecutor [2010] VUCA 10. These were both criminal appeals but the observations made in those judgments, that where there is a substantial period of delay the Court must carefully scrutinise the total circumstances to ascertain if by reason thereof the judicial process has lost its integrity apply, whether the proceedings are criminal or civil.

43. In Cobham v. Frett [2001] 1 WLR 1775, 1783-84 the Privy Council in the Speech of Lord Scott said:

"If excessive delay is to be relied on an attacking a judgment, a fair case must be shown for believing the judgment contains errors that are probably, or even possibly attributable to the delay. The appellate court must be satisfied that the judgment is not safe and to allow it to stand would be unfair to the complainant".

44. This approach has been applied again recently by the Privy Council in Ramnarine v. Ramnarine [2013] UKPC 27.

45. The need for special scrutiny by an appellate Court has been repeatedly stressed. In Nationwide News Pty Ltd v. Naidu & Anor; ISS Security Pty Ltd v. Naidu & Anor [2007] NSWCA 377 at [168]: the Court of Appeal said:

"There has been a body of judicial comment over the last 15 years about the consequences of delay in delivering judgments. These cases were 'collected' by this court in Hadid v

Redpath in the judgment of Heydon JA (as his Honour then was). Relevantly, for present purposes, those cases have held that the usual advantage enjoyed by a trial judge in relation to findings of fact based upon credit may be lost when there is a substantial delay in delivering judgment, so that the trial judge's findings of fact must be looked at with special care: Goose v Wilson Sandford and Co (1998) 142 SJLB 92. It has also been held that a significant delay requires "a more comprehensive statement of the relevant evidence than would normally be required, in order to manifest, for the parties and the public, that the delay has not affected the decision". R v Maxwell (1998) 217 ALR 452 at 463. See also Moylan & Ors v The Nutrasweet Co [2000] NSWCA 337." (Emphasis added)

46. In the present case the submissions of SCVL do not advance specific reasons why the challenged findings could reflect error attributable to delay. The findings accord with the evidence given at trial. The adverse remark of the Judge that the clause inserted into clause 3.5 (k) was a penalty payment is an unsurprising comment that cannot be related to delay. As we have earlier noted, the rejection of SCVL's case that there was a new contract is not based on credit findings. Nor is that finding based on any assessment of evidence that could be tainted by delay. We are not persuaded that any of the findings which are attacked contain error which is probably or even possibly attributable to delay.

47. The cross appeal should be dismissed.

48. The formal orders of the Court are:-

1) Appeal allowed.
2) Declaration that the notice to quit served on the respondent on 9th March 2011 was a valid notice.
3) Declaration that the respondent is entitled to vacant possession of the service station as and from 3rd May 2011.
4) Cross-appeal dismissed.
5) Respondent to pay the appellant's costs of the appeal and cross-appeal on the standard basis.

Dated at Port Vila this 4th day of April, 2014

BY THE COURT

COURT OF APPEAL — COUR D'APPEL

Chief Justice Vincent Lunabek