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

Civil Appeal
Case No.16/922 CoA/CIVA

BETWEEN: LUONG FONG dit TCHONG HUYA
Appelant

AND: CHEN JINQIU
First Respondents

AND: ARNOLD PRASAD,PAUL TELUKLUK and RUIHUA YAO
Second Respondent

Coram: *Hon. Justice Bruce Robertson*
Hon. Justice Oliver Saksak
Hon. Justice John Mansfield
Hon. Justice David Chetwynd
Hon. Justice Paul Geoghegan

Counsel: *Mr Luong Fong Appellant in Person*
Mr Mark Hurley for 1st Respondent
Mr Roger Tevi for 2nd Respondents

Date of Hearing: *18 July 2016*
Date of Judgment: *22 July 2016*

JUDGMENT

INTRODUCTION

1. This claim in the Supreme Court was for possession of lease 03/0183/07/071 (Lease 071) and for payment of mesne profits.

2. Chen Jinqui (Chen) signed a sale and purchase Agreement on 5th December 2014 with Luong Fong dit Tchong Huya (Luong) for Luong to sell him Lease 071 for VT 45 million (the Agreement). By the time of the

judgment under appeal, as we find below, that sum had been fully paid by various instalments. That was not the view of Luong himself, who maintained that there was still VT5 million outstanding.

3. On 15th April 2015, Chen became the registered lessee of Lease 071. That was before the full purchase price had been paid, and while Luong was still in possession of the leased land. On 18th April 2015, Chen began a Supreme Court claim action seeking possession of Lease 071 from Luong. Luong was served with a Notice to Quit on 21st May 2015.

4. Luong, by the time of the trial had not vacated Lease 071.

5. On 10th August 2015, Chen was given leave to amend his claim to join Arnold Prasad, Paul Telukluk Barthelemy and Ruihua Yao as second defendants. They are the registered owners of a business named Tapusia and they operated a shop on part of the leased land.

6. That leave was sought in anticipation of Tapusia being also served by Chen with a Notice to Quit the shop, and Tapusia (as anticipated) not vacating possession of the shop. The Notice to Quit was served on 20th August 2015.

7. The various issues came to trial on 11th March 2016. They were:

   (1) Chen's claims against Luong and Tapusia for possession of Lease 071, and for an Enforcement Warrant to obtain possession, and for mesne profits from 21 May 2015 until possession was obtained;

   (2) Luong's dispute that Chen was entitled to possession, because (he said) Chen became registered as Lessee of Lease 071 in breach of the Agreement, and Luong's counterclaim for rectification of the Register to restore him as the lessee, and alternatively for payment of the balance of the purchase price; and

(3) Tapusia's claim that, despite the Notice to Quit, they have remained in possession of the shop on the instruction of Luong, and are therefore not liable for any mesne profits to Chen.

8. It is also apparent from Tapusia's position that it would vacate the shop if it was clear that Chen was properly entitled to have given the Notice to Quit.

9. The alternative claim of Luong appeared to accept that, if he received the full purchase price, he would accept that Lease 071 should be registered in the name of Chen. That clearly emerged at the commencement of the trial. Chen had by then paid the full purchase price. Luong accepted that Chen should remain on the Register as lessee of Lease 071. The counterclaim was withdrawn.

10. Consequently, on 11 March 2016 the trial judge, by consent, ordered-

(1) Chen is entitled to an order for possession of the Lease; and

(2) Luong's counterclaim filed on 18 September 2015 is withdrawn and dismissed.

11. The trial judge properly recognised that the only remaining issues were the claim for mesne profits against Luong, a time to be specified for Luong and Tapusia to vacate the leased land, and costs.

12. The principal issue was the rate at which the mesne profits should be fixed. Tapusia said that they should be VT280,000 per month, as that was the rental rate they had previously paid Luong. Chen said it should be the "open market rate" of VT 495,500 per month plus VAT.

13. Judgment was given on 16 March 2016 (the Judgment).

14. The trial judge decided the mesne profits payable by Luong should be VT280,000 per month plus VAT from 21 May 2015 (the date of the service of the Notice to Quit on Luong) until he surrendered possession of the leased land. The same mesne profits were jointly payable by Tapusia from 27 August 2015 (seven days after the Notice to Quit was served on Tapusia) until they surrendered possession of the leased land. Tapusia was directed to vacate the land within 21 days of the judgment.

15. Each of Luong and Tapusia were ordered to pay to Chen his costs of the Supreme Court Action.

16. Tapusia apparently continued paying its monthly rent to Luong, rather than to pay it into Court or make any other arrangement for its rent to be held by a third party pending the decision of the Supreme Court about who the rent was payable to. The rental paid was VT250 000 per month to December 2015, and thereafter VT 280 000 per month.

THE HEARING OF THE APPEAL AND CROSS APPEAL

17. Luong appealed from the Judgment. He also applied for the appeal to be heard urgently in the April Session of the Court of Appeal. That application was not granted.

18. However, in light of that application, it can be assumed that he was ready to prosecute his appeal very promptly.

19. At the callover of the July session of the Court of Appeal, he sought the appeal hearing be stood over to the November session of the Court of Appeal. He filed a request for an adjournment on the morning of the callover. He explained that he has engaged in sequence several lawyers to represent him between April and July 2016 to the appeal but did not have a lawyer at that time.

20. The Court of Appeal accommodated his request only to the extent of fixing the hearing of his appeal at the commencement of the second week of the session. It took into account that he had previously been able to be ready for the hearing at short notice, that he had 3 months to prepare such material he wanted to rely on at the hearing of his appeal, and that he had a further week to engage other counsel if he wished to do so. His application for the adjournment was clearly expressed in writing, so it was not apparent in any event that he could not, if he chose to, present his appeal himself.

21. At the hearing of the appeal Luong represented himself. He provided two written submissions (one in his Appeal Book and the second handed up at the hearing) which were detailed and comprehensible. He was provided with an interpreter so that the questions from the Court could properly be understood and his answers given through the interpreter. He also sought to tender as evidence on the appeal a sworn statement of 19 May 2016 of Marisan Vire, his counsel up to the time of the Judgment, apparently prepared for the Supreme Court case. That was received without objection. He also sought to tender a series of receipts for rent payments. They confirmed uncontentious facts as found in the Judgment.

22. The Court of Appeal is satisfied that Luong had a fair opportunity to present his case on the appeal and a response to the cross appeal in the circumstances.

23. Luong's Notice of Appeal seeks to set aside the whole of the Judgment. There is a separate document setting out the Grounds of Appeal. Certain of the grounds are plainly wrong.

24. Ground 1: That Luong was never in possession of Lease 071. This is plainly wrong. He was the lessor of Lease 071. He granted a sublease to Tapusia for the shop on part of the Leased Land. He received the rent payable by Tapusia up to the time of the Judgment and to 6 April 2016.

25. Grounds 2 and 3: That mesne profits are at an excessive rate, as Chen had not paid the full purchase price. That contention is not logical. If Chen is entitled to possession under Lease 071, he may be entitled to mesne profits and if he is not entitled to possession he has no entitlement. His entitlement depends on the right to possession, not on how much of the purchase price he has paid.

26. Ground 4 relates to costs, and is addressed below.

27. Grounds 5-6, 8-9 and 12 concern the conduct of the claim in the Supreme Court by his counsel. They are separately addressed below.

28. Ground 7: Whether Luong had a fair trial. There is nothing to support his claim that in the Supreme Court, he did not have a fair trial. He was represented by Counsel.

29. Ground 10: That the transfer of Lease 071 was procured by fraud as Luong's counsel at the time was related to the Director of Lands. That is plainly not maintainable on the appeal. The Director of Lands was not a party in the Supreme Court action, because the issue was not raised there. It was not the subject of the Judgment. The Lease was transferred pursuant to the Agreement as performed.

30. Ground 11: That Chen has not paid the full purchase price, and so was not entitled to possession. That is considered below.

31. Chen has cross-appealed. He sought the mesne profits to be increased to what he called the uncontested "open market rent" figure of VT 495,500 per month from 21 May 2015 to 6 April 2016 payable by Luong and from 27 August 2015 to 6 April 2016 payable by Tapusia (a joint and several liability).

THE PROPER ISSUES ON THE APPEAL

32. The appeal is from the orders of the Supreme Court as addressed in the Judgment. It is not, and could not be, an appeal from the consent orders made earlier on 11 March 2016. That aspect is referred to in more detail below.

33. In relation to mesne profits, they are

(1) Whether Chen was in possession of the land in lease 071 in all or what part of the relevant period; and

(2) Whether the mesne profits should have been at the "open market rent" according to uncontested expert evidence or the rent payment by Tapusia.

34. Tapusia's submissions support the Judgment on issue (2) and do not address issue (1).

35. There is no other order, or part of the reasons for the Judgment which can properly be raised on the appeal. The only issues, as the trial judge recorded at [9] of his reasons, concerned the claim for mesne profits, and what time should be allowed to Luong and Tapusia to vacate the property.

36. The other issues complained about in Luong's Grounds of Appeal are not matters which were dealt with in the Judgment. There was no judgment addressing whether Chen had paid the full purchase price, or when he had done so. That is because the consent orders were that Chen was entitled to possession of the Lease; and that Luong's counterclaim was dismissed.

37. Luong now asserts in certain of his Grounds of Appeal that those two orders were not made on his instructions that he did not know of the hearing (although he was represented at the hearing by counsel and his

statement of 16 September 2015 was referred to as part of the evidence).

38. Those matters cannot properly be raised on this appeal. There is no suggestion that Chen was a party to any improper conduct so the Consent Orders of 11 March 2016 give effect to a binding agreement.

39. If Luong wants to raise those matters, his available remedy might be against his lawyers for not acting in his interests, or for not complying with his instructions. The Court of Appeal, of course, cannot determine such issues. It is not inappropriate however to point out (as appears from the Counterclaim of Luong) that he included a claim of the balance of the purchase price and that he has since received the full purchase price, so that he has had the Agreement fulfilled. It would appear to be unlikely, in those circumstances, that he could have set aside the Agreement and been re-instated as the registered lessee in any event. Also as a starting point, he would have to repay the VT45 million to Chen before he could pursue a claim now for rectification of the Register. He has not offered to do that. He does not suggest the Agreement itself was invalid. There is no reason to think it was. So the next step, of showing the Agreement should be set aside would seem to be impossible to get over. In short, he has got what he bargained for. Thirdly, one reason for the Supreme Court claim not proceeding, and him not giving possession, appears to have been the claim by his daughter Millie Ogden against him. He sought and obtained a stay in the Supreme Court action until her claim was resolved. That stay was lifted only on 11 December 2015 after Millie Ogden's claim was amended, so that she no longer claimed an interest in Lease 071. On the same day, the claim of Chen was listed for hearing. The sworn statement of his counsel (which he tendered on the hearing of this appeal) would also indicate that Luong has very significant factual obstacles to overcome to be able to succeed in such a claim.

40. These are matters Luong would have to address before he decided to pursue a claim against his lawyers.

CONSIDERATION OF APPEAL AND CROSS APPEAL

(1) Was Chen in possession of the Lease for the period he seeks mesne profits?

This issue became much simplified as counsel for Chen indicated that Chen now seeks mesne profits only for the period for 11 December 2015 to 6 April 2016, rather than for the period sought from, and allowed by, the trial judge.

41. That was the date on which, Chen says, he finally paid the balance of the purchase price. Tapusia accepted that position. Luong adhered to his contention that the full purchase price has not been made, and that VT 5 million is outstanding. Hence, he says, Chen still does not have a right to possession of the leased land.

42. The issue turns upon whether, in the period after 29 August 2014, Chen paid that VT 5 million by allocating rent payments to which he was entitled, but which he allowed to be paid to Luong, to meet that liability. There is clear evidence (including that which Luong sought to tender on this appeal) to show Luong received those rent payments. In fact it is common ground that he continued to receive the payments from Tapusia up to 6 April 2016, mainly at the rate of VT250,000 per month and from January 2016 at VT 280,000 per month as he put up the rent at that time.

43. In our view, the Agreement is clear. It is written in Chinese and there are two separate translations into English. In relevant respects they are effectively the same. The version provided by Chen relevantly reads:

7. After party B finishes the first payment (of 35, 000, 000 Vatu), party A will assist party B with the transfer procedure. After the land being transferred to party B, party B will pay party A the rest of the payment (10, 000, 000 Vatu) with instalment payment, until all payment is cleared. During the instalment payment, the rent income goes to party B. There will be an interest of 1% every month from party B to party A during the instalment payment, until all payment is cleared.

8.During the instalment payment, the land certificate will be kept with a lawyer . It will be returned to party B until all payments is cleared.

44. Plainly, at the point where VT35 million had been paid (by 29 August 2014), Chen became entitled to the rental payments. Instead of receiving them, they were received by Luong to progressively discharge the purchase price. As they were received by Luong, they progressively reduced the balance of the purchase price outstanding. On 11 December 2015, Chen paid the then outstanding VT4 million in one payment.

45. That is, of course, consistent with the agreement recorded in the Consent Orders of 11 March 2016, having regard to the Defence of Luong that Chen would be entitled to the Lease finally when the full purchase price had been paid.

46. On this issue of fact, the trial judge correctly found that Chen – at least from the now relevant date of 11 December 2015 – was entitled to possession of the leased land.

(b) <u>What should be the amount of the mesne profits?</u>

47. The issue is referred to above.

48. The trial judge said that mesne profits should be paid at VT280,000 per month because that was the monthly rental payable by Tapusia, rather than the *"open market rate"* based upon the evidence of Warren Moore, an experienced real estate agent, and based on his analysis of comparative tenancies in Luganville.

49. We agree with the submission of counsel for Chen that the two cases referred to by the trial judge do not provide support for the conclusion that, as a matter of law, the current rent paid by Tapusia is necessarily the proper figure.

50. In *Lawac v. Eglise Catholique du Vanuatu Committee Inc [2014] VUSC 31*, the Chief Justice applied a figure significantly less than the evidence of the open market rent because the claimant accepted the lower rate applied pursuant to an agreement. There was no decision that, as the matter of law in all circumstances, the current rent should be selected and applied even if it is less than the current market rate.

51. In *Metchler v. Natonga [2013] VUSC 169*, Chetwynd J applied the current monthly rent, but in circumstances where there was no contention that the current monthly rent was not the open market rate. That decision was appealed to the Court of Appeal: *Natonga v. Metchler* [2014] VUCA 15 but not on that issue.

52. However, whilst the trial judge may have been in error in his reasons for reaching the conclusion he reached, that does not necessarily follow that on this appeal the Court should simply substitute the figure nominated by Mr. Moore.

53. We consider the proper assessment is the open market value of the premises for the period of the wrongful occupation. That is the principle approved by Lunabek CJ. in *Lawac v. Eglise Catholique* referred to above.

54. We then proceed on the basis that, if error in the reasons for judgment was discerned, it is preferable for the Court of Appeal to determine the monthly figure which represents the current market rent, rather than remit the issue to the Supreme Court. Given the relatively few months involved, the parties supported that. It is a sensible attitude.

55. There are three pieces of relevant evidence. The expert opinion of Mr. Moore. He says the fair market rent of the shop is VT416,900 per month. There is the evidence about the monthly rental of the shop as between Luong and Tapusia. And thirdly there is Chen's evidence that he has rented premises at Sunshine Shopping Centre at a monthly rental of VT401,750 per month, and that the area of the Lease 071 is towards the centre of Luganville and is better located than his presently leased premises almost at the end of Luganville town.

56. We have discounted as hearsay an email from Millie Ogden suggesting that the rent paid by Tapusia is a very low one, and not at a commercial rate. It is obviously not an expert independent opinion. Its context suggests there may be other reasons for that view.

57. We do not think Chen's evidence of his current rental elsewhere is of much significance. We do not know anything about the nature of his business, or the size of leased area, or the quality of the leased premises or adjoining premises.

58. That leaves two pieces of evidence. There is no probative evidence that the rent agreed between Luong and Tapusia, as payable from time to time, is not an arm's length rent fixed between a willing but not anxious lessor and a willing but not anxious lessee. The fact of the increased rent rate from January 2016 tends to confirm that. It is therefore a good indicator of the current market rent value.

59. Mr. Moore was not cross-examined at the trial. It may be observed that he has not referred to the rent for the Tapusia shop in Lease 071 as a

relevant indicator of the market. It is not clear why. As to his table of possible comparators at the upper size area (each of 250m²) the rental is VT1,000 per m². He says they have been in place for some time. He says the smaller areas tend to attract a higher rate per m². The shop as part of the leased area is said to be 379m²; that is considerably larger than the two larger areas he has assessed. He does not refer to the comparative quality of any of the premises. He does not base his analysis at all upon the earning capacity or potential of particular premises. He does not discuss other potential uses for the shop premises, or suggest any higher or better usage. He does not expressly consider whether, with its particular layout and usage, the shop premises (as almost one and a half times bigger than the larger comparators he has used) do have the potential to, or actually do, each significantly more than the two larger comparators.

60. None of that is intended as a criticism of Mr. Moore's evidence. If he had been cross-examined, or re-examined, responses to those issues might have been given persuasively. But we do not have them.

61. In our view, on the evidence, we adopt the current rental of the shop of VT280,000 per month as at March 2016 as the appropriate figure to use in the calculation of mesne profits.

62. As accepted in the course of submissions, and based on the report of Mr. Moore, the shop is only part of the leased areas. It also comprises some motel units, the rental value of which Mr. Moore says is VT55,000 per month and a restaurant with a rental value of VT24,000 per month.

63. There is no other evidence of those values. It is therefore appropriate to accept them.

64. That means that, for the period of 3 months and 3 weeks between 12 December 2015 and 6 April 2016, the mesne profits are assessed roughly

(a) For the shop, totaling VT1,050,000;

(b) For the motel units and the restaurant, totaling VT296,000

65. It is necessary to distinguish between Luong on the one hand and Tapusia on the other, as Tapusia occupied only part of the leased area. Counsel for Chen drew that to the attention of the Court. Tapusia is liable only for the sum of VT1, 050, 000.

ORDERS

66. For those reasons, the appeal of Luong is largely unsuccessful, save for the adjustment to the amount of the mesne profits prompted by the reduced claim period of Chen. The matters raised by Luong have failed. The cross-appeal is also largely unsuccessful, although the mesne profits payable on a monthly basis by Luong have been increased to cover the mesne profits for the motel and restaurant areas. As the period for which mesne profits are payable has reduced, but this is not a matter Luong specifically raised, in our view Luong should pay Chen the costs of his appeal.

67. The position of Tapusia has not changed except that its liability is less by reason of the reduced period for which mesne profits are to be allowed. That is not a matter it has raised. It accepts it is jointly and severally liable to Chen for the mesne profits attributable to the shop area. There should be no costs orders in relation to Tapusia.

The orders are:

On the appeal:

(1) Orders (3) and (4) by the Supreme Court are varied so that:

(a) Order 3 reads: The First Defendant shall pay mesne profits in respect of the leased area for the period 12 December 2015 to 6 April 2016 totaling VT1,346,000;

(b) Order 4 reads: The Second Defendant shall pay mesne profits in respect of the leased area known as the slop area for the period of 12 December 2015 to 6 April 2016 totally VT1,050,000;

(c) Order 4 A is added to read: The liability of the First Defendant and the Second Defendant in respect of the said sum of VT1,050,000 is joint and several; and

(d) The orders otherwise made as orders (1), (2) and (5) do stand, including the order for costs;

(2) The Appellant pay to the First Respondent's costs of and incidental to the appeal to be taxed or agreed.

On the cross-appeal

(1) The cross appeal is dismissed.

(2) There is no order as to the costs of the cross appeal.

DATED at Port-Vila this 22nd day of July, 2016

BY THE COURT

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

JOHN MANSFIELD
Justice