IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU

Civil Appeal

Case No. 18/3176 CoA/CIVA

BETWEEN: **Republic of Vanuatu**

Appellant

AND: **Don Ken**

Respondent

Date of Hearing:	8 July 2019
Before:	Justice J. Mansfield
	Justice D. Fatiaki
	Justice D. Aru
	Justice S. Felix
	Justice G. Andrée Wiltens
In Attendance:	Mr S. Kalsakau for the Appellant
	Mr G. Boar for the Respondent
Decision:	19 July 2019

JUDGMENT

A. Introduction

1. This case concerns a dispute relating to the occupancy of a Government house at the Colardeau area, Port Vila, by a Government Minister. Subsequently, when the Minister was required to vacate the property, he sought reimbursement for work done on the property at his own expense. The Minister asserted that he had oral permission to proceed with the works.

B. Background

2. Ministers are entitled to their salary plus certain benefits by virtue of the Official Salaries Act [Cap 168] (the OS Act"). In this case, the relevant benefit is described in the Act as: "Furnished house at rental fixed by Government".

3. Mr Ken was entitled to that benefit for the periods he was a Minister of the Government. It is now agreed, as between counsel, that Mr Ken was a Minister between 2 December 2010 and 30 October 2012; and again between 15 May 2014 and 22 January 2016, although the evidence to support that precise detail was lacking at trial. The defence of the Appellant did assert that Mr Ken was not a Minister for the whole period 2011-2017.

4. The evidence led established that Mr Ken had moved in and commenced occupation of the house in question in early 2011. He remained there continuously until required to vacate. It was accepted that while in occupation 3 Notices to Quit had been served on Mr Ken - but they were neither acted upon by Mr Ken at the time, nor followed up by the State. Mr Ken and his family finally vacated on 9 November 2017.

5. The evidence further established that the house was in a state of disrepair when Mr Ken moved in. It was alleged that by virtue of an oral agreement with a Housing Officer, Mr Taiwia, negotiated at the time of first inspecting the property, the Minister had renovated the property at his own expense. This was on the agreed basis of full reimbursement by the State in due course, as the State did not have the necessary funds at the time.

6. Mr Ken refurbished the house and worked on the grounds. He paid out a total of VT 11,791,845 for that work, and by his Claim he sought reimbursement of that amount, plus 10% interest and costs.

7. The Claim was disputed on several grounds. It was not accepted that there was any oral agreement. It was put that the intermittent nature of Mr Ken's appointment as a Government Minister meant he was not entitled to his housing benefit throughout the period he was at the address. There was also dispute about how much he had paid for the renovations; and the quality of the work was questioned. There was a counter-claim for *mesne profits* and damages on the basis that Mr Ken was trespassing.

C. The Supreme Court Decision

8. The primary Judge found there was an oral agreement; that Mr Ken had expended the amounts claimed, and that he was accordingly entitled to re-imbursement plus 5% interest.

9. The primary Judge did not allow the claim for costs, on the basis of a lack of evidence to support that claim.

10. He further dismissed the defendant's counter-claim for *mesne profits* and denied the claim for damages.

D. Preliminary Issue

11. Mr Kalsakau sought leave to file fresh evidence in support of the appeal – that of Mr H. Allanson to the effect that Mr Ken could not have expended the sum claimed as on his assessment the work did not justify it. In fact, Mr Allanson considered that the work done by/for Mr Ken was completed in such a poor manner that it needed to be re-done, at a cost to the State. In Mr Kalsakau's view the cost of that should be set-off against the Claim. On that basis Mr Kalsakau suggested the evidence was relevant and necessary.

12. Mr Kalsakau accepted that pursuant to Rule 27.3 the Court of Appeal's discretion to permit fresh evidence to be led post-trial was constrained – "special grounds" are required. He was unable to articulate what special grounds there were in this case to support his application, although he pointed to the need for the Courts to protect State revenue. One of the matters generally relevant is that the proposed evidence could not reasonably have been called at the trial.

13. After discussion, Mr Kalsakau accepted that the evidence was in fact previously available but had simply not been prepared ahead of the trial.

14. The application for leave to adduce fresh evidence is accordingly declined. Mr Allanson's proposed evidence is neither fresh, nor are there special grounds for allowing it to be led post-trial.

E. Appeal Grounds

15. Complaint was made that the primary Judge had not permitted the State to make final submissions at the conclusion of the evidence. In fact, there was Court timetabling directions for the claimant to file his submissions within 21 days, and for the defendant (now appellant) to file its submissions within a further 21 days. The claimant duly complied; the defendant did not.

16. Thereafter, the claimant was proactive in seeking the Court's decision, despite the lack of final submissions by the defendant; and complaint was made that the correspondence to the Court seeking the decision was not copied to the State Law Office thereby alerting the Office to the possibility of the decision being released without the benefit of final submissions by the defendant. That had the submitted effect of denying the defendant the opportunity to make final submissions. It is proper to communicate with the Court, to seek a further hearing, provided that is copied to the other party/parties. Other than that, it should be said that any substantive communication to the Court after a hearing and before judgment should only be by leave or made with the consent of the other party/parties, and should be copied to them.

17. Mr Kalsakau submitted that the primary Judge was wrong to conclude that there an oral agreement between Mr Ken and the Housing Officer, Mr Taiwia. This was on the basis that Mr Taiwia had denied that proposition. Further it was submitted that Mr Taiwia had no capacity or authority to enter into any such an agreement – as approval for any renovations was required from the Public Works Department ("PWD") and the Housing Committee.

18. In the alternative, it was alleged that an agreement could only have been made by Mr Taiwia usurping the authority of the Housing Committee. Mr Kalsakau submitted that any oral agreement found to exist in those circumstances could have no legal effect and was a nullity. It was submitted that the primary Judge erred in relying on an oral agreement.

19. Mr Kalsakau further pointed to the primary Judge's acceptance of the oral agreement covering the entire period from early 2011 to November 2017, when in fact Mr Ken's entitlement to the housing benefit was for only the beginning and end periods over that time. There was no evidence that the oral agreement was re-negotiated between 30 October 2012 and 15 May 2014, or again after January 2016. This was also submitted to be an error.

20. The basis for the primary Judge's dismissal of the claim for *mesne profits* was challenged as being wrong in law. It was submitted that the house being in a state of disrepair was not a proper basis on which to deny *mesne profits*. Mr Kalsakau pointed to Mr Ken's acceptance of the state of the property when he commenced occupancy, especially as Mr Ken had been proactive in the process of finding his own Ministerial accommodation.

21. Mr Kalsakau submitted there was uncontested evidence that the market rental value for the property was VT 210,000 per month. As 3 notices to quit had been served on Mr Ken while he was occupying the property Mr Kalsakau submitted the primary Judge was wrong to disallow the counter-claim for *mesne profits* on the basis of an insufficiency of evidence.

22. Mr Kalsakau was critical of the lack of explanation by the primary Judge for concluding that Mr Taiwia was not a credible witness. In his submission, more than a mere statement to that effect was required.

23. Finally, Mr Kalsakau submitted the primary Judge was wrong to find that Mr Ken had spent VT 10.8m in renovating the property, as the evidence demonstrated that figure to be fictitious. Mr Allanson's "fresh evidence" demonstrates that some VT 7m less was actually expended. This suggested an element of fraud was involved in the claim.

F. Response

24. Mr Boar, rightly in our view, submitted that the primary Judge had given the appellant a proper opportunity to make final submissions.

25. Mr Boar stressed that Mr Taiwia was THE Housing Officer, in charge of all Government houses in Vanuatu. He submitted that Mr Taiwia therefore had the capacity to enter the oral

agreement entered into with Mr Ken, as was found by the primary Judge. Mr Boar submitted the primary Judge was entitled to find Mr Taiwia's denial of the oral agreement as not credible. Mr Boar also disputed the notion that Mr Taiwia had usurped the Housing Committee's authority when entering into the oral agreement with Mr Ken.

26. Mr Boar submitted that as Mr Taiwia was aware of (and did not object to) the work being done by Mr Ken, the State was *estopped* from denying liability for reimbursement. He argued it was inequitable in these circumstances for the State to deny liability.

27. Mr Boar respectfully agreed with the primary Judge that there was no evidence to support the claim for *mesne profits*. He further submitted that was no clear evidence as to the period(s) that any such claim could be made; and that it was for the appellant to have led evidence on that issue rather than expect the primary Judge to trawl through Government Gazette notices to ascertain the accurate position.

28. Mr Boar strongly contested the suggestion of fraud. He submitted there was simply no evidence to support that allegation before the primary Judge; and, as he opposed the application to adduce fresh evidence, it was his position that there remained no evidence to support the contention.

G. Discussion

29. In our view, there was a clear error by the primary Judge in finding that Mr Ken was entitled to reimbursement for work done to the property over the entire period of his occupancy from the beginning of 2011 to November 2017. Not only was Mr Ken not entitled to his Ministerial housing benefit over the entire period, but there is no evidence of the oral agreement having been re-negotiated or renewed following Mr Ken's removal as a Minister and his later reinstatement. The primary Judge has effectively held that the oral agreement was entered into in perpetuity – and that cannot be correct. It appears that the primary Judge wrongly accepted that Mr Ken had remained a Minister for the period between 2011-2017, as he regarded the notices to vacate given on 2 May 2013 and 12 November 2013 as invalid for that reason.

30. Mr Taiwia retired from his position as Housing Officer in 2015. Following that, his replacement Judith Melsul wrote to Mr Ken on 20 May 2015, reminding Mr Ken that any structural alterations or modifications required prior PWD approval. The letter set out the relevant part of the Housing Policy, advised Mr Ken to cease all work, and reminded him that all work done becomes property of the Government without compensation. Mr Ken was told that if he considered work was required, then he should first consult PWD. In addition, the 3 notices to vacate given whilst Mr Ken was not a Minister, but was still in occupation, may have been enough to bring any such agreement to an end. That aspect was not considered by the primary Judge by reason of the wrong understanding of when Mr Ken was a Minister.

31. Mr Ken gave evidence of remedial work done prior to, and after, he and his family initially occupied the premises. However, serious damage was subsequently caused to the house by Cyclone Pam in March 2015, which required rectification – and which Mr Ken additionally attended to at his own expense. In his sworn statement he provided a summary of all the receipts for the work done, as well as copies of all the receipts. It was on that basis that he justified his claim for VT 11,791,845.

32. Looking at that list of expenditure, it is clear that Mr Ken continued to renovate the house post the 20 May 2015 letter from the newly appointed Housing Officer Ms Melsul. In our view, Mr Ken cannot maintain his claim for any costs incurred following receipt of the letter, which completely undermined any oral agreement he may have had with Mr Taiwia. His claimed expenditure after 20 May 2015 exceeds VT 1.7m. The primary Judge has further erred in allowing that part of Mr Ken's claim.

33. During discussion with counsel, it became apparent to the Court that there was also no evidence before the primary Judge as to any rent deductions from Mr Ken's official salary. The Housing Policy document attached to Mr Kalsakau's submissions may or may not have been before the primary Judge – that is unclear. However, the document relevantly sets out the structures involved relating to housing benefits. The Office of the Public Service Commission is responsible for the formulation and administration of housing policy. It created the Housing Management Committee, which is responsible for carrying out the Housing Policy and the allocation of Government houses. The Committee is also responsible for periodic reviews of rent allowances and rent deductions.

34. The Policy document provides that all Government employees entitled to housing benefits are required to sign Residential Tenancy Agreements and to comply with the terms and conditions therein set out. It is not clear whether Mr Ken did so or not – and if he did, whether that document was tendered in evidence. That evidence would be significant as within that same provision, as set out in Ms Melsul's letter, is the requirement of tenants obtaining prior PWD approval to any structural alterations/modifications.

35. Significantly, there is also a provision which appears to have attracted no attention in the Court below:

> **"8. Rent**
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> (a) Rent (salary deduction) is payable by **all** employees/tenants who are occupying Government housing regardless of their employment status unless determined by the GRT.
>
> (b) Unless otherwise determined rent will be charged at a fortnightly rate of 15% of the employees/tenants salary and be deducted from salary. Any change to the fortnightly rate is to be determined by the Remuneration Authority."

36. This issue appears to have not been before the primary Judge – yet, depending on what is revealed, it may undermine the State's counter-claim for *mesne profits*, and/or it could undermine Mr Ken's claim for reimbursement in that no/insufficient rent deductions have been made which may need to be set off. It is unsatisfactory that the case has been determined without reference to such a relevant consideration.

37. Lastly, we note Mr Kalsakau's submission that the primary Judge erred in simply stating that he did not accept the evidence of Mr Taiwia. The Judge was of course entitled to accept or reject any of the evidence. We do not need to finally resolve that issue. We did not have the benefit of the trial note taken by the Judge to see what put to Mr Taiwia in cross-examination. It is sometimes difficult to explain why a particular witness is not believed – whether it be the way of answering questions, evasiveness or other factors. Generally, for an Appeal Court, it is helpful to be able to understand why the rejected evidence is (as was said here) unreliable and not to be believed.

H. Result

38. In all the circumstances, we are of the view that the decision below is unsatisfactory as there are errors by the primary Judge; and as well there are other relevant matters which should have been explored to enable the Court to arrive at a just and complete result.

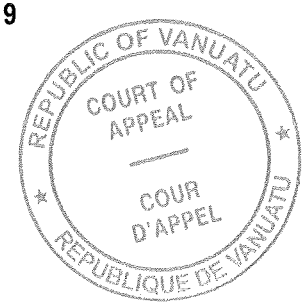
39. The appeal is allowed.

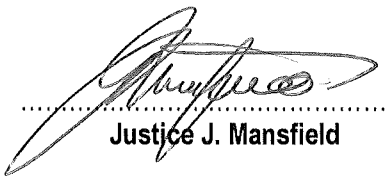
40. The case is returned to the Supreme Court for re-trial.

41. Costs of the appeal are set at VT 60,000. They are to be paid to the appellant within 21 days.

Dated at Port Vila this 19th day of July 2019

BY THE COURT





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Justice J. Mansfield