IN THE MAGISTRATES' COURT OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 90 of 2011

BETWEEN: LAWSON TRADING LIMITED

Claimant

Claimant's Lawyer: Garry Blake of RIDGWAY BLAKE LAWYERS, 1st Bank Building, Rue Emile Mercet, Port Vila, Vanuatu

AND: TOM LAND

Defendant

Defendant's Lawyer: Willie Daniel of WILLIE DANIEL LAWYERS, 2nd Floor Suite 6, Bouganville House, Rue De Paris, Port Vila, Vanuatu

Coram: Moses Peter
Counsel: Gary Blake for Claimant
Willie Daniel for Defendant

JUDGMENT

Introduction

The Claimant Mr. Justin Johnson, representing Trader Vics Night Club is seeking judgment against the Defendant Mr. Tom Land, on the term of the lease agreement, which is perceived to be automatically extended, after the expiration of the first 3 years to another five years, then another five years thereafter, and finally upon its expiration, another five years, making it a total of 18 years.

The Defendant, Mr. Tom Land, disputed the term of the tenancy agreement, in that the first 3 year period, is the actual term for the tenancy agreement, and whether or not the tenancy agreement can be extended for another five years, he has to give his consent. He said, the extension cannot be facilitated by the Claimant himself as intended. Given that argument, he refused such extension, and seeks an order from the court, to evict the Claimant from his premises, as the period of 3 years had lapsed on the 15th of July 2011.

Background

The Claimant and the Defendant entered into a written agreement dated 15 July 2008, for the Claimant to rent the Defendant's premises formerly known as Imperial Night Club, and from which the Traders Night Club now operates.

It was an express term of the lease that the term of the lease was 3+5+5+5 years. The parties have honored the lease agreement up until 15th July 2011, when the first 3 years period of the lease has come to an end. The Defendant has written a letter three months prior to 15th of July 2011, to the Claimant about his intention not to renew the lease agreement. The Claimant in response to the letter, refused to accept the Defendant's intention, based on the purported term of the lease agreement, giving the right to extend the term for another five years, if the Claimant decides otherwise.

Evidence/ Hearing

The court took into account the following sworn statements filed in this case:-

(1) The Claimant dated 14th July 2011;
(2) The Defendant dated 15th July 2011;
(3) Jack Tom Lann, (but only confined to par. 4);

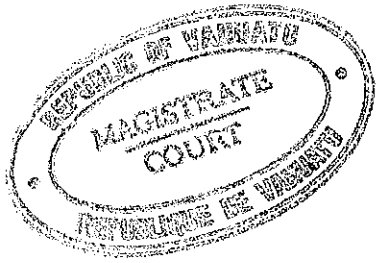
Further Sworn statements

(1) Claimant dated 21 September 2011;
(2) Defendant dated 7th September 2011.

In the Plaintiff's sworn statement dated 14th July 2011, he said, he and the Defendant in February 2007 signed a four year agreement with rental reviews every year. In paragraph 4, he said an issue arises in relation to rental payments, which the Defendant argued that he was behind in the payments. The issue was resolved upon the Claimant's show of evidence that all payments were made on time, and it was agreed that invoices and receipts should be issued to avoid confusions in the future.

In paragraph 6, he said the business began to show signs of improvement and it became apparent that it was necessary to improve the state of the building, and in Paragraph 8, in July 2008 the parties came together to discuss further variation primarily because of the fact that the business began to show signs of improvement.

He further said in paragraph 8, that at the meeting, he explained that it was unreasonable to expect the Defendant to pay for the improvements required, and he was willing to do so, on the



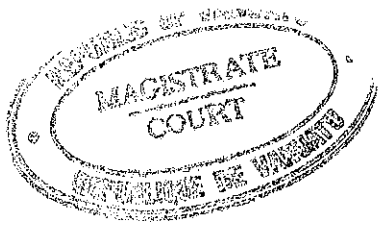
condition that a long term lease is entered into in order to benefit from that expenditure. He said in paragraph 10 that it was mutually agreed upon by both parties that an 18 year lease was commercially sensible for both parties but with the renewable every five years with the first to happen in three years. In paragraph 11, he said the discussions were very clear at that time that a 3 year lease, that is to be renewable at the discretion of the Defendant would not offer sufficient protection to the Claimant considering the investment that was required in the building. He then said also in paragraph 12 that both parties agreed to that 3+5+5+5=18, and this was put down in the lease, and signed on the 15th of July 2008, and as a result of the agreement, and it made clear how the agreement can be terminated. In paragraph 15, he said given the basis that the lease is now for a term of 18 years, he then proceeded with a capital expenditure program that would run until January 2011, but that came to a halt, when the Defendant began indicating that he wished to operate the night club again and for the Claimant to move out as said in paragraph 16. The Capital expenditure program cost approximately 6,234,226 vt, paragraph 17.

He said in paragraph 18, that at every stage of implementing the capital expenditure program, the Defendant was fully aware of the building works before any works commenced without exception, and given the fact that he lives at the premises, he witnessed every stage of construction and was once never raised any concern or question, therefore it is impossible to state that he did not consent. Some of the building works were assisted by the Defendant and or his family.

In paragraph 19, there are no records at all of any disputes/concern/enquiry about any of the construction process, and in paragraph 24, he has maintained the building and its upkeep and strongly denies any contradicting allegations.

He also said in paragraph 29, that he denies in the strongest possible term the accusation that he has used improper language at any time in discussions with the Defendant, and said these statements are blatant lies. On the contrary he said in paragraph 33, 34 that his dog has been murdered and his family has been traumatized during the course of the dispute, and also his staff has been intimidated by dogs and witchcraft and abuse of custom process to interfere with their work.

The Plaintiff in paragraph 4 of his sworn statement dated 14th of July 2011, said during a meeting held on about 31st of January 2011, he advised the Defendant verbally about his wish to extend the least for at least a further 5 years according to the terms of the lease, to the effect "*we want to take a further five (5) years as and from 16 July 2011 when the initial term of our lease arrangement expires.*"



He further said in Paragraph 5, that he originally arranged a meeting to discuss the possibility of buying the property but the Defendant made it clear; he was not willing to sell. Once that became clear, he then spoke of his desire to continue renting the property.

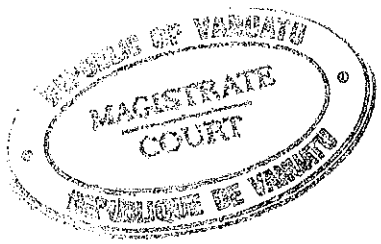
In paragraph 6, he said he received a letter dated 18th February 2011, which the Defendant through his lawyer Willie Daniel wrote to him purporting to terminate the lease. In paragraph 7, he said it has been difficult to engage in any discussions with Mr. Land and in the end he was forced to retain a lawyer to represent him and to seek open lines of communication through the Defendant's lawyer.

This was referred to in various correspondence one of which was the termination letter from Willie Daniel marked as annexure B, and annexure C are copies of various correspondence from both lawyers. In paragraph 11, he said he has exercised his option for a further five years term and has sought to address the amount of the rent to be paid during that five year term without any response from the Defendant and his lawyer, in respect to the rental.

The Claimant further said in paragraph 9, that following a letter from his lawyer to the Defendant's lawyer, that since there was no response from him about their intention to renew the five year term of the lease, they arranged for delivery of a cheque which is for the rent covering the period running from 16th July 2011, when the new lease is to commence to 31 July 2011.

In response to the plaintiff's testimony, the Defendant said in paragraph 2 of his sworn statement dated 15th July 2011, that he came to know the plaintiff when he approached him at his home sometime in 2008 [sic 2007], at Imperial, requesting to rent his imperial building. He said in paragraph 2 that during their conversation, the plaintiff proposed a monthly rental payment of 450,000vt which he accepted it. In paragraph 4 the plaintiff returned the next day asking the Defendant to reduce the proposed rent from 450,000 vt to 350,000 vt, as his friends advised him that the former proposed rent is too high. At that time, he was not really happy about the change but just accepted it anyway. In paragraph 5, the Plaintiff came back on the 15th of July 2008 with a written agreement for us to sign, and during the signing, I had William Simbolo, a private consultant to witness my signing.

As to paragraph 7, he said the agreement signed, was for a term of four years, starting from 15th July 2008, to 15th July 2011, with a rental of 350,000 vt monthly. He said in paragraph 8 (1)(2)(3)(4), the Plaintiff has breached and violated his constitutional rights as the land and property owner pointing to delay of rent payments at almost each month, his attitude of demanding him to sell the land to him, the wrongful allegations of theft against him and his family on stolen items in the Traders Night Club, and the abusive language that he uses against him and his family and of not wanting to see them around. In sub paragraph 5 (i)(ii) he said given the points raised, he wanted to restrain the Plaintiff from not interfering or disturbing him



at his property when the agreement lapses on 15th July 2011. There will be no more agreement entered into, to allow the Plaintiff to operate his business in his property.

In paragraph 9, he said the Plaintiff has sent several persons to pressure him, about renewing the lease agreement. He said a week before the time of making the statement, the plaintiff send a person by the name of Bob Loughman including some other persons who really pressurized him.

He replied in paragraph 11, the Plaintiff's statement in Paragraph 9 that the July rent payment was the payment for June, and that the Plaintiff's statement that the payment was for the new lease running from July 15 was improper because they have not signed a new contract, therefore he still upholds the notice not to renew the lease agreement, as extracted in the annexure B. The sworn statement also enclose as annexure A, copy of the lease agreement, including a letter from the Defendant's lawyer to the Plaintiff about the Defendant's intention not to renew the lease agreement as annexure B, and finally, the notice from the Defendant to the Plaintiff's lawyer not to renew the lease agreement of Trader Vics at Imperial Premises.

Issue

The question that must be asked is whether the term of the agreement 3+5+5+5 could be limited to 3 years. If the answer to this question is yes, then the Claimant can be asked to vacate the Defendant's premises. However, if the answer to the question is no, then the Claimant is entitled to remain in the premises of the longer term.

The onus is on the Claimant to prove that he is entitled to remain on the premises for the longer term. If that onus is not discharged, then the term will be limited to three years.

Law

This dispute raises from the start, the issue of interpretation of the term of the lease agreement that was signed by the parties. While the court is obliged to interpret the term of the agreement based on the submissions of the parties, the court must also by way of guidance, consult the Land Lease Act [Cap 136], which regulates the formalities of acquisitions and dispositions of land leases in Vanuatu.

The Parole evidence rule dictates that extrinsic evidence, including oral evidence, may not be admitted to add, delete or vary the terms of a contract which has been put into writing. However, there are exceptions whereby parole evidence may be produced.

In the Fiji case of Kasabia Brothers Ltd v Reddy Construction Ltd (1977) 23 FLR 235, it is said that the "*express words of the contract must first be construed in the surrounding circumstances*

but not on the basis of what the parties may have said was their intention at that time, Nor can any prior or subsequent conduct determine their written contract unless there is more than one way in which the contract can be construed, that is unless there is an ambiguity in the way in which the term are recorded. In that event subsequent conduct may be looked at....."

Parole evidence is admissible to aid in interpretation of contract term if:

- *It is clearly necessary in order to avoid absurdity or inconsistency (Fitzgerald v Masters (1956) 95 CLR 420; or*
- *The context in which the word or phrase appears renders its meaning doubtful (Reardon Smith Line v Hansen- Tangen [1976] 1WLR 989.*

In the Land Lease Act Cap 136, *"lease" is defined as the grant with or without consideration, by the owner of land of the right to the exclusive possession of his land, and includes the right so granted and the instrument granting it, and also includes a sublease but does not include an agreement for lease;*

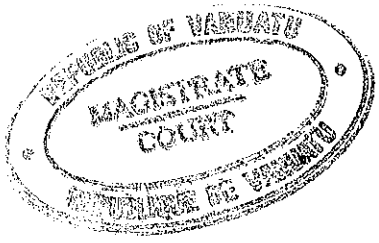
In section 31, it says Subject to the provisions of this Act and of any other law, the owner of land may lease the land or part of it to any person for a definite term.

Section 48 (2) of the Land Lease Act Cap 136, Save as otherwise expressly provided in this Act, the provisions of this Act affecting leases, lessors and lessees, shall apply to subleases, sublessors and sublessees, with such adaptations as are necessary.

Applying Law to facts

For the Plaintiff to have the right to remain in the Defendant's property for the longer term, he must satisfy the court that the terms of the contract are clearly expressed and that the contract that is signed by the parties is the only document governing the obligations of the parties. The term of the contract is stated as 3+5+5+5. It is the submission of the Plaintiff that the term is clear on the face of the document, and is not in any way ambiguous. The Defendant on the other hand says the description of the term does not mean that there was automatic renewal at the end of the first three years but that the lease could be renewed or extended with the express consent of the Defendant.

The land Lease Act Cap 136, states that the owner of a land may lease the land or any part of it to another person for a definite term. The question that must be asked is whether, it is clear on the face of the document that the eighteen year period is clearly stated as the definite term. If that is not so, it would be probable that the definite term would be three years.



The word Definite is defined as *"being very clear about what you say so that everyone understands you"* (Macmillan Dictionary http://www.macmillandictionary.com). The Claimant said that the term is for a term of eighteen years, and when the period of 3 years lapses, he has the option to extend for further five years. The Defendant on the other hand states that the term is for 3 years and if the Defendant wishes to extend for other term, he must give his consent.

Given the two meaning of the term of the contract, the term is held to be ambiguous; therefore the court is bound to employ correspondence, oral statements and the conduct of the parties prior and subsequent to the signing of the contract. *Richard Lang & Co v R [1930-49] WSLR 52.*

The Plaintiff said both parties agreed that 18 year lease was commercially sensible for both parties with rental reviews at the end of each term, and that the renewal of the lease at the discretion of the Defendant would not offer sufficient protection, considering the investment. The term of 3+5+5+5=18 and this was put down in the lease agreement, signed on 15th of July 2008, and the agreement made clear how the agreement can be terminated.

In his oral evidence in court, he said to the effect *"we discussed the terms, I typed it up and gave it to Simbolo to look at it, I did not give it to Tom Land (Defendant) straight away."*

The question I must ask is, does the option of renew by the Plaintiff needs to be specified in the contract, or that it is there even though it is not specified?

In the case of *Societe Civille Familiale Gaudron v Proud South Seas Limited* [1984] VUSC 6, the Plaintiff leased land and building thereon situated at Tassiriki to the Defendant for one year from 1st July 1982 to 30th June 1983. The lease contained provisions for renewal for an undetermined period. Written notice for termination of the lease to be given by either party by one month's notice. Before the lease expired the parties met and discussed a possible new lease. A letter was written on the 25th March 1983 by the Defendant to the Manager, Agence Saint Michael, for the attention of Mrs Paumier who was the person negotiating the lease. Paragraph 2 of the said letter stated:

"*I understand that we can enter into a new lease from 1st July 1983 for a period of eighteen months at a rental of 72,500 VT per month with an option to renew the lease for a further eighteen months. It would be appreciated if the lease document is in English."*

In the case of EC Development v Guam Seventh Day Adventist Clinic [2005] GUSC 10,there was a dispute arising from the alleged breach by SDA of the two units Suit 109, and Suit 110 in the

Palm Village commercial complex, which were to be used for a rehabilitation clinic, physical therapy clinic, health education and primary care services.

For suite 109 the length of the lease was described as lease term: initial 3 years and an option to extend term for an additional 3 years. For suite 110, initial term 3 years lease term with option to extend for additional 3 years period.

The parties in these cases communicated an agreement, and their communication made it clear that the agreement shall provide for an option to renew the lease for further years.

In Dorsen v Brysten [2001] VUCA 5, the landlord and tenant relationship started in the early 1980s. In 1981, the Respondent leased a shop from the Defendant/Appellant for 5 years. In 1986 the lease was renewed for 5 years with an option for the plaintiff to obtain the lease for a further 5 years.

As per Chief Justice Vincent Lunabek, *the primary Judge finds that the plaintiff clearly had an option to extend the lease for five years beyond December 1991, (Doc. P2). The Judge noted "why should the plaintiff enter into any arrangement for a one-year extension when the five-year option was already there...."*
The court is satisfied that there was an option for the plaintiff to extend the lease for five years. This clarity made it possible that the option was exercisable at the plaintiff's wish and not with the consent of the Defendant.

The Plaintiff's counsel submitted that the option to renew is the right of the Plaintiff, and even though it is not explicit in the document, it is there. He said the court must construe the document as a whole, to discern that right.

He further added that the court must consider the capital expenditure program that was undertaken by the Plaintiff as it affirms the Plaintiff's intention to have the lease for the longer term.

The Capital expenditure covers:

External fencing at 122,000 vt;
Paint Internal & External at 250,000vt;
Inside bar Renovations at 500, 470 vt;
Inside electrical & safety switches 1496,493 vt;
Nakamal roof & Install boussier at 106,020 vt;
Nakamal fencing & seating at 60,269 vt;

Construct Thatched roof beer garden at 780, 359 vt;
Paint internal & External at 250,000 vt;
Construct outside bar & roofing at 578,919 vt;
Carpark barriers & Security lighting installation 527, 482 vt;
Garden beds and fencing re enforcements 492,307 vt;
Ladies Lounce renovations at 60,000 vt;
Customer exit door relocation at 100, 107 vt;
Re plum entire building with poly 181,800 vt;
Lightbox construction & water tank stand 664,000 vt;
Re run electrical and balance 80,000 vt;
Install security screens at 106,000 vt

TOTAL: 6,234,226 vt / *courts finding 6,356,226 vt.*

The capital expenditure record is annexed in the Plaintiffs sworn statement as annexure A, and it particularises the entire spending on the renovation structure, however, the amount is not verified with receipts.

This is a contract that governs the conduct of the parties for the period extending to 18 years. It is somewhat odd to see a single paged contract that is to govern a relationship of that term. If the parties agree that the renewable will not be at the discretion of the Defendant, the Plaintiff must clearly emphasis that point in the written contract, and provide express provisions for renewal of the term at the option of the Plaintiff, and which in this case, it did not, and the reasons for not doing so is unfounded.

The Defendant has the right to terminate the contract if the Plaintiff defaults in the performance of its duties, is guilty of gross misconduct or gross negligence, ceases to carry on business, insolvency or bankruptcy, inability to pay rent, and does not maintain government licenses, regulations, insurances and laws.

While, the Defendant is aware of the Plaintiff 's breaches, he did not exercise that right to terminate the lease, but instead, wants to wait until the term of initial lease term expires, so that he can resort to these defaults to decline in renewal of the lease.
The breaches alleged were non payment of rent in time when due, and withheld of the rent payments for two months when the Defendant refused to allow the Plaintiff the right to let an Australian woman to use an office space in the premises. Also, the Plaintiff caused extensive modifications to the Defendant's building without authorization, and that he failed to properly maintain the building as evident by pictures as annexed as annexure C of in the Defendant's sworn statement.

The Counsel for the Defendant submitted it is trite law that once a Landlord gives notice to the tenant to end a tenancy agreement that is the end of the matter. The tenant is required to simply move out of the premises peacefully.

The Counsel referred to *Halsbury Laws of England Vol 27 (1) Landlord and Tennant* at paragraph *558, 567* and *584*, whereby tenants who demonstrate adherent goodwill can have protection in law to have their leases renewed. Furthermore in paragraph 586, the persistent delay in paying rent is a ground for refusal of renewal or termination of the lease agreement, and finally at paragraph 584, it states that the court in dealing with cases of this nature must take into account the general conduct of the parties and history of the current tenancy.

Given the circumstances, the Defendant (Landlord) through his lawyer wrote to the Plaintiff (Tennant) a letter dated 18th February 2011, and 13th April 2011 to the Plaintiff's lawyer, that since the agreement is silent on the mechanism of renewal for a further five year term, the Defendant intends that the lease will not be renewed and that the Plaintiff must vacate the Defendant's premises by 16th of July 2011, as the anniversary date for the initial term.

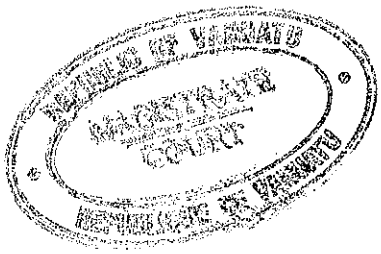
The *Retail Leases Act 2003* of Australia, states *"when the lease does not contain any options to renew the lease for a further term, the landlord must give a written notice to the tenant setting out the Landlord's intention concerning renewal".*

Section 64, states *"the notice must either offer the tenant a renewal of the lease, or inform the tenant that the landlord does not propose to offer the tenant a renewal of period of the lease."*

While I am raising these provisions as an aid to the interpretation of the contract, I shall ascertain the right to an option of renewal on the part of the Plaintiff, only on the given evidences raised in this case.

Findings

In many landlord and tenant agreements as referred to in this case, the right to an option of renewing a lease term is clearly communicated by the parties and is clearly stated in the written agreements.
The Plaintiff in this case, has not proved that he has communicated the right of option to renew the lease term. The reason for saying that, firstly, he drafted the agreement based on his communication with the Defendant, however, the written agreement does not specify the option on his part to renew the lease term.



Secondly, he on the 31st of January 2011, in a meeting with the Defendant, said to effect "*we want to take a further five (5) years as and from 16 July 2011 when the initial term of our lease arrangement expires.*" simply shows that the right to renew does not exist, and unless that right is given by the Defendant, then he can be entitled to have the contract extended for another five year term.

Thirdly, before asking the court to enforce that right for an option to renew the lease term, the Plaintiff uses politicians particularly Bob Loughman and other men to pressurize the Defendant to renew the lease term with him.

Fourthly, the capital expenditure of 6,234, 226 vt, covers renovations done on the building from year 2007, before the agreement was entered into, by the parties in July 15th of 2008. Furthermore, the capital expenditure is not verified by receipts, which could satisfy the court that it was the intention of the Plaintiff to remain in the premises for the longer term given the high spending on renovation works. According to annexure C of the Defendant's sworn statement, it shows that the rear of the building facing the Defendant's house, was not painted, and this was contrary to the Plaintiff's capital expenditure record which particularizes that 250,000 vt was spend on the painting in and outside of the building. Therefore, the Plaintiff has not accepted all the responsibility for the building maintenance and up keep, By simplicity, I can say the renovation is focused primarily on the interest of the Plaintiff, and his business, but has lacked the responsibility to keep the premises in good repair.
I hold the view of the Defendant that his relationship with the Plaintiff has gone beyond repair, and that since there was no mechanisms imposed for the renewal of the lease term, he has acted legitimately in giving notice three months prior to the anniversary date of the initial three year term which is on 16th of July 2011.

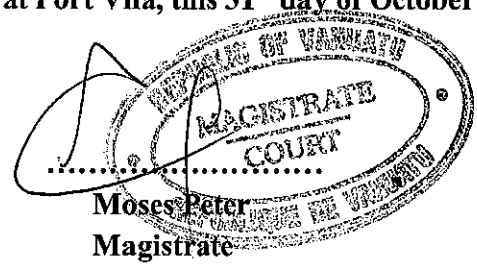
Therefore, the Plaintiff has not proved to the satisfaction of the court that he is entitled to remain in the Defendant's premises for a further five year term.

Accordingly, I enter judgment for the Defendant and orders as such:

1. That the cost be entered against the Plaintiff;
2. That the Plaintiff shall be given 31 days from the date of this judgment to vacate the Defendant's premises;
3. That all improvements shall remain with the building except for removable items that can be extracted upon the agreement of both parties;
4. That the Plaintiff shall be given 28 days to appeal if dissatisfied with the decision.

BY THE COURT

DATED at Port Vila, this 31st day of October 2011



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Moses Peter

Magistrate