

**IN THE SUPREME COURT OF THE  
REPUBLIC OF VANUATU  
(CIVIL JURISDICTION)**

**CIVIL CASE No:107 OF 2013**

**BETWEEN: CHRIS CHRISCOLL**  
Claimant

**AND: TRANSPACIFIC HAUS LIMITED**  
Defendant

Coram: Justice Mary Sey

Counsel: Mr. Edward Nalyal for the Claimant  
Mr. Dane Thornburgh for the Defendant

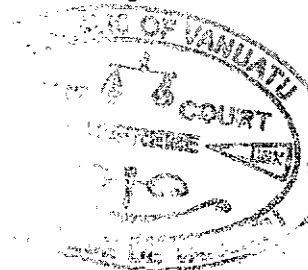
Date of Judgment: 4<sup>th</sup> September 2014

**JUDGMENT**

**Introduction**

1. On 1<sup>st</sup> February 2000, at Port Vila, a Commercial Lease Agreement (the Agreement) was entered into between Windsor House Limited (Landlord) and The Office Pub (Tenant) to lease the commercial premises located at Windsor House for a period of 20 years with an option to renew for a further period.
2. The Agreement was tendered by Mr. Chriscoll at annexure CC1 of "Exhibit C1." Clause F of schedule one of the lease provides that:

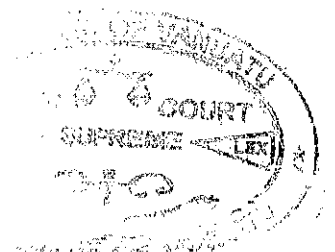
*"The Tenant shall pay rental at the rate of eight hundred and ninety one vatu per square metre. The rent of lease premises shall be the sum of two hundred and fifty thousand Vatu (Vt250,000) per month. This is including*



*Value Added Tax. The rent shall be paid in advance not later than the Fifteenth (15<sup>th</sup>) day of each month to nominated bank account details as follows:-*

*Beneficiary: Windsor House Limited  
Bank: Westpac Banking Corporation  
Branch: Port Vila  
Account No.: 01-972349-01"*

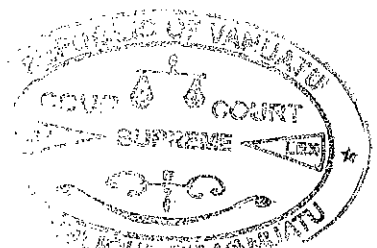
3. Under the caption "Rent Review" in clause G, the lease was expressed to be a "Fixed 20 years lease without increase".
4. In or about October 2005, the claimant acquired the Office Pub business by way of purchase of the Agreement with a lease duration of 15 years. The sale of business agreement between GLENTARM PTY LIMITED and the claimant as found at annexure CC25 of "Exhibit C3" deals with the sublease and assignment of same. At the date of purchase of the business, the claimant acquired the rights and obligations of the Tenant under the Agreement. Geoffrey Gee and Partners acted for the claimant in purchasing the business.
5. On 12<sup>th</sup> December 2007, Windsor House Limited filed a change of name with Vanuatu Financial Services Commission and it has from that date been known as Transpacific Haus Limited (the Defendant named herein).
6. On 9<sup>th</sup> April 2013, the claimant was served with a Notice to Remedy Breach pursuant to section 45 of the Land Leases Act [CAP 163] as amended and he was informed that he had 30 days to remedy the complaints as complained of.
7. On 13<sup>th</sup> May 2013, Thornburgh Lawyers served the claimant with a Notice to Quit. He was informed that the sublessor had terminated the lease and required him to quit and deliver up to it possession of the premises not later than seven (7) days being 20<sup>th</sup> May 2013.



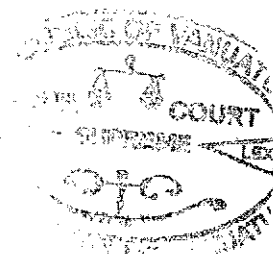
8. On 21<sup>st</sup> May 2013, the claimant obtained a Court Order restraining the defendant from evicting him out of the Office Pub/Flaming Bull Steakhouse premises at Transpacific Haus Limited.
9. On 20<sup>th</sup> August 2013, a Court Order was made directing that all rental payments from April 2013 be deposited into the Chief Registrar's Trust Account N0. 14149 - ANZ Bank on the 15<sup>th</sup> day of each month.
10. The claimant then filed a Supreme Court Claim dated the 5<sup>th</sup> day of June 2013, seeking the following relief:-
  - a. A declaration that the Notice to Remedy Breach dated 8<sup>th</sup> April 2013 is invalid and of no effect.
  - b. A declaration that the purported termination of the Lease Agreement by the Defendant is invalid, void and of no effect.
  - c. Damages against the Defendant for breach of Clause 23, Schedule 2 of the Agreement in failing to provide the air conditioning to the premises of the Claimant.
  - d. Costs against the Defendant.
11. The Defendant filed a Defence and Counter-Claim on 11<sup>th</sup> July 2013 denying the Claims and the defendant counter-claimed in the following terms and seeking the following relief:

The lease is ineffectual, defective and unenforceable, the particulars:-

- i. the Lease was for a purported term of 20 years.
- ii. the Lease was not and has not ever been registered as required pursuant to s22 of the Land Leases Act CAP [163] ("the Act")
- iii. the Lease is ineffectual pursuant to s22 of the Act.



- iv. the Lessor never granted the original Lease for a term of 20 years.
  - v. The Claimant did not purchase the Lease.
  - vi. The Lease was not assigned to the Claimant.
  - vii. The Lease was unable to be assigned or purchased as same was defective and unenforceable.
  - viii. The lessor never granted the original lease for a term of 20 years.
  - ix. There was no lease.
  - x. The lessor never signed the lease.
  - xi. The lease had been materially altered by way of deception of the claimant or others.
12. The claimant filed a Defence to Counterclaim in which he denied the whole Counterclaim and by way of Further Defence, he:
- “13. Says the Defendant is being unreasonable in the approach it has taken to try and remove the Claimant as there are no valid grounds for the action the Defendant has taken.
  - 14. Says Mr. Dane Thornburgh had acted for the Claimant in the same matter, whilst he was employed by Geoffrey Gee & Partners, and therefore he is conflicted out, which issue has been raised with him, however, he has chosen to continue to act.”
13. The claimant submits that the defendant's Notice to Remedy Breach dated 8<sup>th</sup> April 2013 and the subsequent letter dated 13 May 2013 advising purported termination of the claimant's lease are invalid and of no effect on the basis that the defendant had waived its right of forfeiture as regards the alleged breaches of the terms of the claimant's lease.



14. The claimant further submits that from clause F of the lease referred to above, it can be identified that rent on the premises was paid in advance on the 15<sup>th</sup> of each month so that, on the date (8<sup>th</sup> April 2013) the defendant served the forfeiture notice, it had received from the claimant, rent for the premises for the period 15 March 2013 to 15 April 2013.
15. Furthermore, the claimant contends that the alleged breaches of the lease were matters that the defendant was aware of, at least since 2007, when it bought the building, but the defendant chose not to take any action and continued to receive rent on the premises from him.
16. It is further contended by the claimant that by accepting rent from him from 2007, the defendant had waived its right of forfeiture in accord with s.43 (3) (a) & (b) of the Act and had treated the lease as subsisting.
17. For ease of reference, the **Notice to Remedy Breach** is reproduced hereunder:

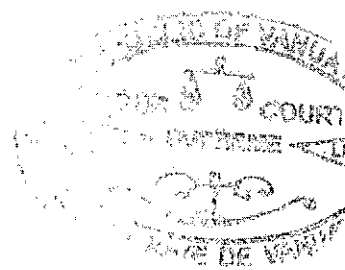
"To: *The Office Pub*  
*PO Box 85*  
*Port Vila Vanuatu*  
*Ground Floor*  
*TransPacific House*  
*Lini Highway*  
*PORT VILA*

***We the undersigned as Solicitors for TransPacific Haus Limited ("the Landlord") of Port Vila Vanuatu hereby give you notice as follows:-***

1. *The Landlord and The Office Pub ("the Tenant") entered into a sublease in respect of the part of the property (described as Leasehold title no.11/OE23/037 situated at Lini Highway, Port Vila Vanuatu ("The Premises") on or about 1 February 2000 (" Lease").*
2. *Paragraph 8 of the said Lease makes it an express term that:*
  - a. *The Tenant shall not structurally alter or add to the Premises in any way without the consent of the Landlord.*
3. *In breach of paragraph 8 of the Lease, you have:*

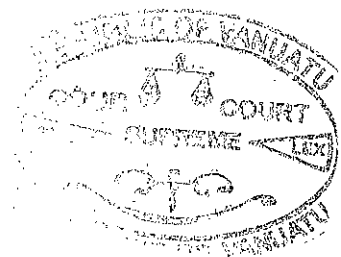


- a. *Constructed a kitchen adjacent and adjoining the fire escape in contravention of the Physical Planning Act and without consent of the landlord and,*
  - b. *Installed a grease trap without consent of the Landlord and,*
  - c. *Erected a chimney to the roof without consent of the Landlord and,*
  - d. *Erected and installed an exhaust fan to the roof without consent of the landlord and,*
  - e. *Subsequently added/commenced cooking operations on the premises when cooking meals on-site was never approved by the Landlord nor contemplated in the original sublease and,*
  - f. *Due to the above, the septic tank is unable to cope as it was never designed for a kitchen to operate from the Premises.*
  - g. *Erected and installed an outside shower adjacent to the Unelco electricity meter.*
4. *The actions as stated in paragraph 3(a) - 3(g) herein represent a continuing breach of the said Lease.*
  5. *The Landlord hereby requires you to take appropriate steps to ensure the above complaints namely paragraph 3(a) - 3(g) herein are rectified by way of removal and cessation thereof no later than Thirty (30) days from the date of receiving this notice by way of service on you.*
  6. *Paragraphs I & K of the said Lease makes it an express term that:*
    - a. *The Tenant shall be responsible for the following payments in addition to rental:-*
      - i. *Municipality taxes and Water Rates on a pro rata basis as calculated by the Landlord and payment of such outgoings shall be made within the 7 days of delivery of invoice for payment by Landlord to the tenant.*
      - ii *All outstanding rentals and outgoings shall bear interest at 15% per annum if not paid within 10 days of the due date.*



7. In breach of paragraphs I & K of the Lease, you have failed to pay or paid late the amounts of Municipality Taxes to the Landlord as follows:

- a. First Semester 2011
  - i. invoiced 97,601vt on 01/03/2011
  - ii. Paid 97,601vt on 23/02/2012
  - iii. 7 Days to pay and interest to accrue 10 days after due therefore interest due after 18/03/2011 @ 15% pa.
  - iv.  $97,601vt \times 15\% \frac{360 \text{ days}}{365 \text{ days}} = 14,440vt$  interest
  - v. Total due first semester 2011 = **14,440vt**
  
- b. Second Semester 2011
  - i. invoiced 97,601vt on 01/08/2011
  - ii. Paid 97,601vt on 23/02/2012
  - iii. 7 Days to pay and interest to accrue 10 days after due therefore interest due after 18/08/2011 @ 15% pa.
  - iv.  $97,601vt \times 15\% \frac{188 \text{ days}}{365 \text{ days}} = 7,541vt$  interest
  - v. Total due second semester 2011 = **7,541vt**
  
- c. First Semester 2012
  - i. invoiced 97,601vt on 18/06/2012
  - ii. 97,601vt Unpaid as of 4 April 2013
  - iii. 7 Days to pay and interest to accrue 10 days after due therefore interest due after 05/07/2012 @ 15% pa
  - iv.  $97,601vt \times 15\% \frac{384 \text{ days}}{365 \text{ days}} = 15,402vt$  interest
  - v. Total due first semester 2012 = **113,003vt**
  
- d. Second Semester 2012
  - i. invoiced 97,601vt on 18/06/2012
  - ii. 97,601vt Unpaid as of 4 April 2013
  - iii. 7 Days to pay and interest to accrue 10 days after due therefore interest due after 05/07/2012 @ 15% pa
  - iv.  $97,601vt \times 15\% \frac{273 \text{ days}}{365 \text{ days}} = 10,950vt$  interest
  - v. Total due first semester 2012 = **108,551vt**
  
- e. First Semester 2013
  - i. invoiced 97,601vt on 31/01/2013
  - ii. 97,601vt Unpaid as of 4 April 2013
  - iii. 7 Days to pay and interest to accrue 10 days after due therefore interest due after 17/02/2013 @ 15% pa
  - iv.  $97,601vt \times 15\% \frac{46 \text{ days}}{365 \text{ days}} = 1,845vt$  interest
  - v. Total due first semester 2012 = **1,845vt**



8. *The failure to pay the monies as stated in paragraph 7 Herein, as at 4 April 2013, being 342,981VT (THREE HUNDRED AND FOURTY TWO THOUSAND NINE HUNDRED AND EIGHTY ONE VATU) represents a continuing breach of the said Lease.*
9. *The Landlord hereby requires you to pay 342,981VT (THREE HUNDRED AND FOURTY TWO THOUSAND NINE HUNDRED AND EIGHTY ONE VATU) to the offices of Thornburgh Lawyers, 2<sup>nd</sup> Floor TransPacific Haus, Lini Highway Port Vila PO Box 1495 Port Vila Vanuatu no later than Thirty (30) days from the date of receiving this notice by way of service on you.*
10. *Furthermore Paragraph 13 of the Lease makes it an express term of the Lease that:*
  - a. *The tenant shall not cause nuisance or annoyance to its neighbors.*
11. *In breach of paragraph 13 of the Lease, you have and continue to cause nuisance and annoyance to your neighbors, namely:*
  - a. *Allowing Drunken people to sleep across the entrance to the main building and,*
  - b. *Allowing patrons to vomit & urinate around the entrance to the Premises and,*
  - c. *Allowing patrons to vomit & urinate at the main entrance to the main building and,*
  - d. *Allowing patrons to smear unknown substances on glass windows and doors of the main building and,*
  - e. *Allowing patrons to Break windows,*
  - f. *Allowing patrons to smoke in fire exits.*
12. *The actions as stated in paragraph 11(a) - 11(f) are a continuing breach of the said Lease.*
13. *The Landlord hereby requires you to take the appropriate steps to ensure the above complaints namely paragraph 11(a) - 11(f) cease occurring no later than thirty (30) days from the date of receiving this notice by way of service on you.*
14. *Furthermore Paragraph 15 of the Lease makes it an express term of the Lease that:*
  - a. *The tenant agrees not to do or permit to be done anything that shall cause the policy or policies of insurance on the premises against damage by fire, cyclone or other event, to be void or voidable or increase the rate of premium and to repay the landlord all sums paid by way of increased rate of premium of any insurance policy.*

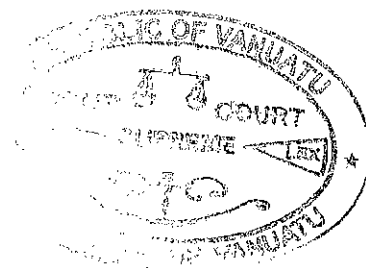




15. *In breach of paragraph 15 of the Lease, your positive acts or omissions are, and continue to be a breach of the said Lease.*
  - a. *Placement of and or allowing various items and or persons to be placed or present in the fire escape stairwell blocking same, including but not limited to:*
    - i. *Beds*
    - ii. *Freezer*
    - iii. *Dryer*
    - iv. *Rubbish bags and loose rubbish*
    - v. *Intoxicated patrons*
    - vi. *Sleeping patrons*
16. *The above acts or omissions effect and or void the Landlord's insurance policies against fire or other event.*
17. *The actions as stated in paragraph 15(a)(i) - 15(a)(vi) are a continuing breach of the said Lease.*
18. *The Landlord hereby requires you to take the appropriate steps to ensure the above complaints namely paragraph 15(a)(i) - 15(a)(vi) cease occurring no later than thirty (30) days from the date of receiving this notice by way of service on you.*
19. *In the event that you fail to comply with this notice within the given reasonable timeframes as stated in this notice, the Landlord will enforce its rights pursuant to s43 of the Land Lease Act.*
20. *This Notice to Remedy Breach shall not be construed as a waiver of any rights or remedies which the Landlord may have including the right to rely on any other notices as served previously and or serve any further notices.*
21. *In particular the Landlord expressly reserves their rights in relation to s22 of the Land Leases Act CAP 163.*

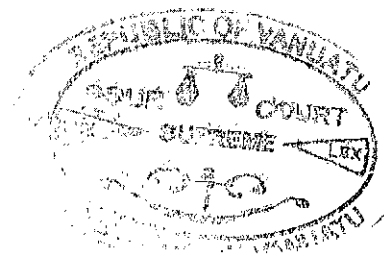
*Dated at Port Vila this 8<sup>th</sup> Day of April 2013*

.....  
**Thornburgh Lawyers**  
*Solicitors for the Landlord TransPacific Haus Limited"*



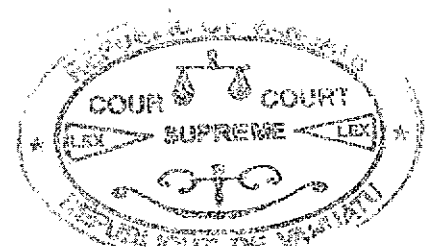
## The Evidence

18. During the trial, three of the matters that came to prominence as grounds for forfeiture of the lease were:
- (a) The fire escape and its use;
  - (b) The non-payment of the municipal rates or taxes; and
  - (c) The authenticity, enforceability and validity of the lease.
19. In his evidence, the claimant said the complaint about use of the room by the stairs was another fabricated reason advanced by the defendant to try and get rid of him from his business premises. He said that:
- (a) He had always stored his freezer, washing machine and dryer in this area since he bought the business as appears in annexure CC2 at page 13 of Exhibit "C1" which shows a photograph dated 28 September, 2005 of the fridge/freezers in the room by the stairs complained of.
  - (b) No one had told him that the stairwell is a fire escape and there was no notice to indicate that. Further, that he has been in the pub for over 8 years and throughout that period the staircase has not been used for fire drills or as an escape route. He said the defendant calls it a stairway but for him it is the laundry.
  - (c) The claimant said there had been no complaint about his use of this area since he bought the business in 2005 until their dispute in Mid-January 2013. He said that for reasons unknown to him, the defendant's agents/employees removed his freezer, washing machine, cutlery and crockery out of the back room and then locked the room. He said he was in the USA undergoing medical treatment at the time his things were removed



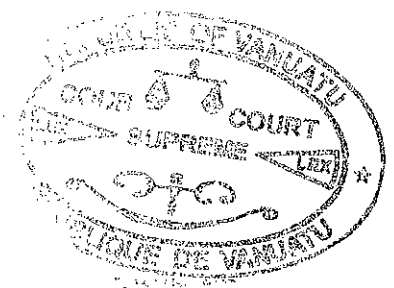
from that room. On 30 January 2013, he moved his things back into the room in question because that is where those crockery and cutlery have always been stored at the next floor up for his business, and the defendant did not provide to him alternative space for storing those things.

20. The claimant went on to say that at the time of purchase of the business, all its fixtures, which the defendant now complains of, already existed including the kitchen, the grease-trap, the chimney and exhaust fan. Further, that cooking was done at the premises, a fact which Mr. Harrison is aware of because he and his staff used to order lunch from there.
21. Mr. Thornburgh referred the claimant to photos behind Tab A of the sworn statement of Ms. Catherine Keys and counsel suggested to the witness that he had unlocked the fire escape door and that provided unfettered access to patrons from his bar to go up the stairs to have sex, sleep and smoke. The claimant denied this and he said that there are usually three security guards by that door all the time.
22. The claimant also denied counsel's suggestion that he had done nothing to remedy the complaints within the 30 days' notice period. He said that he had put a lot of security out there in and outside the pub and that he took steps to remove all the rubbish. He said he had also gone to the police station and complained but they had told him that he "got" no right to deal with those people causing nuisance outside his pub area and that he was not allowed to touch the area.
23. On the issue of the non-payment of the municipal rates or taxes, the claimant said that he will pay the municipal taxes as soon as the defendant fixes his air conditioning that stopped working in 2010. The claimant said he has got the monies to pay Mr. Laurie Harrison immediately provided he would come in to fix his air conditioning. The claimant went on to say that he has never seen any Municipal taxes directly issued by PVMC and that all he has seen are trumped up

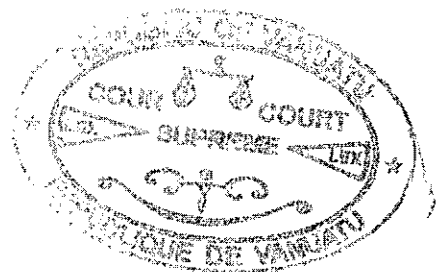


invoices from the defendant. He said he knew he had to pay but that he did not pay because Laurie first breached the Lease Agreement by refusing to repair his air conditioning. The claimant said: "I was dealing with a man who just wanted to take and take and not give. That's Laurie Harrison."

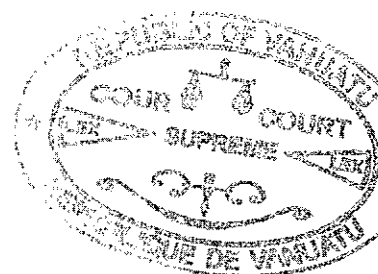
24. The claimant was asked whether he was aware that the defendant's witnesses, namely, Laurie Harrison, Andrew Monroe and Mercy Saula had given evidence that they never signed the lease and that they say the signing clause is a forgery or a fraud. In reply, the claimant said he did not know anything about that and that counsel would have to ask his lawyers Mr. Geoffrey Gee and Mr. John Malcolm who were acting for him at the time.
25. The claimant went on to say that he does not have any recollection of assignment of a lease, but that he could recall that lawyer Dane Thornburgh, who was handling his matter at the time he was working with Geoffrey Gee, had asked him whether his lease was registered. He said he had replied that he did not know and Mr. Thornburgh had said *"it's important because Laurie Harrison might try and cancel your lease"*.
26. For its part, the defendant's primary Defence to the Claim is that the lease is not a valid lease and that the claimant is no more than a periodic tenant. The defendant submits that the following evidence as filed clearly supports and evinces the defence of the defendant seeking a declaration that the lease was void and other relief as prayed for:
  - a. Laurence Harrison - SS filed on 20<sup>th</sup> February 2014
  - b. Mercy Saula - SS filed on 20<sup>th</sup> February 2014
  - c. Andrew Munro - SS filed on 25<sup>th</sup> February 2014



27. Ms. Catherine Keys gave evidence on behalf of the defendant and she relied on her sworn statement filed on 17<sup>th</sup> February 2014 and admitted in evidence as Exhibit D1. She said she took over the management of Transpacific Haus in 2011 in her capacity as Manager of Transpacific Real Estate. Ms. Keys' evidence focused primarily on the complaints which appear in the Notice to Remedy Breach. The witness said that other tenants of the building have been and continue to complain about the nuisance and damage that the claimant, his staff and patrons of his Premises have caused. She said that the claimant's use of the Premises has resulted in nuisance and damages to common property as well as the property of fellow tenants.
28. Recourse to the sworn statement of Catherine Keys indicates the following facts: Exhibit D1 shows the documents that the defendant was served with placing him on notice as to the breach and informing him that rent would not be accepted by the defendant. Annexure K is correspondence dated 17 April 2013 to the claimant, referring to the fact that he had not addressed the Notice to Remedy Breach and was actually committing further breaches. Annexure L is further correspondence dated 17 April 2013 advising the claimant that no rent will be accepted and the rent as due on 15 April 2013 is not accepted and duly returned. Annexure M is further correspondence dated 18 April 2013 and at paragraph 3 on page 2, the claimant is further advised that no rent will be received and rent was returned. Annexure R is further correspondence to the claimant dated 14 May 2013 and at paragraph 6 the defendant advises that no rent was accepted and will not be accepted.
29. The evidence of Mr. Laurie Harrison focused on the fraudulent manner in which he believed the lessee acquired his interest in the lease and the execution and dealing of same. The witness said that the signature on the signature page appears to be his signature and that what he suspects is that someone had prepared the lease and then attached his previous signature and stamp from another document to that page because he has never signed a 20 year lease.

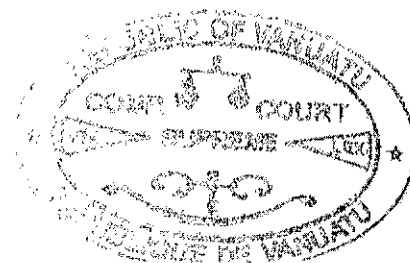


30. Mr. Harrison said that there was a second lease created in 1998 which was not signed and all along he thought that was the lease being referred to until fairly recently (about 6 - 9 months ago) when Mr. Monroe discovered this 2000 lease. He said it was given to Mr. Monroe by the claimant's lawyer Geoffrey Gee but that up to that time they had never seen the 2000 lease. Mr. Nalyal asked the witness whether he was saying that he had relied on an unsigned lease to receive over 21 Million Vatu rent from the claimant and Mr. Harrison said "yes the tenant was occupying the building". It was also put to Mr. Harrison that the only reason the issue of the lease was raised last year was because he wanted to kick out the tenant. His response was that it has always been an issue and he went on to say that he was not suggesting Mr. Chriscoll committed the fraud but that he must have bought the lease from another tenant without proper documentation.
31. Mr. Harrison was asked to confirm whether he had said the rent is too low and he said "Yes, because for VT250,000 for that area of land, I can say the rent is too low." He said it is not right to say that Vince Macdonald owns 50% of Trans-Pacific Haus because he only owns 13% beneficially as he is a shareholder of the Company that owns half of the shares. Mr. Harrison also said that he would be very surprised if Vince had told Chris to pay the cheque to LJ Hooker and that the latter had no right to accept the cheque.
32. On the issue of the fire escape, Mr. Harrison said that when he bought the building in 2007, he does not recall explaining to Mr. Chriscoll that it was a fire escape. He admitted that there are no signs but he said every tenant in the building knows it is a fire escape and it has always been a fire escape. He said that because the pub is on the ground floor he did not think he needed to explain to the claimant that it was a fire escape. The witness said that they have never had fire drills because everybody knows it is a fire escape. Mr. Harrison admitted that the stairs lead into the restaurant and that when he took over in 2007 he had



not done anything about it. Mr. Harrison was referred to paragraph 23 of the Lease Agreement and his response was that if the lease is a valid document the landlord would maintain the air conditioners, but that the lease document in question is fraudulent.

33. Mr. Andrew Ross Munro gave further corroborating evidence in relation to the authenticity, enforceability and validity of the lease and the alleged fraudulent dealings with same. He confirmed that the document attached to his sworn statement as Tab M has Laurie's signature and the stamps but he says it is a forgery. When it was put to him that his Company accepted rent, he said his opinion was that the rent should be in a trust account because they were going to challenge the lease anyway and that they took the approach that it was a 3 months lease because it was never registered.
34. In his outline of submissions, Mr. Thornburgh submitted that as the right of re-entry in this matter under s45 and the Lease, does not lay at the feet of the lessor until s45 and or clause 27 of the Lease is satisfied, their actions prior to the expiration of the Notice to Remedy Breach is immaterial and need not trouble this Court in the slightest.
35. Mr. Thornburgh further submitted that despite the clear and unequivocal actions of the defendant, by way of returning of rent cheques, corresponding with the claimant clearly advising him that no rent will be accepted, he deviously attempted to pay rent to LJ Hooker Real Estate on the basis that he was told by Mr. Vince Macdonald to do so.
36. It is submitted by counsel that in this situation, a witness from LJ Hooker or Vince McDonald should have been called by the claimant to prove his case and in failing to do so the Court should draw the adverse inference that the reason for not doing so was that the evidence was not supportive of the claimant's Claim.



37. Counsel also submitted that more fatal to the claimant's Claim is the failure to call Geoffrey Gee and John Malcolm. Furthermore, that Mr. Gee would have been able to assist with the questions as to terms, assignment, execution, stamp duty and a number of areas of evidence that would have been useful to the Court as to the transaction which concluded with the lease purportedly being assigned to the claimant.
38. Counsel further submitted that the failure to call any witnesses to disprove the live allegations re fraud and the lease should be seen as enlivening the Court's discretion to draw an adverse inference against the claimant as allowed for in **Jones v Dunkel** [1959] HCA 8 and further discussed in contemporary judicial applications in **The Bell Group Ltd v Westpac Banking Corporation [No 9]** [2008] WASC 239:

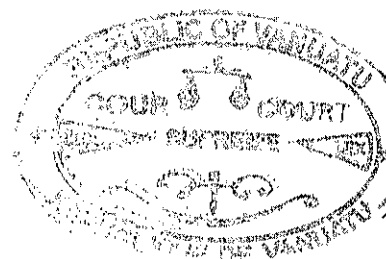
*"The unexplained failure by a party to give evidence or to call a witness or tender certain documents may, in appropriate circumstances, lead to an inference that the uncalled evidence would not have assisted the party's case"*

39. In his final submissions Mr. Thornburgh took issue with Mr. Nalyal's submissions about the question of waiver and made detailed submissions in response. It is primarily submitted that nowhere in the pleadings is the question of waiver of the defendant's rights under the Notice to Remedy Breach pleaded and that the only waiver issue pleaded is to the Notice of Forfeiture, a separate document.

#### **Pertinent law**

40. The right of forfeiture of lease and the subsequent right of the defendant/lessor of re-entry is found in the **Land Leases Act** ("the Act"). **Section 45** provides that:

*"Notwithstanding anything to the contrary contained in the lease, no lessor shall be entitled to exercise the right of forfeiture for the breach of any agreement or condition in the lease, whether expressed or implied, until the lessor has served*





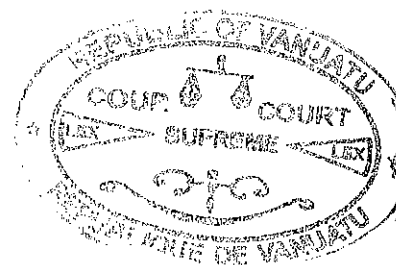
on the lessee and every other person shown by the register to have an interest a notice in writing which:-

- a. shall specify the particular breach complained of; and
- b. if the breach is capable of remedy, shall require the lessee to remedy the breach within such reasonable period as is specified in the notice; and
- c. in any case other than non-payment of rent may require the lessee to make compensation in money for the breach;

And the lessee has failed to remedy the breach within a reasonable time thereafter, if it is capable of remedy and to make reasonable compensation in money if so required."

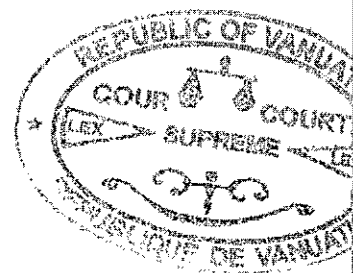
41. **Section 43** of the Act provides as follows:

- (1) Subject to the provisions of section 45 and to any provision to the contrary in the lease, the lessor shall have the right to forfeit the lease if the lessee commits any breach of, or omits to perform any agreement or condition on his part expressed or implied in the lease.
- (2) The right of forfeiture may be –
  - (a) exercised, where neither the lessee nor any person claiming through or under him is in occupation of the land, by entering upon and remaining in possession of the land; or
  - (b) enforced by a reference to the Valuer-General.
- (3) The right of forfeiture shall be taken to have been waived if –
  - (a) the lessor accepts rent which has become due since the breach of the agreement or condition which entitled the lessor to forfeit the lease or has by any other positive act shown an intention to treat the lease as subsisting; and
  - (b) the lessor is, or should by reasonable diligence have become, aware of the commission of the breach."

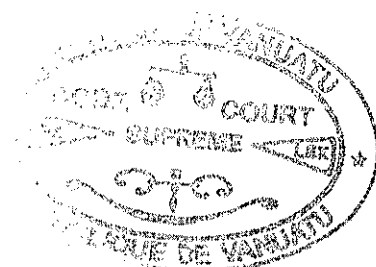


## Findings

42. I have had the opportunity of seeing and hearing all the witnesses as well as observing their demeanour during the trial and I make the following findings of facts:
- (a) It is common ground between the parties that a Notice to Remedy Breach was served on the claimant on 9<sup>th</sup> April 2013 and numerous breaches were named in the Notice to Remedy Breach.
  - (b) Detailed and comprehensive evidence was led by the defendant to establish the alleged breaches of the lease conditions.
  - (c) Pursuant to section 45, the right of the defendant to re-enter and or forfeit the lease does not arise nor vest in the defendant until the expiry of the Notice, which must provide reasonable time to remedy.
  - (d) Pursuant to clause 27 of the Lease Agreement made on the 1<sup>st</sup> day of February 2000, the defendant gave written notice requesting compliance within 30 days.
  - (e) I find that there were steps undertaken by the claimant and actions performed by him to rectify the Notice to Remedy Breach before the 30 days expiry period. I accept the claimant's evidence that he had put a lot of security out there in and outside the pub and that he took steps to remove all the rubbish. He said he had also gone to the police station and complained but they had told him that he "got" no right to deal with those people causing nuisance outside his pub area and that he was not allowed to touch the area. I find this piece of the claimant's evidence credible and I believe him. It was clearly not within his power to control the patrons who were vomiting and smashing glass outside his pub area.
  - (f) It seems clear to me that there had never been any issue or dispute over the claimant's use of the room at the next floor up until a dispute arose between the claimant and defendant in January 2013.
  - (g) I accept the claimant's evidence that those crockery and cutlery have always been stored in that room for his business from the date of purchase of the business in 2005.



- (h) I accept Mr. Nalyal's submission that the complaint about use of the room by the stairs was another fabricated reason used by the defendant to try and get rid of the claimant from his business premises.
- (i) Ms Catherine Keys admitted in evidence that this so called fire escape had never been used in any emergency (fire or earthquake) and the defendant never carried out any fire escape drills using this room or stairs.
- (j) Mr. Laurie Harrison also admitted the same as Ms. Keys and he further admitted he had never showed tenants or identified to them that this was the fire escape. Nor were there any signs put up there to signify it is a fire escape. Mr. Harrison admitted that the stairs lead into the restaurant and that when he took over in 2007 he had not done anything about it.
- (k) In their evidence, both Mr. Harrison and Ms Keys said that the way the claimant used this room or stairs provided a security risk to the defendant. This piece of evidence seems to suggest that the defendant was more concerned about its security rather than ensuring that the stairs was a fire escape for all the tenants.
- (l) I accept the claimant's evidence that he has been in the pub for over 8 years and throughout that period the staircase has not been used for fire drills or as an escape route. The evidence adduced by Mr. Harrison is that when he bought the building in 2007, he does not recall explaining to Mr.Chriscoll that it was a fire escape. He also admitted that there are no signs.
- (m) On the issue of the non-payment of Municipal taxes, Mr. Harrison admitted in his evidence receiving the letters from the claimant and from his lawyers requesting the defendant to fix the air conditioning, but the defendant never repaired the claimant's air conditioning.
- (n) On the issue of rental payments, the last rent accepted by the defendant was for the period of 15 March 2014 until 15 April 2014 and this accords with the submissions of the claimant. The evidence is clear that the defendant then refused to accept rent as and from 15 April 2013, when it was next due. I accept Mr. Thornburgh's submissions on this issue.



- (o) I also accept Mr. Thornburgh's submissions that any waiver can only have occurred after the right of re-entry became available to the defendant on the expiry of the Notice to Remedy Breach which clearly was 9 May 2013.

### The lease

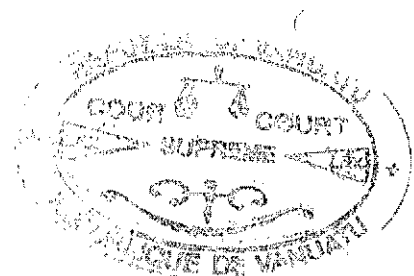
43. At page 2 of the Defence it is pleaded, and used in support of the Counter claim, that the lease is ineffectual because:

- d. The claimant did not purchase the lease.
- e. The lease was not assigned to the claimant.
- f. The lease was unable to be assigned or purchased as same was defective and unenforceable.
- g. The lease was for a purported term of 20 years.
- h. The lessor never granted the original lease for a term of 20 years.

44. At page 4, paragraph 6 of the Defence it is pleaded, and used in support of the Counter claim, that there is no lease and furthermore that:

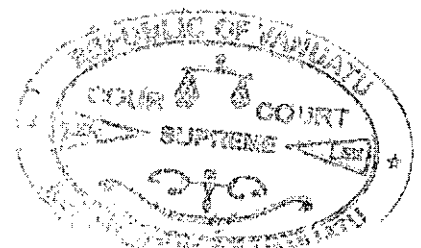
- i. The lessor never signed a document giving a 20 year lease without renewal or review of the rent payable.
- j. The lease the claimant is relying on is not the lease agreed to by the lessor and has been materially altered by way of deception of the Claimant or others.

45. The defendant has alleged fraud and the evidence of Mr. Laurie Harrison focused on the fraudulent manner in which he believed the lessee acquired his interest in the lease and the execution and dealing of same. The witness said that the signature on the signature page appears to be his signature and that what he suspects is that someone had prepared the lease and then attached his



previous signature and stamp from another document to that page because he has never signed a 20 year lease.

46. The evidence that has been placed before this Court from Mercy Saula as contained in her sworn statement filed on 20 February 2013 is that:
  - a. The lease is fraudulent
  - b. She had never sighted the lease
  - c. She never signed the lease
  
47. This was a common theme in the evidence of Mr. Laurie Harrison and Mr. Andrew Munro.
  
48. It is trite that he who alleges must prove. Allegations of fraud cannot be vague but must be detailed in full particulars. The evidence that has been placed before the Court hinges on Mr. Harrison's suspicions that someone had prepared the lease and then attached his previous signature and stamp from another document to that page because he has never signed a 20 year lease. The Court has not been told who that someone is and Mr. Harrison made it clear that he was not suggesting Mr. Chriscoll committed the fraud. His evidence only suggests that Mr. Chriscoll must have bought the lease from another tenant without proper documentation.
  
49. The burden of proof is undoubtedly on the counterclaimant to make out the case of fraud alleged by adducing satisfactory and convincing evidence. To my mind, alleging fraud as to how Mr. Chriscoll had acquired the lease and then hoping to succeed, because he did not call Mr. Geoffrey Gee and Mr. Malcolm to adduce evidence to disprove such allegation, will not work. Mr. Chriscoll is simply not obliged to lead any evidence in that direction. The onus lies entirely on Mr. Laurie Harrison to support his allegation.



50. Suffice it to say that Mr. Harrison's suspicion, by itself, cannot assume the bearings of proof. Judging from the totality of the evidence adduced, I find that Mr. Harrison, as a Director of the defendant, failed to conduct due diligence regarding the validity or otherwise of the lease since it was executed in 2000. He has failed to show that he acted with care even though his evidence is that the lease has always been an issue.

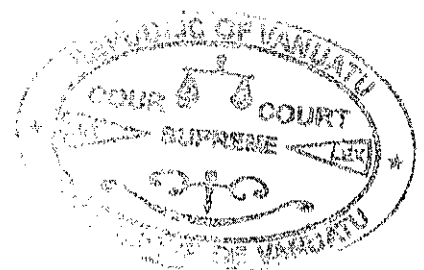
51. On the issue of the alleged non-registration of the lease as alluded to by Mr. Monroe, I accept Mr. Nalyal's submissions that this argument is futile for these reasons:

(a) The Court of Appeal's decision in the recent case of **Societe de Services Petroliers S. A. v Raynaud** [2014] VUCA 4 which states that even if a lease was not registered, the parties were bound contractually by the terms of the lease document they had executed, as section 22(5) of the Act provides:

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

(b) If the defendant says the lease in question is not registered then it follows that it cannot rely on that lease to issue the purported Forfeiture Notice nor terminate the lease.

52. I find that the defendant/counterclaimant knew about the alleged invalidity of the lease from the beginning and despite this knowledge it acquiesced by accepting the claimant's rent amounting to approximately VT21 Million since 2007. This is a positive act which shows the intention of the defendant to treat the lease as subsisting. [See section 43(3)(b) [CAP 163]. See also the Court's decision in the



case of **Willie v Sarginson** [2000] VUSC 20. Nonetheless, the defendant/counterclaimant subsequently did not agitate the registration issue in their outline of submissions. I therefore need not say more about that.

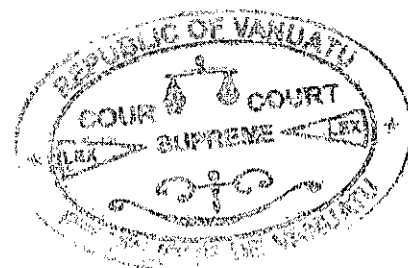
## Conclusion

53. In the result, the defendant's Counterclaim, which is premised on the ground that the lease was unable to be assigned or purchased, as same was defective and unenforceable, fails. That ground is hereby dismissed accordingly.
54. In light of my finding in paragraph 42 (e) above that there were steps undertaken by the claimant and actions performed by him to rectify the Notice to Remedy Breach before the 30 days expiry period, I shall now proceed to consider whether it is appropriate for me to grant the claimant relief against forfeiture.
55. The principles which govern the exercise of the discretion are discussed in **Rose v Hyman** [1911] 2 KB 234; (1912) AC 623 and **Shiloh Spinners Ltd v Harding** [1973] AC 691. In *Shiloh Spinners*, supra, the House of Lords affirmed the right of equity to relieve against forfeiture for breach of any covenant or condition.
56. A leading New Zealand authority on relief against forfeiture is the decision of the High Court in **Studio X Ltd v Mobil Oil New Zealand Ltd** [1996] 2 NZLR 697, where Hammond J comprehensively considered the English and New Zealand cases on the discretion to grant relief against forfeiture. His Lordship then set out a useful list of relevant considerations in the following terms:

*"(a) whether the breach was advertent or deliberately committed. In such a case there are sound reasons why in the normal case relief should not be given: why should a lessor be compelled to remain in a relation to neighbourhood with a person in deliberate breach of his obligations?*

*(b) conversely, whether the breach was caused by inadvertence or was entirely beyond the tenant's control;*

*(c) whether the breach involves an immoral/illegal use...;*



(d) *whether a tenant has made or will make good the breach of the covenant and is able and willing to fulfil his obligations in the future;*

(e) *the conduct of the landlord;*

(f) *the personal qualifications of the tenant;*

(g) *the financial position of the tenant;*

(h) *sometimes the position of third parties has had to be considered...;*

(i) *the gravity of the breach;*

(j) *whether a breach has occasioned lasting damage to a landlord; and*

(k) *Proportionality. Under this head there has to be concern whether whatever damage is said to have been sustained by the landlord can truly be said to be proportionate to the advantages he will obtain if relief is not granted. Generally speaking, and at a greater level of abstraction, there has to be a concern with keeping an even hand."*

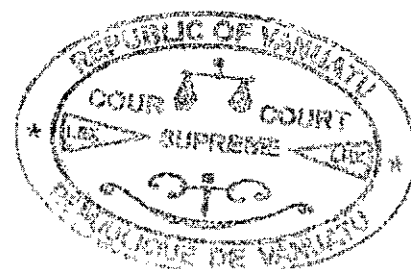
57. As the learned author, Holdsworth, notes in his book entitled A history of English Law, Vol. 3, 3<sup>rd</sup> Edition, the jurisdiction to grant such relief:

*"rests upon the idea that it is not fair that a person should use his legal rights to take advantage of another's misfortune, and still less that he should scheme to get legal rights with this object in view."*

58. Having regard to the present proceedings and the conduct of the parties and all the circumstances of the case, I find that it is appropriate for me to grant the claimant relief against forfeiture and I hereby do so.

59. In the circumstances, I make the following Orders:

- a. A declaration that the Notice to Remedy Breach dated 8<sup>th</sup> April 2013 is effective.
- b. A declaration that the lease is not ineffectual and it is binding on all parties.





- c. A declaration that the claimant is granted relief against forfeiture and he is to desist forthwith from committing further breaches of covenants and conditions of the lease.
- d. An Order for the defendant to maintain the air conditioning to the premises of the claimant in accord with clause 23, Schedule 2 of the Agreement with immediate effect.
- e. An Order for unpaid Municipality charges and rent from the date of Breach Notice to be paid by the claimant to the defendant with immediate effect.
- f. An Order for the parties to bear their own costs.

**DATED at Port Vila, this 4th day of September, 2014.**

**BY THE COURT**

  
**M.M. SEY**  
Judge

