

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Civil Case No. 143 of 2010

BETWEEN: VALERIE RAYNAUD
Claimant

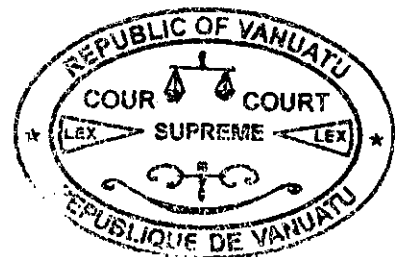
AND: STATION CENTRE VILLE LIMITED
Second Claimant

AND : SOCIETE DE SERVICES PETROLIERS SA
Defendant

Before: Justice Robert Spear
In attendance: Dane Thornburgh for the Claimant
Mark Hurley for the Defendant

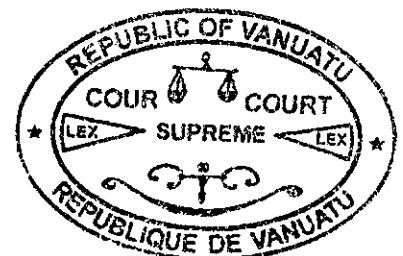
RESERVED DECISION

1. This case relates to a service station business in the center of Port Vila. *Societe De Services Petrolier SA* (SSP) is effectively the owner of the service station business which it leases either to Valerie Raynaud and David Russet trading as *Station Centre Ville* (SCV) or *Station Centre Ville Limited* (SCV Ltd). The uncertainty over the lessee is one of the least taxing issues that arises in this case.
2. The relationship between SCV Ltd for the one part and SSP for the other deteriorated rapidly principally as a result of an ongoing dispute as to the accuracy of the petrol pumps. The accuracy of the petrol pumps is of vital concern to the operator of a service station. The evidence explained that the margin between the wholesale and retail price is tight and the operator's profit very much depends upon the volume of sales.
3. The substantive claim in this case is for damages on the basis that, for a period, the petrol pumps were inaccurate and they were dispensing more petrol than the pumps were recording. This, of course, had the effect of eating into the profits of SCV/SCV Ltd's



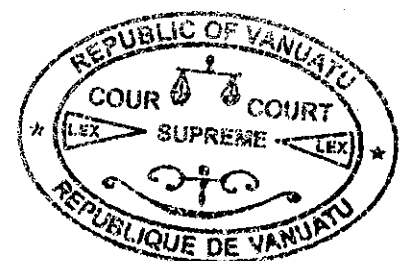
service station business. Complaints were made by Ms Raynaud to Mr Vallette of SSP. Various technicians checked the pumps for SSP and declared them to accurate or within agreed tolerance levels. SCV/SCV Ltd however contends that the problem continued until a technical representative of the manufacturer of the petrol pumps from New Zealand came and inspected the pumps and corrected a malfunction. This is a conclusion that they have reached having regard to the fact that their profit returned to what was expected immediately after the New Zealand technician had made certain adjustments to the petrol pumps. This particular aspect of the case is not for determination at this time. It is mentioned solely to explain the context within which the relationship between Ms Raynaud and Mr Valette deteriorated.

4. Eventually, Ms Raynaud and SCV Ltd commenced this proceeding seeking damages particularly but not exclusively for the loss that SCV/SCV Ltd had suffered as a result of the incorrect calibration of the petrol pumps. Shortly thereafter, SSP delivered notices to quit.
5. The claimants seek damages alleging a breach of contract on the part of SSP.
6. SSP counterclaims for orders that SCV and/or SCV Ltd quit the business and deliver up possession of the premises to SSP.
7. There is a confused factual situation that arises principally because of somewhat untidy contract documentation. Not only is there a dispute as to whether SCV or SCV Ltd is one of the parties to the contract, there is also a dispute as to the date that the contract was terminated or is to terminate.
8. At the commencement of the hearing, and in accordance with a joint request from counsel at pre-trial conferences, it was accepted that the Court would hear just the counterclaim at this time. It was confidently expected by counsel that once the counterclaim was determined, the parties would be able achieve a commercial resolution of the issues advanced by the claim. While it is generally undesirable to split a



proceeding in this way, and notwithstanding the dispute has continued between the parties for quite some time, my assessment accords with that of counsel that the parties will most probably be able to resolve this matter commercially once the counterclaim is finally determined.

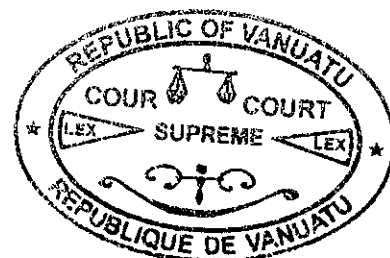
9. It was earlier mentioned that SSP owned the service station business which it leased to either SCV/SCV Ltd. The more correct explanation is that SSP is both the lessee of the land on which the Service station is situated and the owner of the business.
10. Prior to 2006, the owner of the business was Mobil Oil which leased (sub-leased) the business to SCV Ltd. In 2006, Ms Raynaud and Mr Russet purchased the shares of SCV Ltd. In 2007, Mobil Oil sold its interest in the service station to SSP. That is how the parties to this case initially came into a contractual relationship relating to the service station.
11. Later in 2007, SSP entered into a new contract (*the first contract*) with SCV Ltd for the business.
12. A rather faint objection was taken to the admissibility of the document which records the first contract on the basis that the copy presented was not stamped as required by s. 19 of the Stamp Duties Act [Cap. 68]. The evidence from the parties however describes exactly what is contained in this first contract by particular reference to the second contract and it accordingly does not really matter whether the first contract is before the Court or not. That is, other evidence clearly identifies the material aspect of that first contract without the need for the Court to have regard to the copy presented by Mr Vallette for SSP.
13. What is clear is that the parties to the first contract were SSP and SCV Ltd. The term of the contract was for an initial term of 1 year from 1 December 2007 with two rights of renewal each for three years. The first contract is a detailed business agreement that includes the grant of a sub lease to SCV Ltd. The lease title reference in the first contract



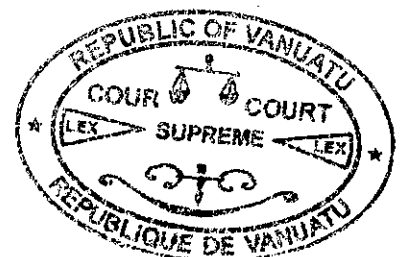
is to 11/OC22/019 but it is accepted by the parties that this is a mistake and that the correct title for the service station land is 11/OD22/033. The mistake in the first contract was carried over to the second contract and not appreciated until early 2011. Nothing turns on this mistake.

14. The rights of renewal, each of three years, required SCV Ltd to give notice in writing to SSP of SCV Ltd's intention to take up of the option not more than three and not less than one month before the then existing term expired.
15. On 7 February 2008, SCV Ltd was struck off the register of companies. Ms Raynaud and Mr Russet explained that they were aware that SCV Ltd was at risk of being struck off for non-compliance with the relevant statutory obligations on companies but they chose to allow the company to be struck off as they did not consider that it was necessary for their service station business to operate within the vehicle of a limited liability company. It can be noted that Ms Raynaud and Mr Russet had registered *Station Centre Ville* (SCV) as a business name on 19 July 2007 which was before the first contract was entered into and when the parties were operating under the old contract.
16. In 2011, the claimants successfully applied for SCV Ltd to be reinstated to the register of companies. Section 335(4) of the Companies Act [Cap. 191] provides that reinstatement results in the company (in this case SCV Ltd) being "*deemed to have continued in existence as if its name had not been struck off*". It is not disputed by SSP that SCV Ltd was reinstated in 2011 and that the application of s. 335 (4) applies with the consequence that SCV Ltd is to be deemed for the purposes of this proceeding and generally to have continued in existence as if its name had not been struck off. The Court of Appeal recently confirmed that s.335(4) is to be applied in this way¹.

¹ *Huang Xiao Ling v Leong* [2013] VUCA 15; Civil Appeal 14 of 2013 (26 July 2013)



17. The striking off/reinstatement issue is of some but not critical importance to SSP's claim that any contractual or statutory right on the part of SCV Ltd to occupy and operate the Service Station business had been brought to an end.
18. Well prior to reinstatement, discussions took place between Ms Raynaud for SCV/SCV Ltd and Mr Vallette (the General Manager of SSP) in respect of the profitability of business. Eventually, it was agreed that the contractual relationship between them would be amended in relation to the pricing structure. In that respect, the first contract provided for not just a price that SCV/SCV Ltd had to pay for the petrol supplied to it by SSP but also the price for which SCV/SCV Ltd could sell the petrol. This of course determined the margin on petrol sales for SCV/SCV Ltd.
19. The mechanics of this pricing review appeared to have arisen in this way. Following negotiations between the parties, Mr Vallette for SSP provided a draft contract to Ms Raynaud for consideration by SCV/SCV Ltd. Mr Vallette's evidence was that this was merely the first contract with just the pricing structure provision redrawn and with no other alteration to the first contract. That re-drafted contract again specified SCV Ltd as the sub lessee rather than SCV.
20. As it happened, another of SSP's service stations at Tebakor that was under a similar contract to SCV / SCV LTD was also undergoing the same pricing review.
21. The draft amended contracts were eventually returned to Mr Vallette by both the proprietor of the Tebakor Station and Ms Raynaud without any alteration being made to the redrawn schedule as to the pricing structure and without any further comment. Certainly, no indication was given by Ms Raynaud to Mr Vallette that SCV Ltd had been struck off the register notwithstanding that SCV Ltd still appeared as the sub-lessee. Specifically, SSP was not informed that the contract should be with Ms Raynaud and Mr Russet trading as SCV. The redrafted contract in the form returned was eventually executed by the parties (*the second contract*) on 2 April 2009 with Mr Vallette signing for SSP and Ms Raynaud signing for SCV Ltd.

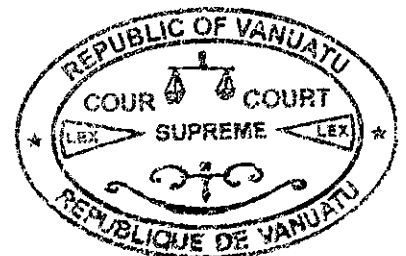


22. Of significance in respect of the second contract:-

- a) The same incorrect titled reference 11/OC22/019 from the first contract was repeated in the second contract;
- b) As mentioned, the sub-lessee was again specified to be SCV Ltd;
- c) The term of the contract was again specified to be for one year commencing 1 December 2007 again with the grant of an option for renewal for two further terms of three years each (clause 14);
- d) The amended schedule relating to the pricing structure was unchanged from the draft submitted to SCV/SCV Ltd;
- e) A provision was included in clause 4 relating to a payment required to be made by SSP in the event that the contract was terminated for whatever reason.

23. In the first contract, clause 4 relates to defaults and it appears to be in unexceptional commercial terms. It covers pages 9 and 10 of the first contract.

24. However, the draft document that was returned to Mr Vallette had been altered significantly as to clause 4 but Mr Vallette's notice was not drawn to it. It is clear that pages 9 and 10 had been completely retyped using the same font or typeface but with the addition of a termination payment requirement imposed on SSP. The redrafted clause 4 also mistakenly omitted to include the title to that clause. Notwithstanding the attempt to present the redrafted pages 9 and 10 to SSP as if there had been no changes made, it is abundantly clear that this was not a *cut and paste* alteration as had been the case with the pricing schedule. Someone had gone to the trouble of completely retyping pages 9 and 10 and inserting those retyped pages in the draft second contract.



25. The added provision is nothing short of a penalty payment and is in the following terms:

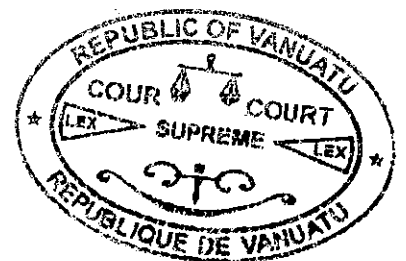
"whatever is the cause of termination or lapse of the sub lease, (SSP) shall pay to (SCV Ltd) an indemnity amounting to 10% of the aggregate amount of the turnover of (SCV Ltd) in the last 3 years".

26. This is an extraordinary provision for a commercial contract and one that any business entity in the place of SSP would surely be slow to entertain.

27. Mr Vallette said that he received the draft second contract documents back from the proprietor of the Tebakor Station and Ms Raynaud without appreciating that this provision had been inserted or that pages 9 and 10 had been retyped with that alteration. Mr Vallette was emphatic that he had no knowledge or involvement at all with the inclusion of that penalty provision until it was drawn to his attention some years later and well after the second contract had been executed. I am in no doubt at all that Mr Vallette had nothing to do with the drafting of that provision nor that he appreciated that it was in the draft second contract when that document was returned to him and subsequently executed.

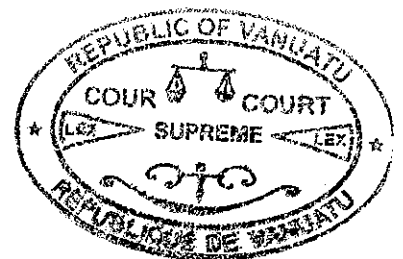
28. Mr Vallette impressed me as someone who would have realised immediately the significance of a provision such as this if he had become aware of it and, if he did not reject it outright, he would have at least referred it to SSP's legal section. . The evidence is that the Tebakor Station document had been similarly altered and again that alteration was not brought to Mr Vallette's attention..

29. I am in no doubt at all that either the proprietor of the Tebakor Station, or Ms Raynaud, or both of them working together, arranged for pages 9 and 10 to be retyped with the inclusion of that extraordinary provision. Furthermore, I accept that Mr Valette was not involved in any way in that retype or the inclusion of that provision. There is no other way to categorise this other than as a fraudulent attempt to introduce by stealth a contractual provision that is unquestionably and significantly advantageous to SCV Ltd



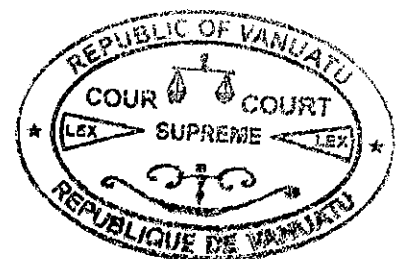
and in the hope that it would pass unnoticed by SSP. That indeed proved to be so as the second contract was executed unaltered by SSP and Ms Raynaud on 2 April 2009.

30. It can be noted at this stage that the signature of Ms Raynaud to this second contract appears beside the notation: "*SIGNED BY THE SUB LESSEE(S) BY ITS DULY AUTHORISED REPRESENTATIVES.*" Of course, the sub-lessee specified in the second contract (as with the first contract) is SCV Ltd and not SCV.
31. Ms Raynaud disavowed any knowledge of that particular penalty provision or how it had been introduced. Frankly, I do not accept her evidence in that respect; I do not believe her. This was not an alteration that could realistically have been made without her knowledge. Ms Raynaud attempted an explanation that the alteration must have been made by the proprietor of the Tebakor Station with whom she stated she left her copy of the draft second contract for return to Mr Valette. Frankly, that explanation is disingenuous and I do not accept it.
32. Ms Raynaud's attempt to explain this issue away in that manner confirms, however, that this was not a provision that had been discussed between the parties and could not accordingly ever be relied on by SCV/SCV Ltd. The only significance that this has for the hearing of the counterclaim is that it reflects adversely on Ms Raynaud's general credibility.
33. Of much greater significance to the counterclaim is the date that is specified as the commencement date of the second contract. The second contract states that the initial term of one year commenced on 1 December 2007 notwithstanding that the second contract was executed on 2 April 2009 and accordingly after the first term of one year had expired. Of course, that is the same commencement date that appears in the first contract. There is no evidence that formal notice under clause 14 of the first contract was given by or on behalf of SCV/SCV Ltd to take up the option of a second term of three years as from 1 December 2008 notwithstanding that SCV/SCV Ltd remained in occupation and continued to operate the Service Station business. Furthermore,



SCV/SCV Ltd continued to pay the rental under the contracts and which rental has been and continues to be accepted by SSP.

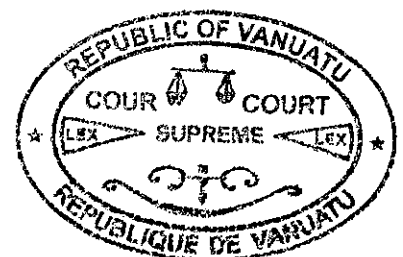
34. Mr Vallette explained that the second contract was essentially a reconsideration of the first contract only as to the pricing structure and designed simply to replace it.
35. Ms Raynaud, however, contended that the second contract was a new contract and that a mistake had clearly been made as to the commencement date which should have been 2 April 2009; the date that the second contract was executed. This is a matter of some importance particularly as the first one year term from 1 December 2007 had already expired by the time the second contract was entered into and there is no evidence that the option was taken to extend the term.
36. It is difficult to understand how this second contract could have any currency unless either:
- a. The second contract was understood by the parties to commence on 2 April 2009 (as is contended for by SCV/SCV Ltd) and that the contract should accordingly be rectified to correct that typographical or mutual error.
 - b. Alternatively, that the intention was (as Mr Vallette contended) to amend the first contract just as to the new pricing structure retaining the commencement date of 1 December 2007.
37. I find that the second contract was just an amendment of the first contract for the purpose of revising the pricing structure. That is the date on the second contract and there has been no claim for rectification.
38. I am then drawn favourably to Mr Thornburgh's submission that SSP cannot now assert that the second contract effectively operated as if the option has not been taken up by SCV/SCV Ltd to extend for the first available period of three years from 1 December



2008. The parties conducted themselves as if the option to take the first extension had been taken up. What would have been the point of redrafting the second contract in this way if the first one year term had already expired and SCV/SCV Ltd was merely a periodic tenant. Mr Thornburgh argues that SSP should be estopped from denying that the contract term has been extended in this way and I accept that this must be so.

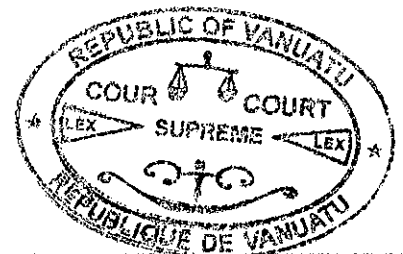
39. Of course, that still does not resolve the situation as to whether the second contract was between SCV (as the business vehicle of Ms Raynaud and Mr Russet) or whether it was with their company, SCV Ltd. I do not consider that this matters to the issues before the Court on the counterclaim.
40. However, it is difficult to see how the plain wording of the contract can be departed from. Again, no attempt was made to seek rectification of the contract. SCV Ltd was the legal entity that operated the service station under contract with SSP from the outset and that continued to be so with both the first contract and the second contract. Notwithstanding that SCV Ltd was struck off, it was reinstated by order of this Court and by operation of law is deemed never to have been struck off. Of perhaps greater significance is that neither Ms Raynaud nor Mr Russet nor anyone else on their behalf indicated to SSP that the business had been taken over or adopted by Ms Raynaud and Mr Russet through their trading entity SCV notwithstanding that that might well have been their intention.
41. The claim for damages was commenced by Ms Raynaud on 23 December 2010. On 30 December 2010, SSP gave notice purporting to determine the lease and requiring possession by 7 January 2011. That notice had the incorrect lease number as well. When the mistake was pointed out further notices were issued on 9 March 2011 with the correct title number. The three notices to quit issued and delivered were addressed to each of the following:-

- a) Valerie Raynaud trading as Station Centre Ville;
- b) Valerie Raynaud and David Russet trading as Station Centre Ville;



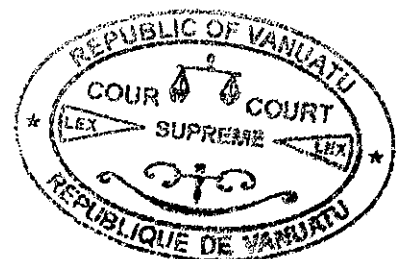
c) Station Centre Ville Ltd.

42. The three notices to quit are essentially in much the same form and contend:-
- a. SSP and SCV Ltd entered into a contract in respect of the service station business.
 - b. SCV Ltd was struck off the register of companies and dissolved on 7 February 2008.
 - c. SSP was not notified that SCV Ltd had been struck off.
 - d. Following the “dissolution” of SCV Ltd, SCV entered into occupation of the premises as a periodic tenant, without the benefit of any written sublease, and at the same rental as previously stipulated in the contract.
 - e. SSP required SCV to quit and deliver up possession of the premises.
43. Of significance is that the notices to quit were presented on the basis that the second contract had been determined because SSP had not been informed that SCV Ltd had been struck off.
44. The difficulty with those notices to quit is that when they were delivered on 9 March 2011, SCV Ltd was operating the business pursuant to its rights under the second contract and in particular that this must have been in the course of the second term of the contract that commenced on 1 December 2008 for a three year term to 30 November 2011.
45. Furthermore, and as Mr Thornburgh correctly argued, if the sub lessee is SCV Ltd then by operation of law it is deemed never to have been struck off which undermines the basis on which the notices to quit were presented. Additionally, the contract has no provision which gives the right to terminate the contract if the sub lessee was struck off.

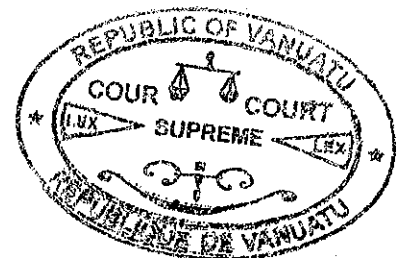


I accept those submissions. I do not consider that any of the three notices can operate as a notice to quit for those reasons.

46. Furthermore, a notice to forfeit a lease is governed by s. 43-46 of the Land Leases Act. Accepting that at the time the notices to quit were given on 9 March 2011, and accepting further that this is essentially the exercise or purported exercise by SSP of its right of forfeiture, that right of forfeiture must be taken to have been waived if SSP accepted rent for any succeeding period – s. 43(3). Furthermore, SSP was constrained in relation to any attempt to exercise its right to forfeiture for breach by the provisions of s. 45 which required it to serve a specific notice in writing specifying the particular breach and if the breach was capable for remedy then requiring SCV Ltd (in this case) to remedy the breach within a reasonable period.
47. If the fact that SCV Ltd was struck off was a breach of the second contract then the available remedy was simply to require it to be reinstated. The appropriate notice was not given.
48. For these reasons I do not consider that any of the three notices had the effect of commencing the required forfeiture or termination process much less determining the contract.
49. That left the contractual position between the parties still within the second contract leading up to the expiry date of the second lease term on 30 November 2011.
50. Ms Raynaud wrote to Mr Vallette on 10 February 2010 about the on-going dispute that related to the accuracy of the petrol pumps. Ms Raynaud stated that, with that letter, she enclosed a separate notice to SSP that purported to exercise the option to extend the term of the second contract. Mr Vallette acknowledged receiving Ms Raynaud's letter but stated that it was not accompanied nor did not appear to be accompanied by the additional notice purporting to exercise the option.



51. The first observation to be made here is that, accepting Ms Raynaud's evidence that she gave notice on 10 February 2010 that SCV/SCV Ltd wished to take up the option of extending the term of the lease, it was well before the period within which she was entitled to do so. Ms Raynaud's evidence assumes that the second contract commenced on 2 April 2009 for the initial one year term with the two rights renewal each of the three years to follow. As I have already determined, that was not the contractual position between the parties. The first term of the second contract expired on 30 November 2008. For the reasons already mentioned I consider that SSP is not able to contend that the option was not taken to extend the term of the lease. Of course, that meant that the three year term of the first extension period was to expire on 30 November 2011. Clause 14 of the contract specifically requires notice taking up the option to extend the lease to be given not more than three months but not less than one month before the expiry date of that particular term; that is, between 31 August 2011 and 31 October 2011.
52. So, even accepting Ms Raynaud's evidence on this point, clearly the notice she states she gave to SSP at that time could not have the effect of extending the term of the second contract.
53. Notwithstanding my conclusions as to the invalidity of any such notice, I am not prepared in any event to rely on Ms Raynaud's evidence that she included such a document with her letter. In this respect, I have not overlooked the evidence of Mr Russet that he assisted Ms Raynaud with the drafting of such a notice at that time. It might well be that Ms Raynaud mistakenly omitted to include the notice with the letter but how it all eventuated is of no particular concern.
54. Mr Vallette impressed me as someone who was giving this dispute his careful attention. I am in no doubt that if that notice was delivered then there would have been a reaction from Mr Vallette or more exactly SSP to it and probably by its solicitors who were actively involved at that time. Furthermore, SCV Ltd had also engaged solicitors who were in active communication with SSP's solicitors at that time yet no mention was ever

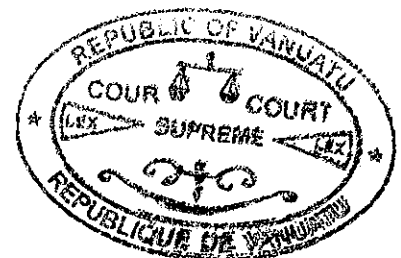


made in the correspondence between them of an attempt by SCV/SCV/Ltd to extend the term of the contract.

55. Nothing more needs to be said about that attempt to extend the term of the lease.
56. This left the parties contractual relationship subject to a term due to expire in 30 November 2011. There is no dispute that within one to three months before that expiry date, no notice was given by SCV Ltd that it exercised its right to extend the contract for a further three year term. Accordingly, by simple operation of the contract, it came to an end at 30 November 2011. Thereafter, SCV Ltd remained in occupation as a periodic tenant. However, the continuing payment and receipt of rental is required by s. 37 (2) Land Leases Act to "*be taken as evidence of consent to the continued occupation of the land*".
57. I find that the position that exists today is that SCV Ltd continues in occupation pursuant generally to the terms of the second contract but on a periodic tenancy.
58. One matter that received some attention from counsel was the validity of the first and second contracts. The argument is that by operation of sections 22 and 35 of the Land Leases Act, both the first and second contracts had to have been registered in order to create a lease over the land,

S22(1) ... Every attempt to create or dispose of a registered lease or mortgage or to create, extinguish, transfer, vary or affect, any right or interest in a registered lease or mortgage otherwise than in accordance with this Act shall be ineffectual to create, or dispose of a registered lease or mortgage or to create, extinguish, transfer, vary or affect any right or interest in the lease or mortgage.

59. It is accepted by the parties that the second contract was required to be registered but that did not take place notwithstanding that it was stamped. That appears to be so but of course does not extinguish or diminish the provisions of second contract except that it cannot be taken as creating a lease over the premises. As the current position is that



SCV Ltd occupies the premises as a periodic tenant it is unnecessary to consider this invalidity issue any further.

60. For all these reasons this counterclaim must fail.
61. Costs should follow the event and accordingly the claimants are entitled to costs on a standard basis to be agreed or taxed. The costs are not payable until resolution of substantive claim.
62. This leaves the parties still with the principal claim to consider and it is hoped of course that the determinations reached in this decision will assist them to resolve those outstanding matters without the need for further attention by this court.

DATED this 13th day of January 2014

BY THE COURT

