

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

Civil Case No. 79 of 2015

BETWEEN : CHEN JINQIU

Claimant

AND: LUONG FONG dit TCHONG HUYA

First Defendant

AND: ARNOLD PRASAD, PAUL TELUKLUK
BARTHELEMY and RUIHUA YAO

Second Defendants

Coram: Justice Aru

Counsel: Mr. M. Hurley for the Claimant
Mr. E. Toka as agent for Mrs. M. Vire for the First Defendant
Mr. K. Loughman for the Second Defendants

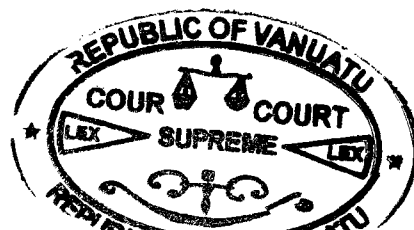
JUDGMENT

Introduction

1. This is a claim for possession of lease title 03/0183/071 ("the Property") and for payment of mesne profits.

Background

2. The following chronology of events provides some background as to how events unfolded in this matter:-
 - 5 December 2014 - The Claimant and the First Defendant signed a Sale and Purchase Agreement ("the Agreement") for the First Defendant to sell the

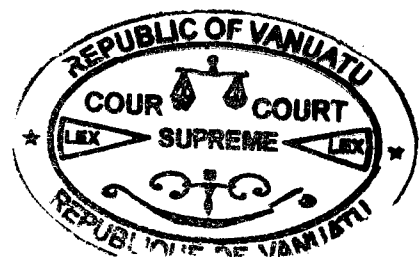


Property to the Claimant for a sum of VT 45 million. The amount was paid in installments and has been paid in full.

- 15 April 2015 - The claimant became the registered proprietor of the Property. On the same date a Notice to Quit was served on the First defendant through his daughter requiring the First Defendant to vacate the Property.
- 28 April 2015 - The Claimant filed his Supreme Court claim.
- 10 August 2015 - The Claimant was given leave to amend his claim to join the Second Defendants as a party. The Second Defendants are the registered proprietors of the business name Tapusia and operate a shop on the Property.
- 20 August 2015 - The Second Defendants were served with a Notice to Quit which was served via Mr Loughman's office as Counsel on record. Despite being served with the Notice to quit the Second Defendants continue to occupy the Property.
- 03 September 2015 - The Claimant filed his amended Supreme Court claim.
- 05 February 2016 – This matter was set down for a one day trial on 11 March 2016 and the Defendants were given 21 days to file and serve their sworn statements if any.

Claim

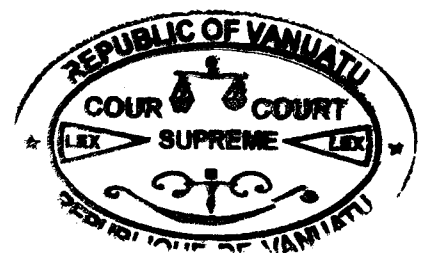
3. The Claimant claims that he is the registered proprietor of the property therefore he should be given possession but since the First and Second Defendants continue to defy the Notices to Quit, he now seeks the following remedies:-



- (1) An order for possession of the Property;
- (2) Leave to issue an Enforcement Warrant (Non Money Order)in respect of the Property; and
- (3) Mesne profits at a rate to be assessed by the Court from 24 April 2015 until possession be delivered up.

Defence

4. The First Defendant filed a defence with a counterclaim on 16 September 2015 where he says that:-
 - a) the Claimant acquired the Property in breach of the Agreement they signed; and
 - b) in the counterclaim he seeks a rectification of the Land Leases Register to restore the First Defendant as proprietor of the Property; and
 - c) seeks payment of the balance of the purchase price.
5. The Second Defendants say that:-
 - a) they acknowledge receipt of the Notice to Quit but say that they remain in occupation of the Property at the First Defendant's instructions and deny any wrongful possession;
 - b) As a result they say that they are not liable for mesne profits to the Claimant;
 - c) Furthermore they say that as a tenant, they will comply with any orders of the Court with respect to vacating the Property.



Evidence

6. The evidence which the claimant relies on are:-

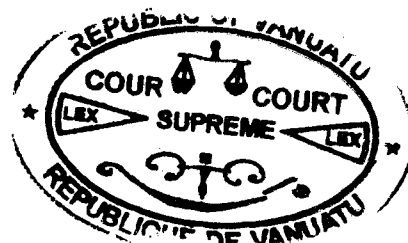
- Sworn Statement of Chen Jinqiu filed on 30 April 2015;
- Sworn Statement of Service of Inspector Andrew Kalman filed on 26 May 2015;
- Sworn Statement of Chen Jinqiu [No2] filed on 11 January 2016;
- Sworn Statement of Warren Leslie Moore filed on 1 February 2016;
- Sworn Statement of Luo Yuqing filed on 4 February 2016;

7. The First Defendant relies on the sworn statement of Luong Fong filed on filed on 16 September 2015.

8. The Second Defendants rely on two sworn statements filed by Ruihua Yao on 16 July 2015 and 9 March 2016 respectively.

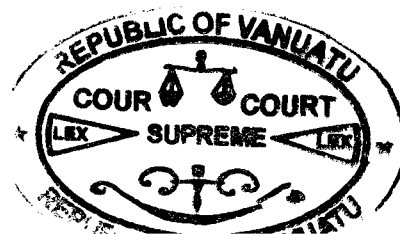
Discussion

9. At the pre-trial conference on 5 February 2016 this matter was set down for a one day trial with all three Counsels present. At the beginning of this trial hearing, Mr Hurley informed the Court that consent orders have recently been reached on two issues. First that the Claimant is entitled to possession of the Property and secondly, that the First Defendant has withdrawn his counterclaim. Draft Consent Orders in those terms were then handed up to the Court for endorsement. As a result the only remaining issues were the claim for mesne profits, time to vacate the Property and costs.



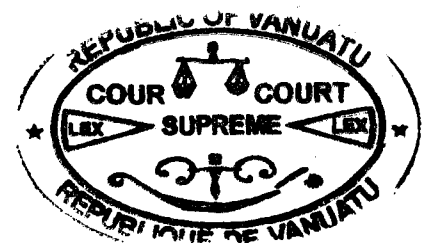
Mesne profits

10. Mr. Toka informed the Court that the First Defendant takes issue with the claim for mesne profits and Mrs. Vire is preparing submissions to be filed with the court and needs time to do so. This was rejected on the basis that this matter was set down for trial on 5 February 2016 and all Counsels had more than a month to prepare for trial and were expected to be ready for the hearing. Mr Hurley handed up to the Court a synopsis of his submissions and there was no reason for others not to have done the same.
11. In any trial, Counsel should be ready to address the Court at the conclusion of the evidence. (*Hack v Fordham* [2005] VUCA 6). This is a simple case which does not require extensive submissions now that possession is conceded and the First Defendant withdrew his counter claim.
12. The Second Defendant's submissions are that if mesne profits are to be assessed then the correct amount payable must be VT 280, 000 per month which is the current rental rate they are paying to the First Defendant. It was further submitted that any mesne profits ordered must be paid by the First Defendant as they (the Second Defendants) were instructed by the First Defendant to remain in occupation of the property.
13. The Claimant on the other hand submits that mesne profit must be calculated based on the open market value of rental for the period of the defendants' wrongful occupation and relies on what the Court said in *Lawac v Eglise Catholic de Vanuatu Committee Inc.* [2014] VUSC 31.
14. The Claimant in his Second Sworn Statement filed on 11 January 2016 at paragraphs 25, 26 and 27 says that he decided to claim for mesne profits when the defendants failed to give up possession of the Property after being served with the Notice to Quit. He says that he has had to rent other premises with a monthly rental



of VT 401, 750 per month at the Sunshine Shopping Center and believes the rental on the Property could be higher. He relies on the evidence of Mr Warren Leslie Moore who has been in the real estate business in Santo for over 8 years as Managing Partner of V One (Realty) Santo Limited trading as First National Santo who says in his evidence that the open market value of the Property is VT 495, 500 per month plus VAT (Value Added Tax). Mr Moore arrives at this figure by assessing the physical features of the Property and making comparisons with comparable rental rates in Luganville.

15. The question is whether the open market rate test is applicable in this case. The answer in my view is in the negative for two reasons. First, **Lawac v Eglise Catholic** is easily distinguished on its facts. In the case before me, the Second Defendants are paying rent to the First Defendant at the rate of VT 280,000 per month whereas in **Lawac v Eglise Catholic** no rental rate or amount was imposed in the tenancy arrangement to be paid by Nathalie Lawac as rent. Therefore in assessing mesne profit, the Court relied on the open market rate. Secondly, this Court in **Mechtler v Natonga** [2015] VUSC 169 has held that the amount to be paid monthly as mesne profits is the same as monthly rental.
16. In adopting the same approach in **Mechtler v Natonga**, I am of the view that mesne profit to be paid by the defendants must be VT 280, 000 per month plus VAT until possession is delivered up.
17. The effective date for recovery of mesne profits has been held to be from the date of the Notice to Quit to the date of delivery of possession (**Mechtler v Natonga**) or from the date of service of the claim to the date of delivery of possession. (**Canas Property Co. Ltd v KL Television Services Ltd** [1970] 2 QB 433, [1970] 2 All ER 795 as applied by Lunabek CJ in **Lawac v Eglise Catholic**).
18. For the First defendant, the effective date must be 21 May 2015 when he was personally served with the Court documents including the Notice to Quit. Therefore



the First defendant shall pay mesne profit in the sum of VT280, 000 per month plus VAT with effect from 21 May 2015 until vacant possession is delivered up.

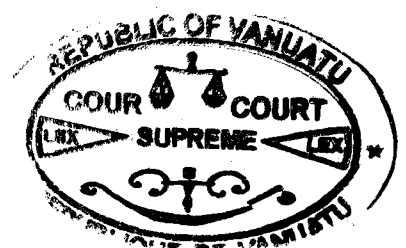
19. For the Second Defendant they cannot escape liability for an order for payment of mesne profits by their reliance on the instructions of the First Defendant to continue to occupy the Property. First, it was open to them to pay their rental into Court until the dispute over the Property is resolved but they chose to do nothing. As a result of their ongoing unlawful occupation of the Property the Claimant suffered loss. Secondly, once the Amended claim was served on the First Defendants, it was also open to them to ascertain for themselves who the legally registered proprietor of the Property was by carrying out their own search of the title record at the Land Records Office rather than rely on the First Defendant's instructions. They did nothing.

20. The Second Defendants shall also therefore pay mesne profits in the sum of VT280, 000 per month plus VAT with effect from 27 August 2015 (being seven days after the Notice to Quit was served on Counsel) until vacant possession is delivered up.

Time be given to vacate the Property

21. The Claimant submits that the First and Second Defendants have had more than ample time to vacate the property from when the Notices to Quit was first served on each of them. It was further submitted that only seven days should be given to the Second Defendants to vacate the property as they have pleaded in their defence at paragraph 5 that they are a tenant and will comply with any orders of the Court to vacate the Property. Secondly it was submitted that the Second Defendants have another shop and land in Luganville which they could easily relocate to.

22. The Second Defendants submit that they have been operating their business from the premises for over ten years and will require one to two months to vacate the Property.



23. I am not persuaded that the Second Defendants should be allowed more than a month to vacate the Property given that they have known for quite some time that the Claimant was the new proprietor of the Property and should have given up possession upon receipt of the Notice to Quit. The delay is not justified as they have now consented that the Claimant is entitled to possession of the property.

24. I allow the Second Defendants 21 days to vacate the Property and if they do not do so within this time frame then the Claimant is at liberty to apply for further orders.

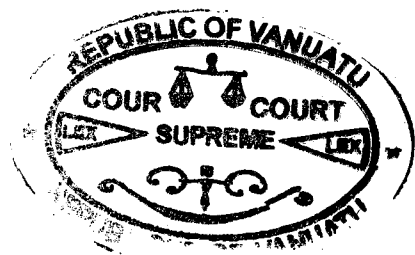
Costs

25. On the question of costs both Messrs Toka and Loughman submit that each party should bear their own costs. This is clearly unacceptable as the First and Second Defendants have never had an arguable defence and have put the Claimant to great cost in pursuing his claim right up to the trial hearing only for them to concede that he (the Claimant) is entitled to possession and the First Defendant withdrawing his counterclaim. The general rule is that the costs of a proceeding are payable by the party who is not successful in the proceeding. [See Rule 15.1 (2)].

26. The First and Second Defendants being parties who were not successful must pay the Claimant's costs of the proceedings.

ORDERS

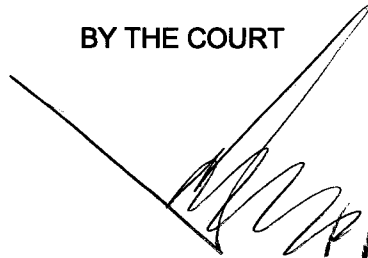
- (1) Order 1 of the Consent Orders made on 11 March 2016 is suspended until 4.30 pm on 6 April 2016;
- (2) If the Second Defendants have not vacated the Property and given possession of it to the Claimant by 4.30 pm on 6 April 2016 the Claimant is entitled to the issue of an Enforcement Warrant (Non Money) Order in respect of the Property forthwith;



- (3) The First Defendant shall pay mesne profits at the rate of VT 280, 000 per month plus VAT with effect from 21 May 2015 until possession is delivered up;
- (4) The Second Defendant shall pay mesne profits at the rate of VT 280, 000 per month plus VAT with effect from 27 August 2015 until possession is delivered up;
- (5) The First and Second Defendants shall jointly and severally pay the Claimant's costs of an incidental to the proceedings on a standard basis to be taxed by the Master if not agreed.

DATED at Port Vila, this 16 day of March, 2016

BY THE COURT



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D. Aru
Judge

