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

CIVIL CASE No. 22/1354 SC/CVIL

BETWEEN: BLUE SPRINGS GROUP LTD
of PO Box 1368
Tasiriki, Port Vila, Vanuatu
Claimant

TEVI BULU LAWYERS
Claimant's Lawyer

**AND: PONATOKA DEVELOPMENT
COMPANY LIMITED**
of PO Box 95
Port Vila, Vanuatu
Defendant's

FERRIEUX PATTERSON LAWYERS
Defendant's lawyer

Date of hearing: 14th day of March 2024 at 1:30pm
Before: Justice E.P. GOLDSBROUGH
In attendance: Counsel for the Claimant – Mr Roger Tevi
Counsel for the Defendant – Ms Viska Muluane

JUDGMENT (PROOF HEARING)

A. INTRODUCTION

- [1]. On 15th of May 2017, the parties signed a sublease agreement, for the Claimant to sublease the Leasehold titles 12/0822/387 and 12/0822/386 ("**leases**") for a period of 10 years commencing on 01st of July 2017 (hereinafter called the "**sublease**")¹.
- [2]. The Defendant is the registered proprietor of the Leases.
- [3]. The sublease was breached by the Claimant.
- [4]. On 26.03.21, the Defendant through its lawyer (Ferrieux Patterson Lawyers) wrote a letter to the Claimant's Director, Mr Hans Yq Han ("**Hans**") notifying the Claimant that it has breached the terms and conditions of the sublease and requested the Claimant to remedy the breaches within 30 days from the date of the letter ("**letter**")².
- [5]. The letter was served on the registered office of the Claimant and in accordance with Clause 22(b) of the sublease³.

¹ Annexure "IVQ101" of the sworn statement of Hans dated 26.07.22



[6]. Subsequently, on 01.04.21, the parties signed a Memorandum of Understanding ("**MOU**") that the outstanding land rent for the period of 2020 and 2021 be paid by installment⁴.

[7]. On 12.10.22, the Defendant through its lawyer wrote another letter giving 14 days' notice to vacate the Leases on the grounds that the Claimant did not completely remedy the breaches within the 30 days⁵.

[8]. On 10.11.22, the Defendant through its lawyer wrote to the Claimant giving it notice of re-possession of the Leases and notifying it that the sublease has been terminated⁶.

[9]. On 15.12.22, the Claimant filed a claim ("**original claim**") against the Defendant for:

[a] a declaration that the sublease in question subsists and continues to bind the Claimant and the Defendant.

[b] a permanent injunction against the Defendant, its directors, agents and representatives from blocking the entrance to the Mele Cascades property, and causing any disturbance whatsoever to the Claimant, its directors, agents, employees or representatives.

[c] An order for the Defendant to pay damages.

[d] Any other orders this Court deems fit.

[e] Costs against the Defendant.

[10]. On 24.03.23, the Defendant filed a Defence to the original claim and a Counterclaim ("**Counterclaim**") seeking the following remedies:

[a] An order that the sublease has been breached and is therefore terminated and forfeited.

[b] An award of specific damages to be assessed by the Court.

[c] An award of general damages to be assessed by the Court.

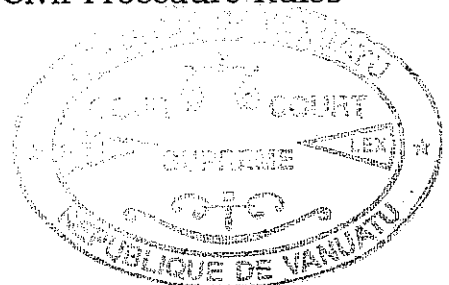
[d] Interest of 5%

[e] Cost of the proceedings.

[11]. No defence to the Counterclaim has been subsequently filed.

B. PRELIMINARY MATTERS

[12]. On 12.02.24, the Defendant filed an application for default judgment for fixed amount and to show cause why a judgment should not be entered against the Claimant ("**the Application**") for failure to file a defense within 28 days after being served with the counterclaim in compliance with Rules 4.4, 4.5 and 4.13 of the Civil Procedure Rules ("**CPR**").



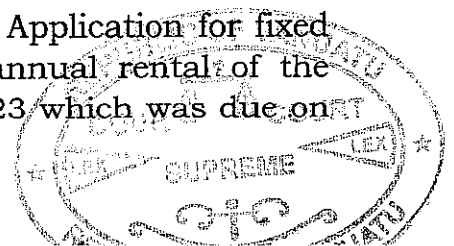
⁴ Annexure "HYQH03" of the sworn statement of Hans dated 26.07.23.

⁵ Annexure "HYQH05" of the sworn statement of Hans dated 26.07.23.

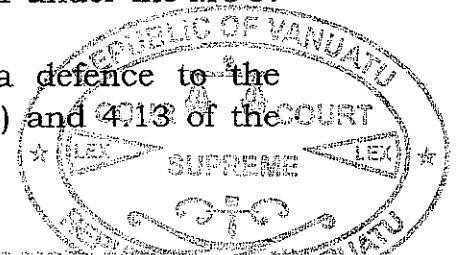
- [13]. For the purposes of dealing with the Application, the Claimant will be referred to as the Counter Defendant (“**CD**”) and the Defendant as the Counter Claimant (“**CC**”).
- [14]. Proof of service of the counterclaim on the CD’s lawyer at that time, Mr. Edward Nalyal of Nalyal and Partners (“**Mr Nalyal**”), was filed with the Court on 02.08.23 (i.e.: Sworn statement of service of Marie Hellen Omry dated 02.08.23).
- [15]. Mr Nalyal ceased to act for the CD afterwards, around May 2023 and Mr. Roger Tevi (“**Mr Tevi**”) becomes the CD’s lawyer around June 2023.
- [16]. The Application was listed for hearing on 01.03.24, however, it was re-listed for 14.03.24, to allow the CD to get instructions from its client and to file a response to the Application. Mr Tevi was advised to file a response and give a reasonable explanation as to why the CD failed to file a response within 14 days and/or a defence to the Counterclaim within 28 days.
- [17]. Accordingly, on 01.03.24, at the request of the Court and by consent of the parties, a signed joint memorandum by the parties, attaching with it a draft order setting out the terms of the filing directions before the next listing date for proof hearing on the Counterclaim dated 24.02.23 for 14.03.24 at 1:30pm (“**Orders**”).
- [18]. On the 07th of March 2024, the Court endorsed the Orders.
- [19]. Opportunity and time were given for the CD to file a response and statement before close of business on 11th of March 2024.
- [20]. On 04.03.24, the Counterclaimant filed a sworn statement of Phillip Kaltango Malastapu.

C. DISCUSSION

- [21]. No response to the Application was filed by the CD.
- [22]. The only document filed was a sworn statement from Liwei Han who is the daughter of the CD’s Director filed on the 13.03.24 (2 days late - not in compliance with the Orders).
- [23]. On 14.03.24, the Court heard the Application and proceeded with proof hearing on the Counterclaim.
- [24]. For proof hearing, the Court dealt first with the Application for fixed amount of VT180,000 being the outstanding annual rental of the sublease for the period of July 2022 to June 2023 which was due on 01.07.2022.



- [25].As mentioned above, there is no response filed to the Application. Mr Tevi, informed the Court that the Application and the Orders were sent to the CD's Director, Mr Hans who is in China to file and serve a response to the Application. However, no response was received and filed.
- [26].In his oral response to the request for default judgment for fixed amount of VT180,000, Mr Tevi confirmed that the CD did not file a defence, hence failed to comply with Rule 4.13 of the CPR, and accordingly accepts that a judgment can be entered for the fixed amount.
- [27].Ms Muluane also requests that interest of 5% be paid on the fixed amount in accordance with Rule 9.2(2) of the CPR starting from the date when the rent was accrued to date to be paid within 3 days.
- [28].No opposition from Mr Tevi. Accordingly, the Court grants Ms Muluane' request which will be outlined in the orders hereafter.
- [29].For proof hearing on the second part of the counterclaim, the Counterclaimant ("**CC**") relied on the main statements of Mr Phillip Kaltango Malastapu who is the Director of the CC filed on the following dates:
- [a] Sworn statement of Phillip K Malastapu dated 22.12.22;
 - [b] Sworn statement of Phillip K Malastapu dated 04.05.23;
 - [c] Sworn statement of Phillip K Malastapu dated 04.03.24.
- [30].Ms Muluane requests that a correction of spelling word be made in paragraph 3(f) of the sworn statement of Phillip K. Malastapu dated 04.03.24, for the word "*except*" to be deleted and replaced with the word "*and*". Changes were made accordingly.
- [31].Again, for proof hearing on the second part of the counterclaim and the Application, the CD's lawyer acknowledged that there is no defence filed to defend the counterclaim.
- [32].The sworn statement of Mr Hans's daughter dated 13.03.24, does not provide or show any reasonable cause or explanation for not defending the counterclaim in time. She only states that they have been struggling with the cashflow issue every day and did not follow up the case with the lawyer and did not have enough money to pay the lawyers.
- [33].Concerning the sworn statements of Mr Hans, there is no evidence that the CD had remedied the other breaches outlined in the Counterclaim except for the payment of rental arrears of 2020-2021 under the MOU.
- [34].There is no dispute that the CD failed to file a defence to the Counterclaim in compliance with Rule 4.4(1), 4.5(1) and 4.13 of the CPR.



[35]. There is clear evidence that the CD has not remedied some of the breaches of the sublease (i.e.: no evidence of payment of increase of rental on 01st of July 2022, no proof of interest of 10% on all outstanding rentals, no proof of insurance on buildings, no provision of Kiosk selling station, and other breaches as outlined in the counterclaim).

[36]. The CC has proved its counterclaim and is entitled to the relief sought under the Counterclaim.

D. DECISION

[37]. The Counter Defendant is in default.

[38]. On proof hearing, the Application for default judgment for fixed amount in the amount is granted as follows:

[a] **VT180,000** for the outstanding annual rental of the sublease for the period of July 2022 to June 2023 to be paid within 7 days.

[b] Interest of 5% on the principal outstanding sum from the date when it has been accrued (01.07.22) to date in the amount of **VT20,100** (@vt25 per day for 1169 days) to be paid within 7 days from the date of this order.

[39]. Judgment is granted for the counterclaim on proof hearing.

[40]. The Sublease is terminated and forfeited due to the breaches outlined in the counterclaim.

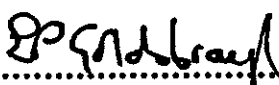
[41]. The original claim is now ineffective as the sublease is terminated and forfeited due to the breaches outlined in the counterclaim.

[42]. That the Counter Claimant is entitled to the cost of the Application in the amount of **VT45,000** to be paid within 30 days from the date of this order.

[43]. That the Counter Defendant is to pay the costs of this proceeding, if agreed within 30 days or to be taxed by the Master.

Date at Port-Vila this ^{25th} day of March 2024

BY THE COURT


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Justice Edwin P. GOLDSBROUGH

