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

Civil
Case No. 22/1263 SC/CIVL

BETWEEN: Mariane Loughman
Claimant

AND: Samuel Toara
Defendant

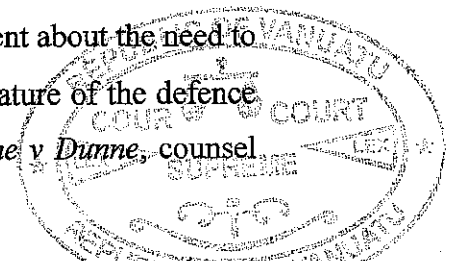
Date of Trial: *27th day of February, 2024*
Delivery of Judgment: *27th February 2024 and reasons 26th March 2024*

Before: *Justice E.P. Goldsbrough*

In Attendance: *Kalmet, A for the Claimant*
Fiuka, P for the Defendant

JUDGMENT

1. This is a claim for eviction. After the claim was filed, a defence was filed. The defence relies on an overriding interest under section 17 (g) of the Land Leases Act. It suggests that the defendant was in actual occupation of the land, which is the subject of a lease, and that the lessee made no sufficient enquiry about any actual occupation of the land, which is the subject of this claim, before execution of the lease.
2. The claimant settled trial fees after an invoice was issued. The defendant paid no trial fee. His counsel indicated that he probably did not tell his client that the trial fee was payable. He agreed that he had received the invoice. Under the Civil Procedure Rules (CPR) Rule 4.12, the Court can make an order about participation in the trial where there is a non-payment.
3. A notice to cross-examine witnesses was filed on behalf of the claimant. No such notice to cross-examine was filed on behalf of the defendant. His counsel indicated that he was waiting for instructions from his client about the need to cross-examine. That isn't easy to understand, given the nature of the defence filed. It is evident that to comply with the rule in *Browne v Dunn*, counsel



would have to challenge at least that part of the evidence in the filed, sworn statements about visits to determine occupation before execution of the lease.

4. The defendant did not turn up for the trial this morning. His counsel indicated that he believes he told his client of today's trial date but has nothing to support that notion. He did not bring his client file with him today.
5. The matter was stood down to allow counsel to retrieve his file. On resumption of the hearing, counsel confirmed that the defendant had been told of the hearing today
6. Satisfied that the defendant has been told of the hearing today, the matter proceeded. The sworn statements relied upon are that of the claimant, her husband Bob, the officer who accompanied Tom Loughman on site visits in the due diligence process, Rono Davide, the Manager of the firm of Estate Agents involved in the transaction, Catherine Boudier -Contant and Kathy Matariki, ANZ Bank Officer. None of the evidence was challenged given the lack of instructions from the defendant to his counsel on how to do so.
7. The evidence for the defendant was nothing but his sworn statement. It is in evidence, as it was filed in these proceedings, but notice to cross-examine was given, and the defendant was not available for cross-examination. That reduces the probative value of his statement, given that it could not be the subject of cross-examination.

Discussion

8. The evidence for the claimant is unchallenged. A lease was executed after due diligence failed to throw up any actual occupation of the land, which might give rise to a section 17 (g) right. There was no sign of actual occupation. The defendant cannot rely upon that provision in the Land Leases Act as a defence. Other than that, the defendant puts forward no other defence. On the evidence, when the lease was executed, about which there was no challenge, the due diligence procedure undertaken by the claimant, her family, and others showed no pre-existing overriding interest and therefore entitled her to all the rights given to a lease, occupation, and indefeasible title.



9. In his sworn statement, the defendant alleges fraud in the execution of the lease and indicates that the lease will be challenged on that ground, but nothing has come of that threat. He asserts his overriding interest based on a prior arrangement with a person he says is the custom owner. No evidence from that alleged custom owner is in evidence, and the authority relied upon granting ownership to that individual is the subject of a stay and pending appeal. Notice to vacate the premises was given to the defendant after the lease in favour of the claimant had been executed after he placed namele leaves on the property when he saw the claimant starting work on her land.
10. In the event a finding is made in favour of the claimant and an order evicting the defendant from property title no. 12/0922/009 and an order restraining him from re-entering the property or interfering with her quiet and peaceful enjoyment of the land. An order for costs is made for VT 100,000 against the defendant, payable to the claimant, and an Enforcement hearing is scheduled for 11.00 a.m. on 29 April 2024. The decision was announced at the end of the hearing, and reasons were to be published thereafter. These are those reasons.
11. The claim is upheld, and an order evicting the defendant will be issued. Costs are awarded against the defendant for VT 100,000, to be paid within 28 days. An enforcement conference will be held on 29 April 2024 to ensure that the court's orders are complied with. Counsel for the claimant is to file a draft order setting out the above terms and submit for signature, after which it is to be served on the defendant in person prior to execution.

DATED at Port Vila this 26th day of March 2024.

BY THE COURT



**E.P. Goldsbrough
Judge of the Supreme Court**

