IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Appellate Jurisdiction)

Civil Appeal Case No.19 of 2014

BETWEEN: FRANCO ZUCHETTO
Appellant

AND: THE REPUBLIC OF VANUATU
First Respondent

AND: BLUE MIRAGE LIMITED
Second Respondent

AND: JOSHUA KALSAKAU
Third Respondent

AND: BLUE QUEST LIMITED
Fourth Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice Raynor Asher
Hon. Justice Stephen Harrop
Hon. Justice Oliver Saksak
Hon. Justice Dudley Aru
Hon. Justice Mary Sey

Counsel: *Mr. John Less Napuati for Appellant*
Mr. Fredrick Gilu for First Respondent
Mr. John Malcolm for Second and Fourth Respondents (attendance excused)

Date of Hearing: *23 July 2014*

Date of Judgment: *25 July 2014*

JUDGMENT

1. The appellant Franco Zuchetto appeals part of a decision of the Supreme Court, which held that a lease he had executed with the first respondent the Republic of Vanuatu was void for common mistake.

2. The history of the transaction goes back to 6 December 1989, and relates to a block of land above the waterfront in Vila. There was a building known as the Marina motel on the land. It was in disrepair. On that date by a lease known as lease 015, it was transferred by the Republic as owner to a Mr. and Mrs. Hamagushi.

3. In the years that followed the motel was not repaired and assumed the appearance of a derelict building. No rent was paid. On 19 August 2008 the then Minister of Lands issued a notice before forfeiture document

under s. 45 of the Land Leases Act (LLA). The notice specified as grounds for forfeiture non-payment of rent and insurance. It required that the breach be remedied by 8 September 2008, and stated that if this did not occur the "*...Minister responsible for Lands as lessor shall forthwith forfeit the said lease without notice*".

4. There was no response from the Hamagushis and rent remained unpaid. At this time Mr. Zuchetto had become aware of the state of the property, and had made enquiries about leasing it. He approached the Ministry of Lands and obtained a negotiator certificate on 10 September 2008. The detail of his dealings with the Ministry is relevant and will be considered later.

5. On 12 September 2008 the Minister of Lands and Mr. Zuchetto signed a 75 year lease in standard form. Mr. Zuchetto paid stamp duty and registration fees. The Ministry was to proceed to register the lease. Mr. Zuchetto then proceeded on the basis that he had a valid lease. He paid the stamp duty of VT126,140 and registration fees of $167,000.

6. Although the notice before forfeiture document had been served and the default remained, the rest of the forfeiture process required by s 43 of the LLA had not been completed at that point, and no steps were taken to complete it until 26 February 2009. The delay was not explained by Ministry witnesses.

7. At that point the Minister as lessor gave notice to the Hamagushis that the breaches not having been remedied following the service of the notice before forfeiture, the lease was "*formally forfeit*" under s. 43(2)(a) of the LLA. He pointed out the right to seek relief against forfeiture, and advised that the Director of Lands was being informed, so that the register would record the cancellation. This was not the end of the required forfeiture process under s. 43, and there was then another period of unexplained delay.

8. Eventually on 20 July 2009 the Valuer General wrote to the Hamaguchis informing them of the Minister's referral to that office for enforcement of the right of forfeiture. The letter was the Valuer General's exercise of the forfeiture power under s. 43 (2) (b) of the LLA. This was the penultimate step in the required forfeiture process.

9. On 21 August the Valuer General issued a determination forfeiting the lease, the final step, and the application for forfeiture of lease was registered on 26 August 2009.

10. Then on 28 August rather than registering Mr. Zuchetto's lease as would have been expected, the Minister entered into a new and different lease with the second and third respondents, It was registered within four days, and on 9 November the transfer of the lease to the fourth respondent was registered.

11. Mr. Zuchetto found out about this second lease when he went to pay his second rental payment in September 2009. He brought this proceeding. In the Supreme Court the relief he sought was an order cancelling the second lease or a direction that his lease was valid. He claimed that the second registration was void for fraud. In the alternative he sought damages for breach of the lease contract of VT48,095,640.

The Supreme Court decision

12. At the outset of the Supreme Court hearing Mr. Zuchetto's counsel reserved the right to call further evidence of loss, and the hearing proceeded on the basis that such evidence could be adduced. The key issue at trial was whether the second lease should be set aside, but the ability of Mr. Zuchetto to claim damages for breach of contract was also considered and determined. The core submission for the Republic was that its lease with Mr. Zuchetto was void for mutual mistake. The key submission for the respondents involved in the second lease was that they were bona fide lessees for value without notice, and entitled to rely on the register and the registration of that lease before that of Mr. Zuchetto.

13. It was held that the first lease contract with Mr. Zuchetto was void for mistake. It was said at [23]:

> *"Both Minister Korman and the claimant were plainly under a "mutual mistake" on 12 September 2008 in that, as a matter of law, the leasehold interest of Hamagushi had been forfeited and the Minister could create a new lease in favour of the claimant over the land comprised in the forfeited lease".*

14. It was also held that the parties had acted bona fide on the second lease, and as it was the second lease and not Mr. Zuchetto's lease that had been registered, the second lease prevailed. The second third and fourth respondents therefore succeeded. That part of the decision in their favour has not been challenged in this appeal, and we can see why given that in the absence of fraud or mistake the principle of the indefeasibility of the registered title would prevail. Accordingly, the only parties to argue this appeal were Mr. Zuchetto and the Republic.

15. There is no legislation in Vanuatu which relates to the law of mistake. We have not been referred to any Vanuatu case law on the topic. The law of Britain and France in force or applying immediately before independence insofar as it is not inconsistent with the independent status of Vanuatu will apply, (Article 95 (2) of the Constitution of the Republic of Vanuatu). The judge properly considered the English common law of common mistake. While the Constitution makes no reference to developments in the British or French law since independence, this Court can derive assistance from cases after independence that are consistent with the pre-independence law and consider it further.

16. The judge relied on the two English decisions of *Cochrane v Wills* [1865] 1 Ch App 58 and *Bell v Lever Brothers Ltd* [1932] AC 161 at 218, and quoted from *Bell v Lever Bros*. In a key finding the judge held that both the Ministry and Mr. Zuchetto were labouring under the same error, namely that the lease had been forfeited. There was mutual mistake, and the lease to Mr. Zuchetto was void.

17. It was noted that the parties were presumed to intend that the lease commenced operation immediately and that the claimant would gain an immediate right to possession and occupancy, but that this was not legally possible:

> *"The Minister had no right to convey a leasehold title to the claimant at that time and the contract could never have been performed for that reason."*

18. The short issue in this appeal therefore is whether the lease of 12 September 2009 was void for common mistake.

Common mistake - factual analysis

19. We do not agree with the conclusion in the judgment that the lease could never have been performed, or the statement in the judgment that as a matter of law both parties were under the mistaken belief that the lease had been forfeited.

20. Mr. Zuchetto ultimately gave detailed evidence as to what he did and understood when he negotiated and signed the lease. The Ministry chose not to give any such evidence from those involved in the transaction. Rather the evidence from the Ministry was limited to that of Mr. Jean Marc Pierre the Director of Lands, Survey and Records and Mr.

Peter Pata a Principal Officer and Acting Director. Neither was involved in any direct discussions with Mr. Zuchetto, and neither offered an explanation as to how it came about that having entered into a lease with him on the basis that the Hamagushi lease was to be forfeited, the process of forfeiture was delayed for a year, and a new lease entered into a year later with a different party.

21. So the only evidence as to the entering into of the contract was from Mr. Zuchetto. His most detailed account was in cross-examination and re-examination. His evidence was not referred to in detail in the judgment. We have examined the judge's notes of evidence and observe:

- Mr. Zuchetto stated under cross examination that he understood when he commenced his enquiries that the Hamagushi lease was in existence and not surrendered or forfeited.

- When he made enquiries he was put onto the Minister's "PA" (first political adviser) who told him that the Minister "can forfeit lease". He then said "He told me I had 4 months to apply for the lease, and the Minister had forfeited it".

- He said "*I never saw any forfeiture notice or determination issued to Mr. and Mrs. Hamagushi*".

- Then in re-examination he said he was told that the Minister had "already signed the forfeiture for the land". He was shown a document and told to go back to the Lands Department and apply for another lease of the land.

- He went to the Department and paid for a negotiator's certificate.

22. This factual sequence was not referred to in the Supreme Court decision. Although it was assumed in that decision that Mr. Zuchetto had assumed that there had been a completed forfeiture process, we are obliged to reach our own conclusions from the notes.

23. They show that Mr. Zuchetto knew that there was a lease in the name of the Hamagushis. He knew that it had to be forfeited. But as a non-lawyer he showed no understanding of the process of forfeiture. He was relying on the Ministry to do whatever had to be done to give him good title to the lease that was to be signed. The evidence shows that he only believed that there had been forfeiture because that is what he was clearly told by the Minister's first political adviser.

24. Moreover it is clear that once he had paid the necessary sums and the lease was signed he left the mechanics of registration to the Minister and

the Department of Lands. He was entitled to assume that which needed to be done would be done by the Ministry. This was accepted by Mr. Gilu for the Republic.

25. We consider that while the leasehold title could not be transferred at the time Mr. Zuchetto's lease was signed, the contract could and would have been performed if the forfeiture that was underway had been completed, and the Minister had proceeded to have the lease registered. The contract was not capable of performance at the time of execution, but fully capable of performance, and was only not performed because of the errors of the Ministry of Lands in failing to complete the forfeiture process and register the new lease with Mr. Zuchetto.

26. Mr. Zuchetto rightly believed that the Republic should be able to transfer the lease to him, if not instantly, in due course. It could have and but for its negligence presumably would have. Mr. Zuchetto was only mistaken as to whether the Hamagushi lease was already forfeited in the sense that he was clearly told by the Minister's PA that it had been.

Our legal analysis

27. It is necessary to consider the law in more detail.

28. The doctrine of common mistake recognizes that sometimes the intention to create legal relations is based on an incorrect assumption of facts and that, if the parties had been aware of the true nature of the facts, the parties would not have intended to have been bound by the agreement. In *Norwich Union Fire Insurance Society Ltd v Price*, in relation to the formation of contract and the intention to form legal relations, Lord Wright stated obiter that:[1]

> *"But proof of mistake affirmatively excludes intention. It is, however, essential that the mistake relied on should be of such a nature that it can be properly described as a mistake in respect of the underlying assumption of the contract or transaction or as being fundamental or basic."*

29. Lord Atkin in Bell v. Lever Bros at 217 stated that:

> *"if mistake operates at all, it operates so as to negative or in some cases to nullify consent"*

1 *Norwich Union Fire Insurance Society Ltd v Price* [1943] AC 455 (HL) at 463.

We adopt this broad approach and use the phrase "*common mistake*" rather than mutual mistake although they are used in the cases interchangeably.

30. It has long been recognized that where the common mistake relates to the existence of the subject matter of the contract the contract is void.[2] In *Couturier v Hastie* there was a sale of a cargo of corn that was being shipped from Salonica in Greece to the United Kingdom.[3] Unknown to both parties the corn had become fermented and so the master of the ship had sold the corn to a purchaser at Tunis. The House of Lords held that the purchaser was not liable for the price of the cargo and the contract was void.

31. The House of Lords considered that determining whether the contract was void was a matter of construction of the contract. If the purchaser had agreed to buy specific goods then clearly the goods no longer existed and the contract was void. However, if the contract had provided that the purchaser has simply agreed to buy an adventure (the benefit of the insurance that had been effected to cover the possible failure of the goods to arrive), then the purchaser would have been liable to pay for the corn. The House of Lords preferred the first interpretation. Because both parties had contemplated an existing something to be bought and sold, but this existing something did not exist at the time the contract was formed, the contract was void because the contract presupposed the existence of goods capable of delivery.[4]

32. This principle was again recognized in *Pritchard v Merchants' and Tradesman's Mutual Life Assurance Society.*[5] Here the life insurance policy had lapsed due to non-payment of the premium. The beneficiary paid the insurers a renewal premium. However, unknown to both parties the insured had died before the payment was made. The Court considered that the payment was made and accepted on the understanding that the insured party was alive. Williams J stated that "*Both parties were labouring under a mistake, and consequently the transaction was altogether void.*"[6]

33. So clearly where the subject matter of the contract does not exist then the contract can be void. Similarly where the property does exist, but for instance it belongs to the party in the contract who is essentially buying or leasing the property from themselves then the contract can be a nullity. For example if A agrees to buy or lease property from B, and both

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2 Michael Furmston (ed) *Cheshire, Fifoot & Furmston's Law of Contract* (16th ed, Oxford University Press, Oxford, 2012) at 296.

3 *Couturier v Hastie* (1856) 5 HL Cas 673.

4 At 681–682 per Lord Cranworth.

5 *Pritchard v Merchant's and Tradesman's Mutual Life Assurance Society* (1858) 3 CBNZ 622 (CP).

6 At 640.

parties believe that B owns the property, but in reality A owns the property, then the contract is a nullity because B has nothing to sell or convey to A.[7] As Knight Bruce LJ said, "*It would be contrary to all the rules of equity and common law to give effect to such an agreement.*"[8]

34. It is not apparent to us that either of these situations arises here. The property that was the subject of the contract did exist. The Republic owned it. However, there was a mistake as to the legal availability of the land for a new lease by the Ministry, as an existing lease, while in the process of forfeiture, was not forfeit. This was not however a common mistake.

35. Lord Atkin observed in *Bell v Lever Bros* at 236 that such a common mistake must relate "*...to something which both must necessarily have accepted in their minds as an essential and integral part of the subject matter*".

36. Mr. Zuchetto did not expect immediate and operative forfeiture (and registration of his lease) as an essential and integral part of the subject matter. He just wanted the Ministry to do whatever was necessary to give him a lease. As we have set out, Mr. Zuchetto did not make a mistake. He did not have a clear idea as to what the process of forfeiture was or where it was up to. He relied on the Ministry to provided him with a good lease.

37. Any mistake was made by the Ministry only. It was unilateral. There has been no defence raised of unilateral mistake, and given Mr. Zuchetto's lack of knowledge of what was required to give him a good lease, we do not consider that this very limited basis for relief could assist the Republic. Its error did not negative his consent to the lease.

Mistake as to the facts in general

38. While common mistake has rendered contracts void where the subject matter does not exist or already belonged to the person attempting to obtain it, the position is less clear where the mistake relates to subject matter that exists but is fundamental to the contract.

39. Until 2002 the position was unclear with much depending on how one interpreted the House of Lords decision in *Bell v Lever Bros Ltd.*[9] In that case Lever Bros had appointed Mr. Bell the managing director of a company. Later they made Mr. Bell redundant and paid him out £30,000. Afterwards they discovered that Mr. Bell had breached his duty as a

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7 *Cochrane v Willis* (1865) 1 Ch App 58; *Bebenham v Sawbridge* [1901] 2 Ch 98 at 109.
8 *Cochrane v Willis*, above n 7, at 63.
9 *Bell v Lever Bros Ltd* [1932] AC 161 (HL).

director several times. This would have justified dismissing him without compensation and so they sought to recover the £30,000. The House of Lords considered that there was no unilateral mistake because Mr. Bell's mind was not directed to his breaches of duty when the compensation agreement was made.

40. The question was whether the common mistake was fundamental to the contract. Lord Warrington considered that a mistake made by both parties "*without which the parties would not have made the contract*" is "*if proved, sufficient to render a contract void*".[10] Lord Thankerton considered that common mistake may render a mistake void where the mistake "*properly relate[s] to something which both [parties] must necessarily have accepted in their minds as an essential and integral element of the subject-matter.*"[11] Lord Atkin agreed and stated that where the mistake is to the quality of a thing, rather than its existence, "*a mistake will not affect assent unless it is a mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be.*"[12] By a majority, the House of Lords held that there was no mistake.

41. *Bell v Lever Bros Ltd* was the subject of much consideration, but later cases seemed to confine the decision and not interpret it to allow a contract to be held void where there was a mistake about the nature (rather than existence) of a fact.[13] For example, in *Leaf v International Galleries* the plaintiff bought from the defendants a picture which they both believed to have been painted by John Constable.[14] However, it was not. The plaintiff sued on the basis that this fact was fundamental to the contract. While the Court of Appeal considered that the mistake was "*in one sense essential or fundamental*" it did not avoid the contract.[15]

42. In *Great Peace Shipping v Tsavliris Salvage Ltd* the English Court of Appeal made it clear that the doctrine of common mistake was wider than situations *res extincta* or *res sua*.[16] In this case the ship the Cape Providence was on her way from Brazil to China and suffered serious structural damage while at sea. Tsavliris Salvage Ltd offered to assist the owners recover the ship and this was agreed. Tsavliris organised a tug boat to come to the ship's assistance but this would take five to six days to arrive. Because the ship was in danger of sinking, Tsavliris sought to find a merchant vessel in the vicinity which could assist the Cape Providence by standing alongside and evacuating crew if the ship began to sink. A firm of brokers found the Great Peace was nearby and,

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10 At 206.
11 At 235.
12 At 218.
13 *Solle v Butcher* [1950] 1 KB 671, [1949] 2 ALL ER 1107 (CA); *Grist v Bailey* [1967] Ch 532, [1966] 2 All ER 875.
14 *Leaf v International Galleries* [1950] 2 KB 86, [1950] 1 All ER 693 (CA).
15 At 89, 694.
16 *Great Peace Shipping v Tsavliris Salvage Ltd* [2002] EWCA Civ 1407, [2003] QB 679 at [71] – [75].

based upon its position, could arrive within 12 hours. Unfortunately the position of the Great Peace was incorrect (by about 390 miles) and it would take much longer for the Great Peace to arrive. After waiting to confirm other ships were closer, Tsavliris was instructed to cancel the contract with the Great Peace. The owners of Great Peace then sued seeking $US 82,500 as moneys payable under the contract.

43. Here the subject matter existed (the Great Peace) but it was argued that both parties were mistaken as to the closeness of the Great Peace and this was fundamental to the contract. If Tsavliris knew of the location they would not have made the contract. The Court considered that the underlying basis for common mistake was the impossibility of performing the contract. The Court explained that:[17]

> "*The avoidance of a contract on the ground of common mistake results from a rule of law under which, if it transpires that one or both of the parties have agreed to do something which it is impossible to perform, no obligation arises out of that agreement.*"

44. In determining whether the performance of the contract is impossible, the Court said it was "*necessary to identify what it is that the parties agreed would be performed. This involves looking not only at the express terms, but at any implications that may arise out of the surrounding circumstances.*"[18]

45. The Court considered that the following five elements must be present if common mistake is to avoid a contract:[19]

    (a) There must be a common assumption as to the existence of a state of affairs;

    (b) There must be no warranty by either party that the state of affairs exists;

    (c) The non-existence of the state of affairs must not be attributable to the fault of either party;

    (d) The non-existence of the state of affairs must render performance impossible;

    (e) The state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.

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17 At [71].
18 At [74].
19 At [76].

46. This decision has been applied by courts in England and other jurisdictions, and the above stated summary is quoted in *Treitel, The Law of Contract, 12th ed at 8-007.*[20] It is clear that the application of the doctrine of common mistake is not a mechanistic process turning on only on whether the parties laboured under a common misapprehension. The Court will look at matters more broadly to see whether in a case where the mistake is the fault of one party, it is fair for the doctrine to be invoked to defeat an innocent party's rights.

47. We turn to address the factors that all must be present under the *Great Peace* test, and apply them to these facts:

Was there a common assumption as to the existence of a state of affairs?

48. There was an assumption by the Ministry that the land was forfeited and that the Government could lease it to Mr. Zuchetto. It conveyed its assumption to him. He knew that forfeiture was happening and that he was being given a lease that would be valid after forfeiture. He was right.

Was there a warranty by the Government that the land was forfeited?

49. In *McRae v Commonwealth Disposals Commission* (1951) 84 LLR 377 the Commission invited tenders for the purchase of an oil tanker laying on the Jourmaund Reef.[21] McRae submitted a tender which was accepted and prepared a salvage expedition. However there was no such tanker and no such reef. McRae sought damages and the Commission claimed that the contract was void. The High Court of Australia held that the contract was not void and awarded damages to McRae on the basis that the Commission had implicitly warranted the existence of the tanker. So here, the Ministry had implicitly warranted the completion of forfeiture and the provision of a valid lease. This means that the Government cannot claim that the contract was void.

Was the non-existence of the state of affairs attributable to the fault of the Government?

50. In *McRae* the High Court of Australia stated that a party could not rely on a mistake constituting "*of a belief which is ... entertained without reasonable ground, and ... deliberately induced by him in the mind of the*

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20 *Acre 1127 (in liq) v De Monfort Fine Art Ltd* [2011] EWCA Civ 87 at [38]; *Bellway Homes Ltd v Beazor Homes Ltd* [2011] EWCA Civ 15 at [57]; *Graves and Graves* [2007] EWCA Civ 660 at [26]; *Johnson Electric International Ltd v Bel Global Resources Holdings Ltd* [2013] HKCFI 592 at [10].

21 *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377.

other party."[22] The Ministry staff made Mr. Zuchetto believe that the forfeiture position was in their control and under control. The reason that it did not happen was negligence by Ministry staff in not implementing forfeiture promptly, and then when it did so not registering Mr. Zuchetto's lease. The lack of timely forfeiture and registration was entirely the fault of the Republic, and for this reason alone common mistake is not available.

51. Reinforcing this conclusion is the fact that the Minister of Lands is no ordinary lessor. He not only owns the land but also is the head of the Ministry responsible for administering the Land Lease system. Accordingly when a person in Mr. Zuchetto's position is assured (by the Minister's first political adviser) that the forfeiture process is under control, it is entirely understandable that he would rely on that without question. It also makes it all the more inappropriate for the Minister later to contend that he should be denied any compensation for the Minister's error.

Did the non-existence of the state of affairs render performance impossible?

52. The fact that the land was not forfeited at the time the lease was entered into by Mr. Zuchetto and the Republic meant that the lease was not of effect at that point, but it could have been performed later once the land was forfeited. The land was in the process of being forfeited. Performance was possible in due course. It is true as pointed out in the Supreme Court decision that at the time of commencement of the lease its performance was impossible as the forfeiture process had not been completed. However the fact that this could be promptly fixed by the completion of forfeiture takes the mistake out of the realm of those that render a contract void or voidable. The Court can look at the practical realities in assessing impossibility.

Was the state of affairs a vital attribute of the consideration or of the circumstances which must subsist if performance is to be possible

53. The land being forfeited was a vital attribute which would allow the lease to proceed. If the land was not forfeited and there was still a lease between Mr. Zuchetto and the Republic, then no lease could have been granted and Mr. Zuchetto would be wrongfully in possession of the land and trespassing. Therefore the land being able to be leased to Mr. Zuchetto was a vital attribute.

Conclusion

[22] At 408. See also *Great Peace Shipping v Tsavliris Salvage Ltd*, above n 17, at [76]–[77].

54. Common mistake fails here because in terms of the *Bell v Lever Bros* analysis the parties intention to contract was not nullified because the Ministry was mistaken as to whether forfeiture was completed. The Ministry's mistake did not nullify consent. Even if the mistake could be regarded as "*common*", we have no doubt that the parties would have gone ahead with the lease recognizing that there would be a delay until the forfeiture which was seen to be inevitable was completed. More specifically, common mistake has not been made out because the Ministry was at fault in not forfeiting as it warranted. Four of the five factors referred to in the *Great Peace Shipping* case apply:

(a) there was no common assumption of a particular state of affairs;

(b) there was an implied warranty by the Republic that Mr. Zuchetto would get good title,

(c) this did not come about because of the fault of the Ministry;

(d) the non-existence of the state of affairs (the immediate availability of a forfeited title) did not make performance impossible;

55. The Government has breached the contract in that it has not performed in any way. In particular it has not provided the land or quiet enjoyment. As in *McCrae* the Court can award damages for breach of contract in these circumstances. The Ministry did not contest its notional liability for damages if common mistake did not apply. It had breached the contract of lease in not providing quiet enjoyment of the leasehold property, and ultimately making the lease impossible to perform by leasing the property to another party. The pleadings did not specify the type of damages. The damages can be seen as damages in lieu of specific performance, or general damages for breach of contract.

56. The case must be remitted back for a hearing as to the quantum of damages. Mr. Zuchetto will have to make out his case. The right to call further evidence of loss being reserved there will have to be timetable hearing to establish the time frame for the filing of any further evidence and any evidence in reply, and any further necessary directions for the hearing.

57. We will quash the order for costs made in the Supreme Court against the appellant. The appellant should have succeeded against the first respondent. Moreover, the first respondent has been responsible for the two conflicting leases, and the need for litigation to resolve the resulting problem. Therefore the first respondent should pay the costs of the other respondents in the Supreme Court, and not the appellant.

Summary

(a) The appeal is allowed.

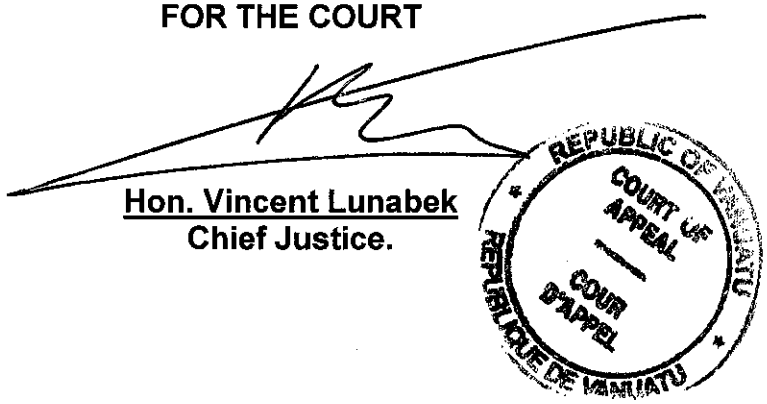
(b) Judgment is entered for the appellant against the respondent on liability. The case is remitted back to the Supreme Court for timetabling and a hearing as to the quantum of damages.

(c) The appellant has been successful in this Court and is entitled to costs. The first respondent is to pay the appellant the costs of the appeal on the usual basis. There is no order for costs in favour of the other respondents as they took no part in the appeal.

(d) We quash the order made in the Supreme Court against the appellant that he pay costs to the other parties.

(e) The first respondent will pay the costs of the appellant and the other respondents in the Supreme Court.

FOR THE COURT



Hon. Vincent Lunabek
Chief Justice.