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

Civil Appeal
Case No. 15/942 CoA/CIVA

BETWEEN: **SABY NATONGA and ARTHUR KNIGHT**
Appellants

AND: **LESLEY MECHTLER**
Respondent

Date of Hearing: ***Tuesday 5th April 2016 @ 3:30pm***

Date of Judgment: ***Friday 15th April 2016 @ 4:00pm***

Coram: ***Hon.Chief Justice Vincent Lunabek***
Hon Justice John von Doussa
Hon Justice Ronald Young
Hon Justice Oliver.A.Saksak
Hon. Justice Daniel Fatiaki
Hon.Justice Dudley Aru
Hon. Justice Mary Sey
Hon.Justice Paul Geoghegan

Counsel: ***Wilson Iauma for Appellants***
John Malcolm for Respondent

JUDGMENT

Introduction

1. The appellant Mr Natonga leased a building at Tagabe Port Vila from Mr Mechtler the respondent. Mr Natonga runs a nightclub known as Planet 107 Entertainment Centre from the front of the premises.

2. In September 2014 the respondent gave Mr Natonga a notice to quit the property. Mr Natonga refused to do so and remains in occupation. The respondent therefore brought proceedings in the Supreme Court seeking a removal order, unpaid rent, mesne profits (the equivalent of unpaid rent after the notice to quit) and the cost of repairing the premises arising from the damage said to have been caused by Mr Natonga.

3. Mr Natonga counterclaimed. He alleged he made substantial improvements to the building for which, in terms of the lease, he was entitled to be compensated. The counterclaim totalled VT 38.900.000.

4. In the Supreme Court after trial the Judge concluded the respondent was entitled to vacant possession. The Judge ordered Mr Natonga to pay rental arrears of VT 480.000, mesne profits of VT 240.000 per calendar month from October 2014 until vacant possession, and repair costs of VT 4.230.000. The Judge dismissed the counterclaim.

The Appeal

5. The primary ground of appeal relates to Mr Natonga's application to call new evidence. He submits that if the grounds to call the new evidence are made out then the judgment of the Supreme Court should be set aside and a new trial ordered of both claim and counterclaim.

6. There were other grounds of appeal although no oral submissions before us were made in support of these grounds.

The "New" Evidence

7. Mr Natonga filed a sworn statement in this Court which together with the annexures was his proposed new evidence.

8. The most significant new evidence presented by Mr Natonga was a lease agreement between the parties relating to the subject premises dated 25th August 2010. This lease had not been produced at trial in the Supreme Court.

9. At trial Mr Mechtler had produced a lease for the same premises dated a few weeks earlier, 8th August 2010. It was this lease that the Judge in the Supreme Court had relied upon in reaching his decision. Mr Natonga claimed that the 25th August lease was the operative lease and entitled him to compensation for the improvements he had made. In addition Mr Natonga annexed valuations of the building which he said proved he had made improvements valued at VT 38.900.000.

10. As to the Respondent's claim for rent, mesne profits and damage Mr Natonga said, he accepted there was outstanding rent of VT 480.000 but he wanted his bond of VT 450.000 previously paid to the Respondent to be used to offset this claim. He denied he had caused the damage alleged by the respondent and he did not respond to the claim for mesne profits.

11. Finally Mr Natonga complained that his lawyer at trial had not properly represented him. Mr Natonga said his lawyer had appeared late at trial, remained mostly silent throughout the trial and *" had not contested the evidence of the Respondent nor presented my case at that time".*

12. We deal with this later point now. When faced with the oral submission that at least a partial reason to allow the appeal was the failure of Mr Natonga's trial Counsel this Court suggested the remedy might be against his lawyer. After enquiry, it turned out that Counsel representing Mr Natonga at trial was a principal of the law firm in which

Mr Natonga's current Counsel was employed. The conflict in such a situation is self-evident.

13. Mr Natonga's current Counsel did not pursue this particular complaint. However in view of the complaint Counsel for Mr Natonga may wish to ensure Mr Natonga has independent legal advice on the conduct of trial Counsel separate from these proceedings.

The Law as to New Evidence

14. Rule 27(2) of the Western Pacific Court of Appeal Rules provides:

" The Court of Appeal shall have full discretionary power to receive further evidence upon a question of fact

Provided that in the case of an appeal from a judgment after trial……., no such further evidence …. shall be admitted except on special grounds".

15. Mr Natonga accepted therefore he had to establish "special grounds" for the admission of this evidence. It was common ground that the special grounds needed to be established were:

a) The evidence proposed to be called could not with reasonable diligence have been obtained before trial and,

b) The evidence was relevant to an issue/issues at trial and capable of belief and,

c) If the evidence was given at trial it would have had a significant effect on the outcome of the trial.

(See: **Adams .v. Public Prosecutor** [2008] VUCA 20 and **Neel.v. Blake** [2004] VUCA 6).

Analysis

16. As to (a) we are satisfied all of the further evidence proposed to be given by Mr Natonga could with reasonable diligence have been discovered before trial and given in evidence at trial.

17. Mr Natonga would have had a copy of the 25th August 2010 lease at the time it was signed and so it was available at trial. The valuations said to support the respondent's claim for compensation for improvements to the premises were obtained in September 2015 before the November 2015 trial. And so they were also available before trial.

18. Mr Natonga also annexed to his affidavit information about the Respondent's head lease of the property. This was all information available and obtained prior to trial. This information in any event did not appear to be relevant to any trial issue.

19. Finally there is Mr Natonga's narrative in his affidavit. Most of the affidavit is a description of the events between August 2010, when the lease began, until 2015 when the Supreme Court trial was heard. Self-evidently this narrative evidence is not new evidence. It was no more than a description of what Mr Natonga knew during the existence of the lease.

20. We are therefore satisfied that all of the evidence proposed to be called by Mr Natonga was known to him before trial. Mr Natonga's application to call this evidence therefore fails at the first hurdle.

21. There is however another issue which is fatal to the admission of the appellant's proposed new evidence.

22. We are satisfied that even if the pivotal new evidence (the 25th August lease and the valuation of the improvements) had been given at trial it would have made no difference to the outcome.

23. First the 25th August 2010 lease. At trial the Respondent had produced and the Court had relied upon a lease dated 8th August 2010.

24. There are similarities and differences between the two leases. Mr Natonga's case is that if the 25th August lease had been before the trial Court and applied then the different provisions relating to rent and improvements (particularly clause 21) in the 25th August lease would have advantaged Mr Natonga and resulted in a different outcome at trial.

25. Clause 21 of the 25th August lease provides:

> *" In the event of non-payment of rental or any other breach of Terms and Conditions of this Lease the following procedure shall apply:*
>
> *(a)*
>
> *(b)*
>
> *(c)*
>
> *(d)*
>
> *(e) All purchases and material used for renovation remains the property of the tenant in all circumstance and in the event of a withdrawal or termination, is claimable by the tenant and compensable by the landlord"*

26. There is no equivalent provision in the 8th August lease. Mr Natonga argues that clause 21 (e) entitled him to claim compensation from the Respondent for the improvements he (Mr Natonga) made to the building. He says these improvements were valued at VT 38.900.000 in the valuations attached to his affidavit.

27. We are satisfied that even if the 25th August 2010 (rather than the 8th August 2010 lease) was the operative lease it was at an end by 1st September 2014. The 25th August lease was for a period of 4 years from 1st September 2010. There was no renewal of the lease and so it ended on 1st September 2014.

28. The introduction to clause 21 of the 25th August lease makes it clear the clause applies only where there has been a non-payment of rent or another breach of the terms of the lease. Neither event occurred here. The lease ended because its term expired. And so

clause 21 has no application to the facts of this case and could not be the basis of Mr Natonga's counterclaim. The valuation therefore had no relevance.

29. Clause 20 of the lease is the relevant provision. This clause is the same in both the 8th and 25th August leases. This clause provided that where the lease had come to an end (as here) the tenant's obligation was to surrender the building in good condition. This was therefore the relevant position at the end of the lease and the basis of the Respondent's claim for damages.

30. We note Counsel for the Respondent accepted that subject to compliance with clause 20, on the vacation of the premises and the payment of outstanding rent, mesne profits and damages, Mr Natonga was entitled to remove any materials he had installed in the building.

31. We are satisfied therefore that even if the 25th August tenancy agreement had been before the Supreme Court it would have made no difference to the conclusions of the Judge.

32. The only other evidence in Mr Natonga's affidavit was his claim that a VT 450.000 bond should be used to in part to offset the claim for VT 480.000 unpaid rent. There was no documentary evidence the VT 450.000 bond had been paid. If indeed the bond has been paid and is not forfeited for any reason the Respondent should deduct it from the money owing.

33. Other grounds of appeal were maintained in Mr Natonga's written appeal submissions but not relied upon in oral submissions.

34. Several related to the interpretation of clause 21 and the counterclaim. Others related to the competence of the Mr Natonga's trial Counsel. We have already dealt with these issues.

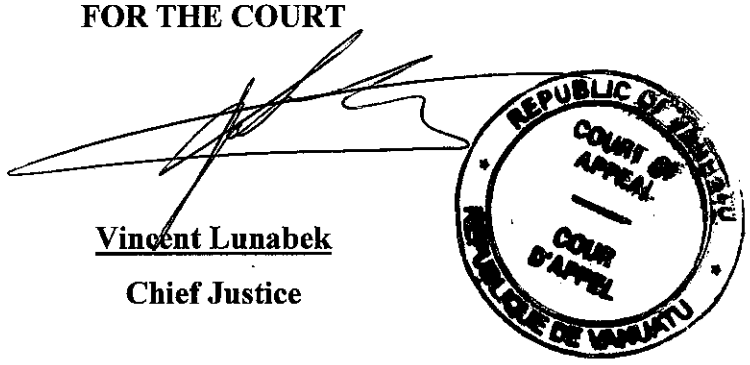
Result

35. We are satisfied the "new" evidence proposed is neither new nor would its admission have affected the outcome of the trial. The application to admit new evidence is therefore dismissed.

36. For the reasons given the appeal will be dismissed with costs to the Respondent of VT 50.000.

DATED at Port Vila this 15th day of April 2016

FOR THE COURT



Vincent Lunabek

Chief Justice