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

Civil Appeal
Case No. 23/683 COA/CIVA

BETWEEN: **PONATOKA DEVELOPMENT COMPANY LIMITED**
Appellant

AND: **EVERGREEN LIMITED**
First Respondent

AND: **GLEN CRAIG**
Second Respondent

Date of Hearing:	*11 August 2023*
Before:	***Hon. Chief Justice V. Lunabek*** ***Hon. Justice J.W. von Doussa*** ***Hon. Justice R. Asher*** ***Hon. Justice O. Saksak*** ***Hon. Justice D. Aru*** ***Hon. Justice V.M. Trief*** ***Hon. Justice E.P. Goldsbrough***
In Attendance:	*MNF Patterson for the Appellant* *N Morrison for the Respondents*
Date of Decision:	*18 August 2023*

JUDGMENT OF THE COURT

A. Introduction

1. This was an appeal against the Supreme Court judgment dismissing the appellant Ponatoka Development Company Limited's ('Ponatoka') claim for damages against the respondents Evergreen Limited ('Evergreen') and Glen Craig.

2. Mr Craig had been appointed as an investigator and/or receiver of Evergreen. The damages claim related to damage allegedly caused to Ponatoka's leasehold property in the three-month period that it was occupied by Evergreen under Mr Craig's control.

B. Background

3. Ponatoka was and is a local company wholly incorporated within Vanuatu and is the registered lessee of leasehold title no. 12/0822/387 ('lease title 387').

4. Lease title 387 is adjacent to another lease title from which Evergreen operated the Mele Cascades tourist attraction business. Evergreen used lease title 387 for the car park and building area at its entrance to the Cascades.

5. Evergreen operated at least two businesses in Vanuatu and in Port Vila, one of which was a real estate business. Its other business was a tourism business with a significant part of the business involving the operation of the Mele Cascades tourist attraction.

6. Evergreen was not run profitably and on 12 September 2016, the ANZ Bank appointed Mr Craig as an investigator pursuant to clause 10 of its General Service Agreement ('GSA') with Evergreen dated 11 January 2010.

7. It was Mr Craig's evidence that after he presented a report to the ANZ Bank following his appointment as an investigator, the Bank on 14 October 2016 appointed him as receiver and manager of Evergreen.

8. Prior to Mr Craig's appointment, there had been ongoing litigation between Ponatoka and Evergreen for a significant period, including over the latter's use of lease title 387. Effectively, Evergreen had been "squatting" on lease title 387 for some 14 years previously and after efforts to negotiate a sublease failed, on 1 December 2016, consent orders were made in the Supreme Court in proceedings between Ponatoka, Evergreen and the Republic of Vanuatu in which Evergreen agreed to vacate lease title 387 by no later than 1 March 2017.

9. The consent orders dated 1 December 2016 provided, relevantly, as follows:

> 1. *The First Defendant [Evergreen] shall vacate least title 12/0822/387 ("the property") by no later than 1 March 2017;*
>
> 2. *Whilst the First Defendant [Evergreen] remains in occupation of the property they shall ensure:*
>
> * *there is adequate comprehensive insurance for the property including fire and theft;*
>
> * *there is continued access to the water pump situated on the property for the current users of that water pump.*

10. Arrangements were made by Evergreen employees to move the public entrance and car park to an adjacent piece of custom land situated by the river downstream from the Mele Cascades, directly adjacent to lease title 387. Evergreen constructed a wire fence along the boundary with the custom land area and constructed an access bridge across the Cascades river from the new car park. Signage was removed, various plantings were

undertaken, new footpaths laid and path lighting relocated to ensure that the business could continue.

11. It was the respondents' evidence that Evergreen vacated the property in the early evening on 28 February 2017.

12. It was accepted that as long as the respondents were in occupation of lease title 387, their conduct was governed by the terms of the consent orders out of which they had a duty of care in respect of the property.

13. By the amended statement of claim filed on 10 November 2022, Ponatoka alleged as follows:

    a) That Mr Craig's appointment was only ever as an investigator and not a receiver. It was alleged that Mr Craig's conduct as an investigator was "reckless and careless" and outside the scope of the powers listed in the GSA;

    b) That Mr Craig "carelessly and recklessly" conducted himself as a receiver/manager of Evergreen "based on the plain and specific terms of the appointment as investigator";

    c) That Mr Craig had induced business through Evergreen with bona fide third parties including Ponatoka through fraudulent or negligent misrepresentations;

    d) That Evergreen was negligent in that "it had a duty to the claimant to ensure at all material times, the exact nature of Mr Craig's capacity as an investigator appointed by the ANZ and was negligent in allowing [Mr Craig] to represent himself as receiver";

    e) That during their three-month occupation of the land and particularly between 28 February and 1 March 2017, both respondents dismantled and damaged the buildings, the bridges, caused alterations to the building and fixtures and removed some items which were affixed to the land and the house and caused damage to the claimant;

    f) That while in occupation of the land the respondents failed to take reasonable care, breached the terms of the consent orders and negligently caused damage by way of the removal of items and fixtures "and buildings" amounting to VT4,239,000. Particulars of the damage consisted of removal of all of the light switches as well as some wirings which were removed, destroyed or cut and the removal of hardwood planks of approximately 2.5 metres to enable tourists to cross the river to a restaurant building located on the property. The hardwood planks were used to build a new bridge across the river to the other side of the river subsequently occupied by Evergreen;

g) That the respondents and their agents "illegally and without authorisation" planted posts with cement on the limit of the claimant's property partly on the claimant's land to build a fence to create an access road for Evergreen to have access to the title which they were to occupy;

h) That the failure of the respondents to take out insurance was negligent, and the loss of protection was a loss suffered by the claimant;

i) That while the land was under the respondents' care and possession and while in occupation of it the respondent had a duty to secure the land failing which theft of numerous affixed items occurred on the land, further aggravating the losses suffered by the claimant; and

j) That because of the damage suffered by the loss of the fixtures and buildings on the land, the claimant had suffered additional damages as it had the effect of substantially reducing the rental value of the land after the departure of the respondents on 1 March 2017.

14. As a result of the many claims within the statement of claim, Ponatoka sought orders that the respondents jointly and severally pay damages as assessed for their trespass, theft, damage, misrepresentation and fraudulent conduct and conversion plus interest at 5% since 1 March 2017 including the repairs for VT4,239,000. Ponatoka also sought an order that the respondents pay for the loss of rental and income due to the damage caused to the property (VT80,000 per month from 1 March 2017 to the date of judgment) as assessed, and against Mr Craig damages for deceit, exemplary damages of VT1,000,000 and aggravated damages (unspecified).

15. Both respondents denied causing any loss to Ponatoka and Mr Craig asserted that at all times he was acting as Receiver of Evergreen.

C. The Supreme Court decision

16. The primary judge recorded at the outset that the claim against Mr Craig rested firmly on whether the Court found that he was acting as an investigator or as a receiver, and if the latter, he was not liable for the damages claimed. This was stated to be the result of Mrs Ferrieux Patterson's concession which he had recorded in a pre-trial Minute dated 10 February 2023 and was the basis upon which the claim proceeded.

17. The primary judge then in a lengthy judgment carefully set out the factual background, the pleadings and the evidence of each of Ponatoka's nine witnesses and of Mr Craig and two other witnesses for the respondents Troy Spann and Mariana Lal. Ms Lal was

the head of credit and risk at ANZ at the commencement of Mr Craig's appointment as Receiver; her evidence simply confirmed his appointment as the Receiver of Evergreen. He found Mr Craig and Mr Spann to be credible witnesses who gave their evidence in an open and genuine manner, and stated that he had no reason to doubt that evidence. He did not set out specific credibility findings for each of Ponatoka's witnesses.

18. In the final section of the judgment, the primary judge summarised counsel's submissions, discussed the evidence and set out his findings of fact. He stated that Mr Craig was not cross-examined at all in respect of whether he was also appointed as a receiver. He referred to the unequivocal and uncontradicted evidence from the ANZ and found that Mr Craig was appointed as Receiver pursuant to clause 8 of the GSA, with duties and responsibilities as set out in the *Companies (Insolvency and Receivership) Act* No. 3 of 2013 (the 'Act'). He noted that the primary duty owed by Mr Craig was to the ANZ Bank.

19. The primary judge set out that he regarded Mrs Ferrieux Patterson's concession as binding on the claimant, the result of which was that upon the finding that Mr Craig was acting as a Receiver, no liability could attach to him. Even so and given Mrs Ferrieux Patterson's submissions addressed to Mr Craig's alleged negligence and recklessness as a Receiver, he went on to address the remaining issues noting however that he had reached the conclusion that even if that concession did not apply, Mr Craig was not liable to Ponatoka for damages.

20. It had been submitted that Mr Craig breached the consent orders by failing to take out insurance cover for theft (which could have resolved the claimant's claim for damages and theft), by failing to deliver up vacant possession and by not advising the owner of the property that he was leaving.

21. The judge accepted the clear evidence of Mr Craig that he had immediately taken out insurance in respect of the property. The judge was not aware of any correspondence between the parties which looked to explore the possibility of pursuing an insurance claim thus he held that Ponatoka had not satisfied its onus of proof to establish that insurance was not taken out.

22. He also found contrary to the submissions made on Ponatoka's behalf that Mr Craig ensured that the consent orders were complied with by vacating lease title 387 no later than 1 March 2017 and that the owner of the property was advised that he was leaving. He found that the evidence, including Ponatoka's own evidence, clearly established that Ponatoka was aware of that.

23. It had also been submitted that Mr Craig had been negligent or reckless thus causing the losses claimed. The primary judge held that the evidence clearly established that Mele Cascades was in a state of disrepair for a considerable period and much of the damage would have occurred prior to the receivership. Further, there was no evidence

which established that Mr Craig did anything other than he was entitled to do as Receiver. He described the evidence of Ponatoka's witnesses as to what was taken from the site as minimal and there was significant scope for confusion on the part of the witnesses who spoke of what they saw on trucks. He found that the evidence did not support the assertion that Mr Craig engaged in the wholesale removal of fixtures.

24. Next, the primary judge dealt with the submissions that Mr Craig claimed "*wrongfully*" to be appointed as a Receiver when his letter of appointment as Receiver referred, in the body of the letter, to an appointment as investigator. The subject heading of the letter referred to appointment as receiver whereas the body of the letter to appointment as investigator. The judge held that that part of the letter was clearly an error, that there would be no reason why the ANZ would appoint Mr Craig as an investigator on two separate occasions therefore it did not make sense to attach that interpretation to the letter, and Ponatoka's own evidence referred to Mr Craig having been appointed as Receiver. He concluded that the claim that Mr Craig acted fraudulently in holding himself out as Receiver was frankly irresponsible. There was no evidence to establish allegations that Mr Craig acted dishonestly. He found that Mr Craig conducted his receivership honestly and in good faith.

25. The primary judge held that the reality was the property was an open property and Mr Craig was not under an obligation to secure the property in a way in which it had not been secured for at least a decade previously. There was no doubt items had gone missing and there had been damage but there was considerable doubt as to when the damage complained of occurred and insufficient evidence to establish that Mr Craig should be responsible for it.

26. As for the claim of the removal of timber from a bridge on lease title 387, the evidence clearly established that it was simply relocated thus there was actually no loss. The evidence also showed that Blue Springs had taken over a lease of the property with an obligation to undertake maintenance and keep the property in good repair. Accordingly, what loss had then been suffered? He found that Ponatoka had not been able to prove damage and dismissed the claim for damages against both respondents with costs.

D. <u>The parties' respective cases</u>

27. Ponatoka's case on appeal is that the entire judgment be set aside as to not finding liability on the part of one or both respondents and that the matter be sent back to the Supreme Court for assessment of damages. It was submitted that the primary judge erred in not finding the respondents liable, in not making any liability finding in respect of Evergreen, in using counsel's concession as determinative of the claim for damages depending on whether Mr Craig was a receiver or investigator and that he erred in his findings of fact. Additionally, that he erred in his findings that the property was in a significant state of disrepair and that most of the damage would have occurred prior to

the receivership, that minimal damage had occurred and that no damage had taken place when Mr Craig removed the hardwood deck in front of the restaurant and had admitted the liability.

28. For the respondents, Mr Morrison submitted that the tenor of the claimant's claim and submissions in the Supreme Court was that Mr Craig had breached the duty of care he owed to Ponatoka by reckless and negligent behaviour. Any liability for Evergreen would flow from his appointment and the primary judge clearly found that no such liability arose leading to the dismissal of the claim against both respondents. He submitted that the evidence did not establish when items were removed from the property and who removed them. He submitted that even with no formal notice of vacation or handover, Ponatoka and the Mele village community were all aware that Evergreen was vacating it as can be seen from Elly Malastapu's evidence that he went onto the land at around 8am on 1 March 2017 to check if Evergreen had left the property. Finally, Mr Morrison submitted that there was no evidence as to what the value of any of the items removed were. Given the Blue Spring sublease subsequently entered for VT200,000 per year, Ponatoka had not suffered damage and the dismissal of the claim should be upheld.

E. Discussion

29. Mrs Ferrieux Patterson submitted that from the Agreed Facts and Issues that counsel jointly handed up at trial, it is clear that the claimant did not regard that any concession had been made at the pre-trial conference on 10 February 2023 in the terms set out by the primary judge. The Court must be able to rely on what counsel say. We are not aware that counsel made any effort to bring to the judge's attention that he may have inaccurately set out that matter in his 10 February 2023 Minute. In any event, having noted the concession as he did, the primary judge went on to consider the balance of the issues between the parties. The concession did not affect the Court's subsequent factual findings therefore there is no cause to interfere with that aspect of the decision.

30. During the trial, Mrs Ferrieux Patterson filed an application to strike out parts of the respondents' sworn statements. The primary judge held that most of the objections had little substance or touched on matters which were not relevant to the outcome. Counsel submitted that the judge erred in that finding. There is nothing raised on appeal sufficient to overturn that ruling by the primary judge.

31. It was open to the primary judge on the evidence before him to find that Mr Craig was appointed as Receiver of Evergreen. The subject heading of the ANZ Bank's letter referred to appointment as receiver but the body of the letter referred to appointment as investigator in identical terms to the ANZ's earlier letter appointing Mr Craig as investigator. The judge held that that was clearly issued in error given the earlier appointment as investigator. The onus was on Ponatoka to bring evidence, including from the ANZ Bank, that Mr Craig had not been appointed as receiver. It did not. Its own

evidence referred to Mr Craig having been appointed as Receiver. It was open to the judge in all of the circumstances to find that Mr Craig was appointed as Receiver.

32. Mr Craig was in control of Evergreen at the material times, Evergreen was the occupier of lease title 387 and while in occupation of the property, Evergreen and Mr Craig had a duty of care in respect of the property whether as investigator or receiver. It is unfortunate that there was so much misplaced focus by the claimant on whether Mr Craig was appointed as investigator or receiver and the allegations that he carelessly and recklessly conducted himself as receiver when he had only been appointed as an investigator, and that Evergreen was negligent in allowing him to represent himself as receiver. It was irrelevant whether Mr Craig was appointed as investigator or receiver of Evergreen.

33. There was simply no evidence as to any fraudulent or otherwise dishonest behaviour by Mr Craig. Allegations of fraud or dishonesty should not be made without clear evidence establishing that allegation. There was no such evidence here and we endorse the primary judge's conclusion that it was irresponsible of Ponatoka's counsel to make such allegations.

34. Under the consent orders, Evergreen had a licence to occupy lease title 387 and thus an implied duty to exercise reasonable care for the property. The consent orders required Evergreen to vacate lease title 387 by no later than 1 March 2017 and to ensure adequate insurance including for theft. The respondents' evidence was that they vacated the land on 28 February 2017 with the last truckload removing items from the site occurring at about half past six in the evening. This was in accordance with the consent orders requiring vacation "by no later than 1 March 2017". There was also no evidence contradicting Mr Craig's evidence that he took out insurance for the property. The respondents therefore did not breach the consent orders.

35. There was a complaint that the respondents did not give formal notice of their vacation of the property nor a handover to Ponatoka. Even so, on their own evidence, Elly Malastapu entered onto lease title 387 at around 8am on 1 March 2017 to check if Evergreen had left the property. Elly Malastapu confirmed in cross-examination that his father Philip Malastapu, a director of Ponatoka, instructed him to go onto the land earlier than that (but he only did at 8am). It was open to the primary judge to infer that Ponatoka knew when Evergreen would leave.

36. There was no doubt items had gone missing and there had been damage but there was considerable doubt as to when the damage complained of occurred and insufficient evidence to establish that the respondents should be responsible for it. Chelsea Dinh's evidence was relied on for the differences observed between her two visits to the property during and after Evergreen had vacated it. Those differences included removal of bathroom sinks, toilets, taps and shower heads, kitchen and bars' sinks, doors and hinges and broken walls of the front farea. Mrs Ferrieux Patterson accepted before this

Court that light fittings were not fixtures but submitted that doors, toilets and sinks were fixtures that should not have been removed from the property. Similarly, the removal of hardwood planks from the wooden deck and bridge in front of the restaurant.

37. The primary judge found that the property was in a significant state of disrepair, that most of the damage would have occurred prior to the receivership and that minimal damage had occurred in its duration. However, these were general findings and it can be inferred applied to the Cascades premises as a whole which included both lease title 387 and the adjacent lease in which the Cascades were located. Those findings can be put to one side; the onus remained on Ponatoka to prove when the items complained of were removed from the property or damaged, and by whom.

38. Mr Craig and Mr Spann denied that they or Evergreen were responsible for any damage. Mr Craig was clear that fixtures were not to be removed. His evidence was it had been a priority to fix the toilet block and that hardwood timber was taken from the existing bridge and relocated to the new bridge which after rectification of the title, is now on Ponatoka land. Mr Spann as operations manager was on the site daily, was there for the last trip from the site on 28 February 2017 and saw nothing untoward.

39. Nine witnesses gave evidence for Ponatoka. The primary judge did not make a specific credibility finding for each of those witnesses but set out their evidence in full to understand the factual matrix of events. In doing so, he gave proper consideration to the evidence of each of the claimant's witnesses. The judge's finding from that evidence was that what was taken from the site was minimal and that the claimant's evidence was unsatisfactory in relation to many aspects of the Claim. He found that the bridge had simply been relocated thus there was actually no loss.

40. The evidence named six persons employed by Evergreen as involved in the removal of items on 28 February and 1 March 2017. However, the evidence did not show that they removed all of the fixtures described in Ms Dinh's evidence. More significantly, there was no evidence that Mr Craig or Mr Spann instructed them to remove fixtures from the property. If those Evergreen employees did, they did so outside the scope of their employment and the respondents cannot be held liable for that. As for the respondents' duty of care, as the primary judge found, Mr Craig was not obliged to secure the property in a manner in which it had not been secured for at least the past decade. Ponatoka did not discharge its onus to prove when the items complained of were removed or damaged, and by whom.

41. Even if Ponatoka established when fixtures were removed from lease title 387 and by whom, it faced the insurmountable difficulty that there was no evidence to establish the value of the lost or damaged items. Jean Michel Deloubes' evidence included his quotation of the new materials that were required to be purchased to replace missing items. However, there was no evidence as to the value of the items that had been on-

site. Without such evidence, Ponatoka simply could not have succeeded in its claim for negligence and damages against the respondents.

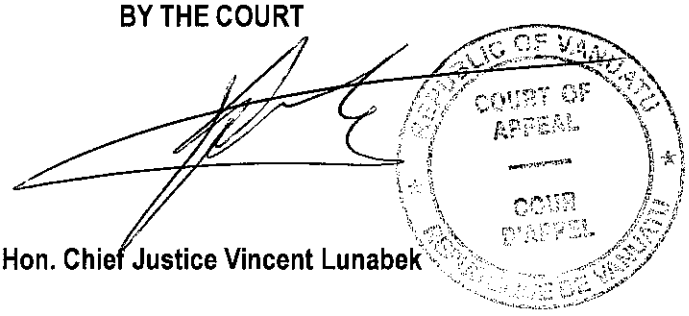
F. Result and Decision

42. The appeal is dismissed.

43. The Appellant is to pay the Respondents' costs as agreed or taxed by the Master. Once settled, the costs are to be paid within 28 days.

DATED at Port Vila, this 18th day of August 2023

BY THE COURT



Hon. Chief Justice Vincent Lunabek