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

Civil Case No. 82 of 2009

BETWEEN: FREDERICK APED
Claimant

AND: SHEFA PROVINCIAL COUNCIL
Defendant

Coram: ***Justice D. Fatiaki***

Counsel: *Mr. J. Kilu for the Claimant*
Mr. J. Tari for the Defendant
Mr. A. F. Obed for the State (at the Court's invitation)

Date of Decision: *26th August 2010*

JUDGMENT

Chronology

- April/May 1983 – The Defendant Council established its Sub-District Office on the Claimant's land in Rovo Bay occupying an area of a little over 6 hectares with the knowledge and approval of the Claimant's father Frederick August for an annual land rental payment of VT100,000 per month. No formal lease agreement was entered into by the parties;

- On 2 February 2007 a lease over the land was registered in favour of the Claimant Frederick Aped;

- Payment over the 24 years of occupation by the Defendant was very irregular and non-existent at times and finally, on 28 June 2007, the Defendant entered into an agreement with August Frederick acknowledging rental arrears of VT12 million. The monthly repayment was agreed at VT100,000 "*for rental arrears only*" and any prospective rental payments was to be made "*only upon registration of a new lease in favour of the Defendant*" ('*the 2007 agreement*'). No new lease was registered in favour of the Defendant.

- By an agreement dated 27th August 2008 between the parties '*the 2007 Agreement*' was revoked and the Claimant accepted a lump sum payment of VT2,330,000 in full and final settlement of the VT12 million arrears of rent owed by the Defendant. As for future rental repayments Clause 4.2 of the new Agreement provided that: "*Any claim for annual land rents from*

2007 will be dealt with by Mr. Frederick August and Shefa Provincial Council" (*'the 2008 Agreement'*).

- Since that lump sum payment in 2008 the Claimant has been paid by the Defendant Council a total of VT300,000 for its continued occupation of the Claimant's leasehold.

- There have been on-going unsuccessful attempts by the Claimant to conclude an agreement in terms of Clause 4.2 (above) for the payment of a monthly rental by the Defendant from 2007. These attempts have included written letters and several personal approaches by the Claimant culminating in the Defendant obtaining a restraining order against the Claimant from the Magistrates Court in January 2009 and then seeking police assistance to have the Claimant removed from its office premises in Port Vila.

- As a last resort on 14 May 2009 the Claimant through his solicitors served an Eviction Notice on the Defendant Council requiring it to vacate the Claimant's land by 31st May 2009. The Defendant Council did not comply.

- On 2 July 2009 the Claimant filed a claim against the Defendant in the Supreme Court seeking an eviction order and mesne profits from 1 January 2007 together with interest at the rate of 10% per annum.

- On 26 July 2009 the Defendant filed a defence which admits its occupation of the Claimant's land but asserts that any delay in agreeing a rental amount, presumably under Clause 4.2 (above), was caused by the Claimant in not providing a land rental valuation report that it had requested from him. It also counterclaimed a sum of VT38,270,000 being the value of improvements it had made on the Claimant's land over the 26 years of its occupation. There is no hint or suggestion by the Defendant Council in its defence, of a right to occupy the Claimant's land.

- On 18 August 2009 the Claimant filed an application for Summary Judgment on the basis that the Defendant had no real prospect of defending the claim based on its pleaded admissions to the following:-

  "*(i) That the Claimant is the registered proprietor of the lease of the land;*

  (ii) That it occupies part of the land;

  (iii) That it has paid rent to the end of 2006 payment being made on 27 August 2008;

  (iv) That it has continued to occupy the land since the end of 2006 and paid only VT200,000 although they have really paid VT300,000 for rent for the whole period making the payment prior to the end of January 2009;

(v) *That the previous monthly tenancy at the rent of VT100,000 per month was agreed to be replaced by a new Agreement made on 27 August 2009;*

(vi) *That the new Agreement provided for the parties to negotiate to resolve outstanding land rent since the end of 2006 and negotiate a new tenancy agreement;*

(vii) *That no new tenancy agreement was negotiated;*

(viii) *That an eviction notice was served on 14 May 2009;*

(ix) *That the Defendant has not left the land.*"

- On 9 October 2009 the Defendant filed an application to amend its defence and counterclaim on the basis that "*... some rights that should have been included in the Defence and Counterclaim were ... not included in the first version.*" The proposed amended defence seeks to qualify the earlier unqualified admissions to paragraphs 7 and 8 of the claim which refers to '*the 2008 Agreement*' and to the failure to resolve the issue of rental under Clause 4.2. In relation to its Counterclaim the amendment asserts "*an equitable interest over the assets created by the Defendant on the land.*" I confess that such an amendment adds little to the existing counterclaim and clarifies nothing;

- On 9 October 2009 the Defendant filed its response to the Summary Judgment application reasserting that all payments it made to the Claimant and his predecessors in title were for "*annual land rent*" and not "*rent paid to a proprietor*" under a lease or tenancy. The Defendant admits however that it has continued to occupy part of the Claimant's leasehold since '*the 2008 Agreement*'.

- On 19 February 2010 both applications were heard and judgment was reserved. However during the course of the argument it became clear that the parties (and Government) had exchanged correspondence over the matter of an agreed monthly rental and, in fact, some payments had been made by the Defendant to the Claimant.

- On 23 February 2010 defence counsel at the Court's direction filed a sworn statement annexing copies of the relevant correspondence including:-

    - A letter dated 7 January 2010 from the Claimant's solicitor to defence counsel;

    - A letter dated 9 February 2010 from the Claimant to the Secretary General of the Defendant Council;

- A letter dated 19 February 2010 from the Claimant to the Secretary General of the Defendant Council revoking his letter of 9 February 2010 (which was delivered after the Court had heard the applications).

The Court also received from defence counsel at the hearing of the application, copies of the following letters:-

- A letter dated 5 January 2010 from the Director of Lands Survey to the Minister of Lands;
- A letter dated 17 February 2010 from the Director of Lands Survey to the Secretary General of the Defendant Council;
- A letter dated 18 February 2010 from Defence counsel to Claimant's counsel;

Discussion

A cursory examination of the above letters reveals the sudden new found urgency by the Defendant Council and the importance of the present proceedings. The land in question presently houses the Defendant Council's Sub-District offices as well as what might be described as the business and government centre for Epi Island ('*the centre*'). Amongst its other occupants are the National Bank of Vanuatu, the Police Station, Market House, Court Building, Telecommunication building, Rural Water Supply offices and sporting facilities. Closure of such a centre will seriously and adversely disrupt the delivery of essential commercial and government services to the people of Epi Island and should be avoided if at all possible.

The letters also reveals that steps have only been taken since March 2010 for the Government to compulsorily acquire the land occupied by the centre under the Land Acquisition Act [CAP. 215]. The relevant acquisition notices have been issued and covers all of the land comprised within the Claimant's registered lease No. 10/1113/001. This is confirmed in a sworn statement deposed by a valuation officer of the Lands Department.

There is not the slightest doubt in my mind that the compulsory acquisition of the Claimant's leasehold is the surest and most appropriate process for resolving any future disputes over the land and for ensuring the continued survival of the centre and the uninterrupted delivery of essential services to the residents of Epi Island.

Having said that however I am equally satisfied that the Defendant Council has not been diligent or fair in its dealings with the Claimant in finalizing and agreeing a monthly rental for the area it occupies within the Claimant's leasehold since 2006 and, for which, it has itself been receiving rental from the tenants of its buildings erected on the Claimant's leasehold.

In this regard the Claimant's counsel sought by letter dated 21 May 2010 a monthly payment of VT250,000 for outstanding rent payments. This was agreed

to and paid out by the Defendant Council on 26 May 2010. The amount was then unilaterally reduced to VT100,000 per month in a Council resolution made on 30 June 2010.

Barely a week after that unilateral reduction, the Defendant Council in an article published in a local daily, publicly announced its purchase of three (3) new Toyota Hilux Double Cabin vehicles at a total cost of VT8 million. Not surprisingly, this public display of seemingly profligate spending on the part of the Defendant council prompted the Claimant to immediately renew his application for the eviction order.

After considering the pleadings, all the sworn statements and the submissions of counsel for the Claimant and defence counsel I am reluctantly driven to the firm conclusion that the Defendant Council has not raised an arguable defence to the Claimant's claim for an eviction order, and accordingly, an eviction order will issue forthwith against the Defendant Council. I am concerned however to limit the disruption that this order will inevitably have on the Defendant Council's operations as much as possible.

I am also satisfied that an interim order for mesne profits adopting the figure of VT100,000 per month and back-dated to 2 February 2007, must be made in favour of the Claimant. Such sum to bear interest at 5% per annum back-dated to 2 February 2007 and is to be paid by monthly installments of VT250,000 until fully repaid.

In conclusion, the orders of the Court are:-

(1) **Eviction order** to issue requiring the Defendant Council to vacate the Claimant's leasehold title No. 10/1113/001 at Rovo Bay on Epi Island. Execution is stayed however for 4 months to enable the compulsory acquisition of the Claimant's leasehold to be finalized or an agreement concluded by the parties on the monthly rental to be paid for the Defendant's continued occupation of the Claimant's leasehold pursuant to Clause 4.2 of '*the 2008 Agreement*', whichever occurs first;

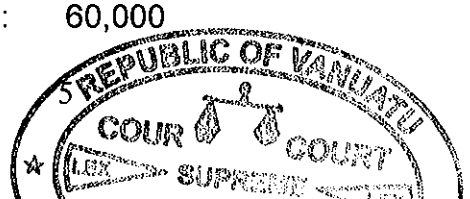
(2) **Mesne profits** (calculated using a monthly rental of VT100,000);

Feb. 2007 – Jan. 2008:	1,2m
Feb. 2008 – Jan. 2009:	1,2m
Feb. 2009 – Jan. 2010:	1,2m
Feb. 2010 – Aug. 2010:	0,7m

	VT4,3 million

(3) **Interest** (@ 5% per annum back-dated to Feb. 2007)

Feb. 2007 – Jan. 2008:	60,000
Feb. 2008 – Jan. 2009:	60,000
Feb. 2009 – Jan. 2010:	60,000



Feb. 2010 – Aug. 2010: 35,000

VT215,000

Judgment is accordingly entered in favour of the Claimant in the sum of VT4,515,000 payable at the rate of VT250,000 per month until fully paid with the first payment due on 27 September 2010;

(4) **Costs** which are summarily assessed at VT200,000.

For the sake of completeness I decline the Defendant's application to amend its counterclaim and I also direct that copies of this judgment be served on the State Law Office as well as the Director of Lands.

DATED at Port Vila, this 26th day of August, 2010.

BY THE COURT

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D. V. FATIAKI
Judge.

REPUBLIC OF VANUATU COUR COURT SUPREME LEX REPUBLIQUE DE VANUATU