

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

Civil
Case No. 16/1227 SC/CIVL

BETWEEN:

Don Ken

Claimant

AND:

The Republic of Vanuatu

Defendant

Date of Hearing: 31 August 2020
Date of Judgment: 18th November 2020

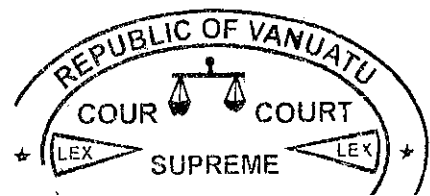
Before: Justice Oliver A. Saksak

Counsel: Willie Kapalu for the Claimant
Hardison Tabi for the Defendant

JUDGMENT

Introduction

1. The Claimant's claim is for the sum of VT11,791,845 being monies he spent on repair works to a Government Ministerial House situated at Collardeau, Port Vila. The claim is for the period from March 2014 through 30 June 2015. He claims a further VT1,500,000 as general damages with interest at 5% per annum, and standard costs.
2. The defendant denies liability and says the claimant is not entitled to the reliefs he seeks. The defendant counter-claims against the claimant for rents and mesne profits in the sum of VT1,875,720. This amount is the balance of rents of 15% for 6 years and 4 months from 26 June 2011 to 16 November 2017. The total amount of not claimed is VT2,681,280 reduced by VT805,560 being for 22 months 25 days when the claimant occupied a Ministerial portfolio from 2011 to 2016. The defendant claims for costs on an indemnity basis.
3. This Court issued its first judgment on 12 October 2018. The defendant appealed successfully. On 19 July 2019 the Court of Appeal returned the case for a rehearing.



4. The Court of Appeal raised two specific issues for the Court to embark further on and to determine. These were (a) whether the claimant and defendant had signed any Residential Tenancy Agreement, and (b) whether there was any obligation imposed on the claimant to pay rents at 15% from his monthly salaries.

Evidence

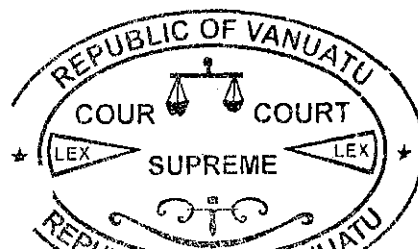
5. The claimant filed further evidence by sworn statement on 1st October 2019.
6. The defendant filed a sworn statement from Harold Allanson on 16 April 2020 and another from Stephen Sam on 18 June 2020.
There were agreed into evidence. There was therefore no need for a trial hearing. Counsel agreed to a time-table to file written submissions.

Submissions

7. The claimant filed written submissions on 11 August 2020 and responding submissions to the submissions of the defendant on 25 August 2020.
8. The defendant filed written submissions on 19 August 2020.

Issues

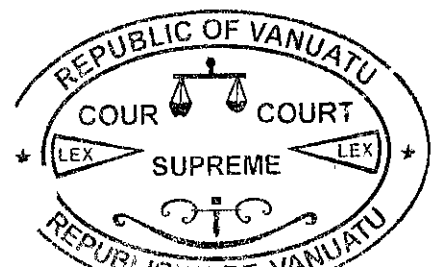
9. The claimant raised the following issues:
 - (a) Whether or not there existed a Residential Tenancy Agreement executed by the claimant and defendant requiring a monthly deduction of his salaries at 15%?
 - (b) If there was such an Agreement, how much should the claimant have to pay to the defendant for the relevant period he occupied the Government House?
 - (c) If there was no such Agreement, could the Court still order the claimant to pay rents for the relevant period of his occupation?



- (d) Was there a Government Remuneration Tribunal (GRT) Decision on rentals of Government Houses at the relevant time requiring the claimant to pay such rental?
- (e) Can the claimant be reimbursed for expenses post 20 May 2015?

Discussion

10. The facts are stated in paragraphs 5, 6 and 7 of the first judgment dated 12 October 2019 and I need not repeat them. There is little or no dispute as to those facts.
11. The only factual issue was whether the claimant had permission to repair the House and that he would be reimbursed. In the first judgment I discussed the evidence of Vidal Taiwia in paragraphs 20 and made 21 specific finding in paragraph 21. I maintain these findings. Following are the reasons. The evidence of Vidal Taiwia lacked credibility. I have for the purposes of this judgment reviewed the records and notes of the examination of Vital Taiwia. I refer only to few examples in his Examination-In-Chief and in cross showing he was evasive and inconsistent: -
- (a) The first is when Mr Kalsakau led him as follows:
- Q: "Don Ken came as witness. He said he occupied House in 2011 to 2015. He did work on the house. He said Vidal Taiwia told him to do the works and that the Government to refund him - what do you say to that?"
- Ans: As of today, I am no longer a civil servant. If there are records with government, I can't recall at this time.
- (b) Q: "Witness said they were with Don Ken when he met you and you told him to do the work and government would refund him?"
- Ans: When I went to meet him, we talked about the house. I told him that there should be report based on invoices – 3 invoices to be seen, to be certified for works to be done so that refund could be possible. But it did not happen."
- (c) Q: "Don Ken said you never told him about the policy – what do you say?"
- Ans: I think that Don Ken was aware about the policy."
12. In all 3 instances Vidal Taiwia did not answer the specific questions asked by Mr Kalsakau. It was obvious he knew the answers but evaded answering them directly and giving different answers.
13. In cross-examination Mr Boar asked Vidal Taiwia the following –



- (a) Q: "In 2011 Don Ken, a messenger and P/A (Political Advisor) went to see you about a house?
Ans: Yes"
- (b) Q: "At your house at Blacksands Don Ken told you he had taken steps to repair house – on Sunday as you said.
Ans: No"
- (c) Q: "You told him to do the work and you would know later?
Ans: Yes"
- (d) Q: "In 2011 – 2012 were you visiting the house?
Ans: Yes, as I said earlier, every day I did.
Q: You saw repairs done by Don Ken – You never wrote a letter to Don Ken to tell him to stop?
Ans: There were some superior that I should abide by their instructions."

14. The answers to the questions in (a) and (b) are contradictory to each other. And the answers to (d) is evasive.

15. It was due to these inconsistencies and evasive answers that the Court did not believe Vidal Taiwia was a truthful witness thus leading the Court to find there was a verbal agreement authorising the claimant to do repairs at his own expense, to be later reimbursed by the Government.

16. Some further evidence from Vidal Taiwia showing he authorised the claimant to reside in the House and to do the repair works to be reimbursed. Mr Boar in cross-asked:

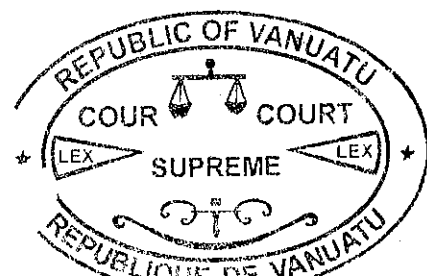
Q: "As Minister of State, no allocation. You told him to go into the house so he did?"

Ans: I did not tell him to go into the house – Housing Committee does that but did not.

Q: I put to you that you are telling lies – Don Ken went after you to write a letter?"

Ans: No. I was the only person working at the time responsible for 600 houses."

17. From all that evidence it was clear to me there was no Housing Committee. Vidal Taiwia as Housing Officer, as he admitted, was solely responsible for making decisions at the time resulting in the claimant taking occupation and doing repair works as he did. Mr Taiwia could not possibly shift responsibility for those decisions to other officers. There were none except himself.



Evidence by Harold Allanson

18. He filed a sworn statement on 16 August 2020. He annexes an Assessment Report by Rocky Adams as "HA1" made following a site inspection in or about June 2019. Mr Kapalu submitted the statement by Harold Allanson is irrelevant. I accept that submission. It irrelevant as to the issue of whether the works done by the claimant was a result of poor workmanship. It was done about 2 years after the claimant had vacated the premises. Mr Allanson was not the maker of the Assessment Report and its reliability is therefore in question, although Mr Kapalu did not raise any objections to the report.

Residential Tenancy Agreement

19. I now return to consider the issues raised. The first is whether or not there existed any Residential Tenancy Agreement between the claimant and the defendant. It is commonly accepted by both the claimant and the defendant there was no such an agreement. Neither the evidence of Harold Allanson and Stephen Sam nor of the claimant himself depose to or show any such agreement.

20. The defendant accepts at paragraph 77 of their written submissions that according to the Official Salaries Act the Minister is entitled to a Government rent free house. However they went further to submit that in order for the Minister to get that rent free house. He had to enter into the Residential Tenancy Agreement as stipulated in the Housing Policy.

21. With respect that submission cannot be correct. The relevant part of the Housing Policy is Part B and clause 4 which provides:

"B. Government Housing

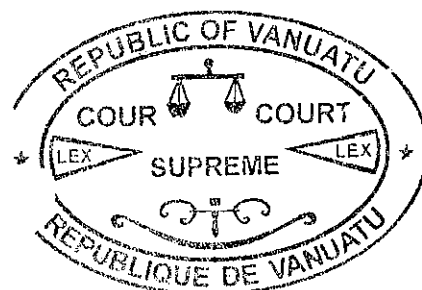
4. Entitlement and Eligibility for Housing.

(a) Certain statutory office holders, teachers, police and permanent employees employed in the Vanuatu Public Service are either entitled or eligible for Government Housing.

Entitled Officers and Entitled Employees

(b) Entitled Officers and Entitled Employees include:

- President
- Prime Minister
- Ministers
- Constitutional Post Holders



- Directors
- Managers and other post holders subject to PSC's approval
- Senior positions (including Police, Teachers and State Law Office employees appointed on executive level
- Overseas recruited employees subject to section 4(c)
- Locally recruited employees subject to section 4(d)

The entitlements of the President, Prime Minister and Ministers are provided for in the Official Salaries Act CAP 168 and are not the subject of this Housing Policy.” (My emphasis)

22. Clause 7 of the Housing Policy states:

"7. Residential Tenancy Agreement.

- (a) All Government employees (entitled and eligible) who occupy Government houses are required to sign a Residential Tenancy Agreement in accordance with this policy. No stamp duty is applicable.
- (b) All tenants are required to comply with the Residential Tenancy Agreement and its terms and conditions.
- (c)
- (d)
- (e) Tenants shall not carry out any structural alterations or modifications unless the Public Works Department has granted approval. The responsible officer must ensure that tenant alternatives or modifications of Government house are of an acceptable standard. Any addition to the structure become the property of the Government and no compensation will be paid to the tenant on termination of the Residential Tenancy Agreement and occupancy. The costs of any repairs necessitated by the removal of such items shall be charged to the tenant."

23. The Official Salaries Act is an Act of Parliament whereas the Housing Policy is only a set of Policies about Government housing. The Official Salaries Act overrides the Policy. That being so the claimant in his position as State Minister did not have to execute a Residential Tenancy Agreement. The Official Salaries Act, as amended from time to time, provides for his legal entitlement to a rent-free house. But that must be only for the period the claimant held a ministerial portfolio.

Evidence of the claimant's Ministerial Positions

24. From the evidence of Stephen Sam, the claimant held Ministerial positions from 26 June 2011 as Minister for Ni-Vanuatu Business Development. There is no evidence of his removal as such until 15



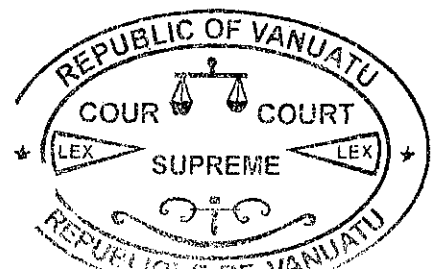
May 2014 when he was appointed as Minister for Youth and Sports. He was removed as such on 5 May 2015. He was appointed again on 22 October 2015 as Minister for Infrastructure and Public Utilities until 24 November 2015 when Parliament was dissolved. He was appointed again on 10 November 2018 as Minister for Justice and Community Services. There is no evidence of the time he ceased to hold that Ministerial position.

Notices To Quit

25. There was evidence from the defendant that the claimant was issued with 4 separate notices to vacate the House. These are discussed in paragraph 17 of the first judgment dated 12 October 2018. That is not contested by the claimant. And the only possible explanation for his non-compliance with the notices can be inferred from his multiple appointments as Minister of State from 26 June 2011 until Parliament was dissolved on 24 November 2015.

26. Despite the issuance of 4 notices to vacate, the defendant and its agency did nothing to enforce the notice. Clause 13 of the Residential Tenancy Agreement provides for "Termination of Government Housing Tenancy:

- (a) If an employee ceases to be entitled or eligible and is occupying a Government House, the tenancy shall be terminated under the provisions of the Residential Tenancy Agreement.
- (b) Eligible employees who occupy a Government House shall be given up to three (3) months to leave the house whenever the house is required for other purposes.
- (c) A tenancy will cease upon an employee ceasing to be permanently employed.
- (d)
- (e)
- (f) If an employee or tenant fails to vacate a Government house within the required time from a Notice to Quit letter must be issued giving the tenant notice that the house must be vacated within one month from the date of the letter. If the employee or tenant remains in the house after this date the employee or tenant becomes an illegal occupant and legal proceedings should be invoked."
(My emphasis)



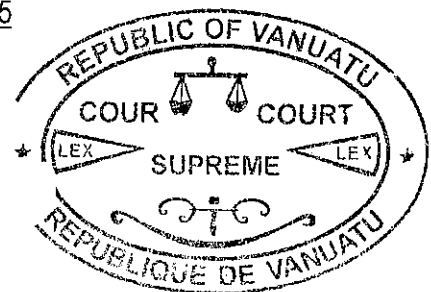
Findings

27. The defendant took no legal proceedings in accordance with Clause 13 (f) of the Housing Policy to enforce any of the 4 notices issued. The defendant only filed a counter-claim on 9 August 2016 after the claimant had filed his claims on 15 April 2016.
28. Moreover, the claimant was an entitled officer. As such if the Residential Tenancy Agreement was applicable to him, he was entitled to 3 months instead of 1 month or 14 days he was given to vacate the house in the Notices to Quit sent to him by the defendant.
29. That being so, in my view the notices issued on 2 May 2013, and 12 November 2013 were invalid. The only valid notice may have been that issued by Judith Melsul on 30 March 2016. This was a late notice. The claimant ceased to be a Minister on 24 November 2015 when Parliament was dissolved. He would as an entitled officer have been entitled to 3 months which ended on 24 February 2016. In my view the claimant became an illegal occupant only after 24 February 2016. No rents prior to this date is claimable by the defendant.

The Letter dated 20 May 2015

30. The letter dated 20 May 2015 was not a Notice to Quit. It was a letter advising the claimant to cease doing any structural developments on the house. This date therefore must be the cut-off date on which the claimant is to be entitled to recover any repairs and renovation costs he incurred from 31 March 2014.
31. The claimant's valid claims therefore are –

(a) From 31 March 2014 to 12 December 2014 =	VT485,854
(b) From 21 November 2014 to 19 December 2014 =	VT361,611
(c) From 27 March 2015 to 8 May 2015 =	<u>VT727,859</u>
Total	= <u>VT1,138,055</u>



32. The claimant's claims from 22 November 2014 to 30 June 2015 are disallowed. These relate to the period he was clearly advised not to continue with any structural developments in accordance with the Letter of 20 May 2015.

Rents

33. The claimant continued to occupy Government House from 24 February 2016. He was no longer an entitled officer or an eligible employee. The Official Salaries Act was no longer applicable to him after that date. He was therefore obliged to have entered into a Residential Tenancy Agreement but did not. That there was no such agreement is immaterial. The defendant in my view was entitled to rentals from 24 February 2016 until 4 October 2017 when an eviction order was successfully obtained by the defendant requiring the claimant to leave the House.

Findings on the Issues

34. Having made these analysis and findings, I answer the issues as follows: -

- (a) There was no Residential Tenancy Agreement between the claimant and the defendant during his terms as a Minister and even after his terms had ended as Minister.
- (b) Despite there was no such agreement the defendant was entitled to rentals pursuant to its Housing Policy for the periods the claimant had not been an entitled officer or an eligible employee. The amounts will be determined from 24 February 2016 to 4 October 2017.
- (c) The answer to this issue is "Yes".
- (d) The answer to this issue is "No."

Amount of Rents

35. I accept the defendant's submissions that the calculation should be based on the claimant's annual salaries at the time which was $VT2,822,400/12 \text{ months} = 235,200 \div 2 = 117,600$ per fortnight. 15% of this amount is VT17,640. The monthly rents were therefore $VT17,640 \times 2 = VT35,280$.



36. From 24 February 2016 to 4 October 2017 the claimant had been residing without authorisation for a total of 19 months. The rents he should have paid was VT35,280 x 19 months = VT670,320.
37. The amount of VT670,320 shall be set off against the sum of VT1,138,055 leaving the balance payable to the claimant for costs of repairs to be VT467,735.

The Result

38. The claimant has judgment in his favour for costs of repairs but at a reduced sum of VT1,138,055. His claim for general damages at VT1,500,000 is dismissed for lack of evidence.
39. The defendant is successful in their counter-claim for rents and mesne profits in the sum of VT670,320 to be set off against the sum of VT1,138.055 due to the claimant for costs of repairs as allowed under this judgment.
40. I order the defendant to pay the balance of VT467,735 to the claimant within a period of 28 days from the date of this judgment. He is entitled to interest of 5% per annum on VT467,735 from the date of filing his proceeding to date of judgment.
41. There will be no order as to costs. Each party is to bear their own costs.

DATED at Port Vila this 18th day of November, 2020.

BY THE COURT


OLIVER A. SAKSAK
Judge

