IN THE SUPREME COURT OF

THE REPUBLIC OF VANUATU

(Civil Jurisdiction)

Civil Case No. 21/1438 SC/CIVL

BETWEEN: **Blue Springs Ever Evergreen Real Estate Limited**

Claimant

AND: **Airports Vanuatu Limited**

Defendant

Date of Hearing	5th December 2022
Further Submissions:	6th December 2022
Before:	Justice S M Harrop
Distribution to:	Mr. Rongo for the Claimant
	Mr N. Morrison for the Defendant
Date of Judgment:	9th December 2022

JUDGMENT

Introduction

1. The defendant has for a number of years had a navigation tower in a fenced-off area of approximately 100 m2 on land contained within leasehold title 12/0544/017.

2. In August 2018, with the consent of the lessor custom owners, a transfer of the leasehold title from Mary Jane Dinh to the claimant was registered.

3. In a letter to the defendant dated 26 February 2021 the claimant's director Mr Han stated that the claimant would not sign any lease agreement for the tower and

demanded that the defendant pay VT 150,000 per month for "rental" from 1 August 2018 "as you occupied illegally". A total of VT 4,650,000 (33 months) was sought. He also demanded that the tower be removed by 1 March 2021 and threatened further action if that did not occur.

4. The claimant apparently did not respond and a further letter dated 22 March 2021 from solicitors instructed by the claimant was equally ineffective.

5. The claimant issued this proceeding on 6 May 2021.

6. Paragraph 2 of the claim states: "*The claimant brings an action against the defendant for an outstanding rental payment of the defendant's tower which is located inside the claimant's lease title, at an amount of VT 4,950,000*".

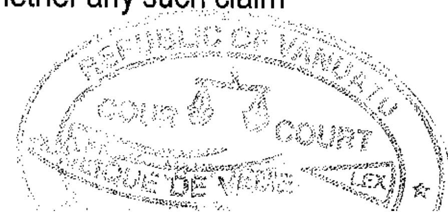
7. Paragraph 5 of the claim states: "*the defendant have (sic) been utilising the space without any rent being paid whatsoever and have not made a positive attempt to meet Mr Hans Q Han as the Claimant's Director to rectify the position and to bring rental payments up to date or enter into a formal agreement for rental or alternatively to move the Tower off the property by paying all rentals to date*".

8. The defendant, in its amended defence dated 2 December 2022, denies that any contractual arrangement for payment of rental has ever been entered into by the defendant and says in any event the amount sought for "rental" is unreasonable and accordingly is not agreed to. It says the disputed area relates to an essential navigational installation as referred to and defined under the Civil Aviation Act CAP 258. The defendant says it has never been required to pay previous lessees for the presence of the tower. While the claim is denied in full the defendant pleaded it was "ready and willing to mediate a resolution with the claimant".

9. By way of further or alternative defence the defendant "claims protection for the location within the subject lease title of the navigation tower under sections 17(c) and/or (g) of the Land Leases Act CAP 163.

Issues

10. Accordingly, the three main issues I need to determine in this judgment are: (a) whether the claimant has established any cause of action entitling it to claim from the defendant some form of rental or other payment; and, if so; (b) whether any such claim



is affected or extinguished by s17(c) or 17(g) of the Land Leases Act?; and, if not; (c) whether the claimant is entitled to judgment against the defendant for the VT4,950,000[1] it claims (33 months at VT 150,000 per month), or some different sum?

Evidence

11. The evidence for the claimant was contained in sworn statements of Mr Han dated 6 May 2021 and 30 November 2021, supplemented briefly at trial. He explained, with reference to a development masterplan dated 23 October 2019, that the tower is on a part of his land which "is absolutely vital to my company (sic) proposed development of the area and is therefore of substantial value to my company". It is the highest point of the land in the leasehold title. The intention is that a water supply facility for a substantial intended subdivision would be placed where the tower is. In evidence at trial Mr Han reiterated how important this part of the land was to his company's proposed subdivision and how much it would cost to make alternative arrangements for the supply of water, which is necessary for the subdivision to proceed.

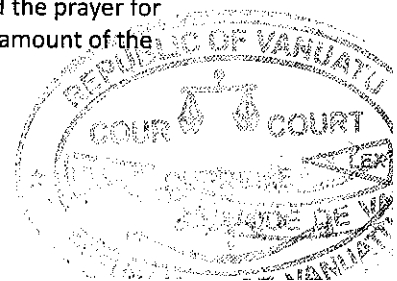
12. He added that if the tower remains in place it would detrimentally affect the value of the sections in the proposed subdivision.

13. Mr Han contends that because of the substantial value to his company of the land on which the tower sits, the value of any payment for use of that land by the defendant must reflect that and accordingly must also be substantial. That is why he considers a rental payment of VT 150,000 per month entirely reasonable.

14. Despite the importance of the land on which the tower sits to his development plan, Mr Han conceded that he had not visited the land prior to purchasing the lease and was not even aware, until later when the development plan was prepared, that the tower was on the land.

15. The defendant called as its sole witness Mr Richard Dick, a registered valuer from Vanuatu Property Appraisals. He had filed a sworn statement on 16 September 2021 attaching a report he had prepared as to the fair rental value of the use of the land on which the tower sits. He considered, partly with reference to payments Digicel has agreed to pay landowners for its cell phone or telecommunications towers at four

[1] There is a discrepancy between paragraph 2 of the claim where VT 4,950,000 is sought and the prayer for relief where VT 4,970,000 is sought; I infer from the evidence that the former is the correct amount of the claim because that is VT 150,000 x 33 (months).



locations, that a fair market rental value would be around VT200 per m2, which works out to VT 30,000 per annum. That equates to VT 2,500 per month, substantially less than the VT 150,000 per month which the claimant seeks.

16. Judging by the photographs included in Mr Dick's report, the tower is of considerable height and readily visible from the sealed road adjoining the leasehold land. It is also clearly fenced off with security fencing.

17. At the conclusion of the hearing, I reserved my judgment and provided the opportunity to the parties to make written submissions which were filed promptly.

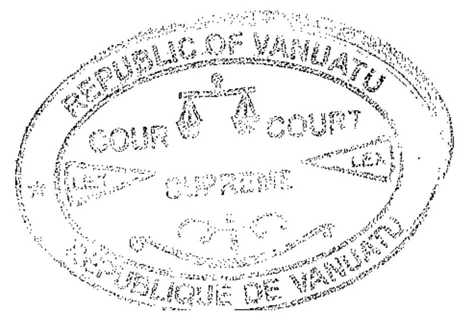
Submissions

18. Mr Rongo's submissions do not identify the legal basis for the claim. He describes the claim as "an action against the defendant for an outstanding rental payment of the defendant's tower which is located inside the claimant's lease title at an amount of VT4,950,000".

19. His submissions emphasise the points about the claimant's case which I have already summarised: that the claimed rental payment of VT150,000 per month is entirely reasonable having regard to the importance of the site to the claimant's proposed development and the cost of an alternative water supply arrangement. At the conclusion of his submission Mr Rongo says: "In all fairness this court must award an amount that is reasonable and fair enough to the claimant and an amount that will reflect the claimant's situation concerning the claimant's proposed development plan if this court ruled that the defendant tower must remain on the claimant's lease title".

20. I note there is no claim in this proceeding for removal of the tower, although that has certainly been threatened in correspondence and there is a clear implication in paragraph 15 of Mr Rongo's submissions that if the claim for payment does not succeed "then the claimant has no other options but to use his power under section 15 of the Land Leases Act to remove the defendant (sic) tower".

21. Mr Rongo's submissions do not address the expert evidence of Mr Dick as to an appropriate objectively-assessed rental nor do they address the alternative defence based on s17 of the Land Leases Act.



22. As to the latter, I note and take into account as part of the claimant's case Mr Han's evidence in his sworn statement of 13 January 2022 where he said: "*... I understood that section 17C gives the defendants(sic) an overriding interest. However, as a legally registered proprietor, I will refer to section 15 of the Land Leases Act which gives me all the rights over my property and... I will maintain my position that the defendant must rent the tower from me since their tower is located right inside my property... I understand that section 17 gives the defendant an overriding interest but section 17 was just there for the protection of the navigation tower but section 15 gives me all the rights as a proprietor to say that I will accept that for the tower to be protected under section 17 but it must be rented from me or else I will remove the tower under section 15 which gives me all the rights over my property... Section 17 doesn't say that the navigation tower will be there for free*".

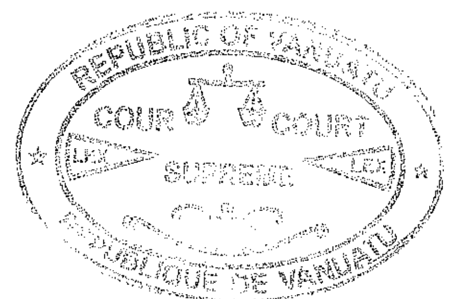
23. For the defendant Mr Morrison says the several references in the claim to "outstanding" or "unpaid" rental indicate the claim appears to be for breach of a contract to pay rent. He then submits: "The problem with that claim is that there is no agreement to sue on. Rental payment was never agreed but always refused. There can be no breach giving rise to damage when there is no agreement."

24. Accordingly, Mr Morrison submits the claim for damages for breach of contract must be dismissed, there being no contract to sue upon.

25. In the alternative, Mr Morrison submitted, as was conceded by Mr Han in his statement of 13 January 2022, that s17(c) of the Land Leases Act provided an overriding interest in the land and therefore provides a defence to any claim for payment.

26. In the event that, contrary to his other submissions, the court finds some payment was due, Mr Morrison submitted that Mr Dick's evidence, which was unchallenged, meant that the most that could be awarded was at the rate of Vt30,000 per annum.

27. Mr Morrison sought costs, asserting that the claim should never have been brought and that it was a hopeless case, pursued despite clear advice from the bench about its shortcomings. He submitted the level of costs should reflect that.



Discussion and decision

28. The first, and fundamental, issue is to determine what, if any, legal cause of action is pleaded in the claim.

29. I accept Mr Morrison's submission that there is none which is clearly pleaded. On the face of it, the claim is for rental which implies an agreement to pay rent which has been breached. There was no such agreement here. Indeed ironically in his own letter of 26 February 2021 Mr Han expressly said that the claimant would not sign any lease agreement for the tower. His view clearly was that there was no right for the tower to be there.

30. In the discharge of my obligations under Rules 1.3 and 1.4 of the Civil Procedure Rules, I drew Mr Rongo's attention to this pleading flaw. In paragraph 2 of my Minute of 22 November 2022 I said: "*The current claim does not clearly plead the legal basis on which the claimant says "rent" should be paid for the use and occupation of the area of land on which the navigation tower sets. Mr Rongo is to file and serve an amended claim by 5 pm on Friday, 25 November 2022.*"

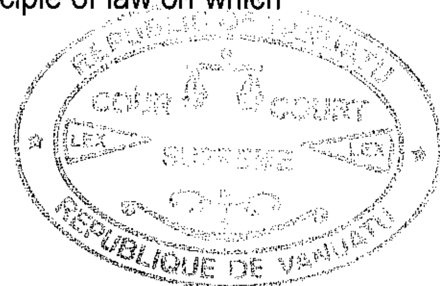
31. Surprisingly, when I enquired on 30 November why no such amended claim had been filed, I was informed that the claimant wished to proceed to trial on the basis of the existing claim.

32. In my Minute of 30 November 2022 in response I observed: "*This of course is its right but the claimant should be aware of the risk that entails; I expressly pointed out at the conference on 22 November and recorded this in my Minute that there appears to be no legal basis pleaded on which the claimant says that "rent" should be paid for the use and occupation of the area of land on which the navigation tower sits.*"

33. Still no amended claim was filed.

34. Rule 4.2 of the Civil Procedure Rules provides that each statement of the case must... "*(c) identify any statute or principle of law on which the party relies, but not contain the legal arguments about it.*"

35. The claimant's claim does not identify the statutory or other principle of law on which it relies to justify the court granting the relief it seeks.



36. In effect the claimant says to the court: "the defendant has a tower on my land which stands in the way of my plans to develop it. It refuses to pay me anything for its use of that piece of my land. That is not fair and I want the court to recognise that by ordering that the defendant pay a fair "rental" for it, assessed by reference to the value of that piece of land to me".

37. This is essentially an appeal to the court on moral grounds to order a fair payment by way of "rental". But this is a court of law and judgment can only be given based on an established legal cause of action. It is quite wrong for a judge, in the face of what the judge may consider personally to be a morally strong but legally homeless claim, to search for a legal vehicle to allow him or her to meet the moral justice of the case, as perceived by the judge. Doing so goes beyond the proper role of a judge and would involve a breach of natural justice because the judge would then be determining the case on a basis of which the defendant has not had fair notice, either from the claimant in his pleadings or from the judge in the course of his or her deliberations.

38. In *Republic of Vanuatu v Emil*[2] the Court of Appeal allowed an appeal against a judgment where the Supreme Court judge had dismissed Mr Emil's claims for unlawful arrest and false imprisonment yet nevertheless awarded exemplary damages in his favour in the sum of VT 2 million. The Court of Appeal observed[3]: "*What appears to have happened in the Supreme Court is that despite the court having rejected all of the causes of action pleaded by the claimant, it independently decided, notwithstanding that, to give tangible effect to its expression of "concern" about some of the conduct about which evidence was given at trial. But that conduct was irrelevant, because there was no pleading relating to it, let alone a properly particularised one*".

39. The Court further stated[4]: "*It is not open to a court to make findings and awards of damages on issues that are not raised on the pleadings, no matter how much the court may be "concerned" about evidence which emerges at trial if it does that, a fundamental unfairness in breach of natural justice occurs because the defendant has had neither notice from the claimant and is pleadings, nor from the court, of the matter being an issue. He therefore does not have a fair opportunity to file and be heard in support of his defence.*"

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[2] Civil Appeal Case No. 45 of 2014; judgment given on 8 May 2015

[3] At paragraph 26

[4] At paragraph 32

40. Precise and focused pleadings, as required by Rule 4.2, are essential to the fair determination of claims. Recently, in *Nalpuis v Buletare & others*[5], the Court of Appeal has emphasised this[6]: "*The matters to which we have referred underline the importance of claimants pleading their claims properly. An insistence on proper pleading is not merely a matter of technicality or form for its own sake. Pleadings serve an important function in the fair conduct of litigation. One of their functions is to state with sufficient clarity the case which must be met by the defendant at the trial. In this way pleadings serve to ensure that a basic requirement of procedural fairness is satisfied, namely, that a party has a fair opportunity of meeting the case against him or her. Pleadings also define the issues for the court's decision.*"

41. The court added[7] :" *Sometimes the omission of a claimant to plead a claim properly can be overlooked as, for example, when a defendant has had proper notice of the claim by other means and is not prejudiced by the absence of the proper pleading. However, that is not this case...*"

42. Nor is it the case here. Despite my express direction on 22 November 2022 for the claimant to file an amended claim articulating the legal basis for its claim it has not done so. As a result the defendant does not know the case it has to meet and nor is the court is informed of the asserted cause of action it needs to assess.

43. Despite it being beyond the proper scope of my role I have given brief consideration (uninformed by submissions) to whether, despite not being properly pleaded, some form of "use and occupation" cause of action might apply. I note the observations of the learned author in *Land Law* [8]that if a tenant has agreed to pay rent but no precise amount has been agreed on, a landlord may bring an action for use and occupation; likewise where a tenant has agreed to pay a specified rent but the lease is contractually invalid for some reason. In those circumstances a landlord will be awarded whatever is a reasonable sum for a tenant's use and occupation of the land. But a precondition to this is that there must have been an agreement, express or implied, that the tenant would pay for the use of the land.

44. It is crystal clear here that no such agreement has been reached; there is no relationship between the parties of, or akin to, landlord and tenant. So, even if "use

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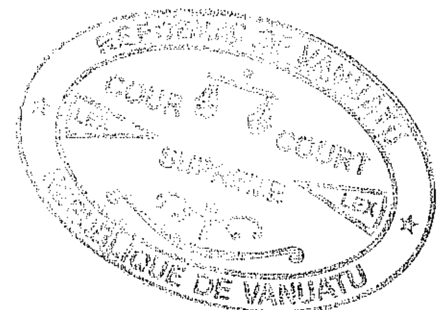
[5] Civil Appeal Case No. 21/3374; judgment given on 18 February 2022

[6] At paragraph 34; cited authorities omitted

[7] At 35

[8] Peter Butt 5th edition, Lawbook Co, Sydney 2006; see paragraph [15181]



and occupation" been pleaded as an alleged cause of action, there is no basis on which that could have succeeded.

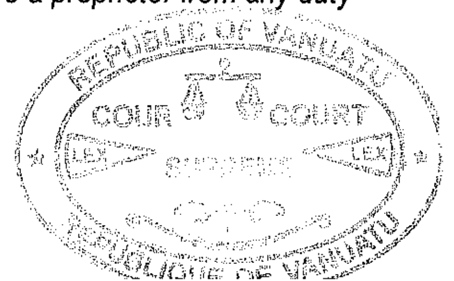
45. Here the claimant has purchased a lease unaware of an existing use (for which no form of "rent" has ever been paid) on a small part of the land by the defendant, for what must surely be an important navigational aid for aircraft leaving and arriving at Bauerfield Airport. Mr Han says he was not aware of the presence of this substantial tower, but he should have been. His company's decision to purchase the property should have been made with awareness of the presence of the tower and of the consequences for any proposed development, but apparently was not.

46. The claim is dismissed as being without legal foundation.

47. Although it is not necessary to my decision to do so, I think it is important, especially in view of Mr Han's stated beliefs about the legal position disclosed in his statement of 13 January 2022, and because the parties will inevitably have an ongoing relationship at a certain level, to spend some time discussing the s17 Land Leases Act defence, in particular the status of the site of the navigational tower and the nature of the relationship between the parties as it is informed by s17; the application of s17(c) and/or (g) was of course raised expressly as an alternative defence by the defendant.

48. Section 15 of the Land Leases Act CAP 163 provides:

> ***"15. Rights of proprietor***
>
> *The rights of a proprietor of a registered interest, whether acquired on first registration or subsequently for valuable consideration or by an order of the Court shall be rights not liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all rights, privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –*
>
> *(a) to the encumbrances and to the conditions and restrictions shown in the register;*
>
> *(b) unless the contrary is expressed in the register, to such of the liabilities, rights and interests as are declared by this Act not to require registration and are subsisting:*
>
> *Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as trustee.*



49. One of the provisions in the Act which is an exception to those s.15 rights of the registered proprietor (that is, it is one of those matters covered by the words "except as provided in this Act" in s15), is s17, which provides:

> *"**17. Overriding interests***
> *Unless the contrary is expressed in the register, the proprietor of a registered lease shall hold such lease subject to such of the following overriding liabilities, rights and interests as may, for the time being, subsist and affect the same, without their being noted on the register –*
>
> *(a) rights of way, rights of water, easements and profits subsisting at the time of first registration of that lease under this Act;*
>
> *(b) natural rights of light, air, water and support;*
>
> *(c) rights to sites of trigonometrical stations and navigational aids conferred by any law;*
>
> *(d) rights of compulsory acquisition, resumption, entry, search and user conferred by any law;*
>
> *(e) the interest of a tenant in possession under a sublease for a term of not more than 3 years or under a periodic tenancy;*
>
> *(f) any charge for unpaid rates or other moneys, which, without the condition of registration under this Act, are expressly declared by any law to give rise to a charge on land;*
>
> *(g) the rights of a person in actual occupation of land save where enquiry is made of such person and the rights are not disclosed; and*
>
> *(h) rights and powers relating to electric supply lines, telegraph and telephone lines or poles, pipelines, aqueducts, canals, weirs, dams, roads and ancillary works conferred by any law:*
>
> *Provided that the Director may direct registration of any of the liabilities rights and interests herein before defined in such manner as he may think fit.*

50. If section 17(c) applies here, as Mr Han has conceded in his statement it does, then the claimant's s15 rights as registered proprietor are, in the words of section 15, "liable to be defeated" by the defendant as an unregistered rights holder with an overriding interest in respect of that small part of its land. The claimant's otherwise fundamental

and unrestricted s15 rights in respect of the leased land are *entirely subject to* and *liable to be defeated by* those unregistered rights, which are labelled as "*overriding*".

51. I consider that because the unregistered rights holder has *overriding* rights this means that the registered proprietor has *no more than underlying rights* to the relevant portion of his land, as against the defendant. Its rights are expressly *subject to* and overridden by the defendant's s17 rights. Indeed, logically, if the registered proprietor were to use that part of the land which is subject to the overriding but unregistered rights, then it is the registered proprietor who would have to pay compensation to the defendant for such use.

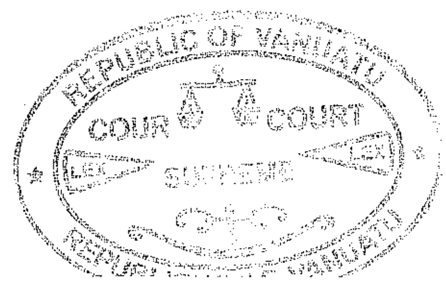
52. I therefore reject the claimant's argument that, even if the defendant is entitled to keep its tower where it is, still entitled to be paid rent for that portion of the land. I find that a party in the position of the claimant has no basis on which it can claim compensation for the exercise of the benefits of the overriding rights by the unregistered rights holder. It would be inconsistent with the overriding status of the defendant's rights for it to be required to pay compensation of some kind for the use of that portion of land to a party whose rights are defeated by and subject to its rights.

53. So, is the defendant correct in its contention that s17 applies to prevent any claim the claimant might otherwise have?

54. Here the defendant claims that both s17(c) and(g) apply, so that in two separate ways the claimant as proprietor of the registered lease holds that lease subject to its overriding rights, despite their not being noted on the register.

55. The defendant first submits under s17(c) that it has rights to the site of the tower because it is a navigational aid in respect of which those rights are "conferred by any law", namely the Civil Aviation Act CAP 258.

56. In addition, if this is necessary to support its case, the defendant claims under s17(g) that it has the rights of a person in actual occupation of that part of the land prior to the claimant's acquisition of the lease. The fact that Mr Han may not have been aware of the existence of the tower when he purchased the lease does not change the fact that it was and had been there for some time and that accordingly the defendant was in that way in "actual occupation of" the land. The tower was plainly there to be seen and



was apparently well known to the previous owner Ms Dinh, though she sought no payment for it.

57. Dealing first with the section 17 (c) argument, the Civil Aviation Act defines navigation installation as:

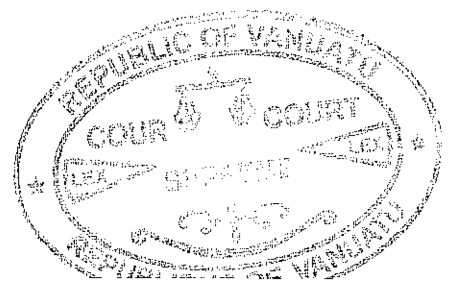
> *"navigation installation" means any building, facility, work, apparatus, equipment or place (whether or not part of an airport) that is intended to assist in the control of air traffic or as an aid to air navigation, and includes any adjacent land, equipment or place used in connection with it."*

58. The defendant's tower is clearly both a "navigation installation" within this definition in the Civil Aviation Act and a "navigational aid" for the purposes of s17(c). The fenced off area in which the tower sits is clearly "adjacent land… or place" for the purposes of the definition and the "site" of the navigational aid for the purposes of section 17 (c).

59. Meeting these definitions is a start but what rights have been conferred on the defendant "by any law" to the site of this navigational aid? As to this there was no evidence filed by the defendant. However, the defendant is entitled to rely on Mr Han's clear concession in his statement of 13 January 2022 that section 17 (c) did confer an overriding interest in respect of the disputed land.

60. I therefore proceed on the basis that because the defendant has, as a result of its navigational aid being on the disputed land, a "site" in terms of s 17 (c), then it has "rights conferred by any law" (being the Civil Aviation Act), even though there is no evidence as to what particular rights they are and under which section of that Act those rights were conferred. In his submissions Mr Morrison attached sections 92 to 99, contained in Part 9 of that Act, but the defendant adduced no evidence of any decisions made in respect of this particular tower or of any particular status having been accorded to it. But whatever rights they are, they override the defendant's rights to that portion of the land.

61. Even if s17(c) does not apply I am satisfied that s17(g) does. The defendant was a person (which clearly includes corporate persons rather than merely human beings) in actual - and lawful- occupation of the fenced-off site when the claimant purchased the lease. There is no suggestion that enquiry was made of the defendant and that on such enquiry its rights were not disclosed or asserted.



62. The interpretation of section 17 (g) was considered by the Court of Appeal in William v. William. [9] The Court observed that a number of important matters arose from the language of section 17 and, with reference to section 17 (g) said:

Fifthly, section 17 (g) operates in respect of "rights", that is rights recognised by the law of Vanuatu. A person in actual occupation who is a trespasser will have no "rights" which are protected by the provision. A right may arise under custom law, or it might derives from and through the proprietor of a registered lease or the predecessor entitled of that lease.

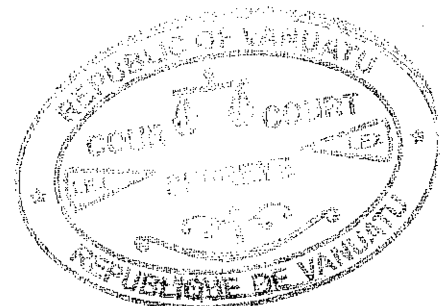
Sixthly, if the person in actual occupation claiming under section 17 (g) establishes rights which support the occupation, the rights will be, "overriding" rights unless the proprietor of the registered lease establishes that enquiry was made of that person for an explanation of his or her occupancy, and the rights were not disclosed. The onus of proof as to the making of due enquiries is on the proprietor of the registered lease. To discharge that onus the proprietor would have to establish that a sufficient enquiry was made before the proprietor became the registered proprietor of a lease.

Seventhly, the evident intent of section 17 (g) is to protect on the one hand a person who is in actual occupation of land pursuant to rights recognised by law, and on the other hand to provide a mechanism for those acquiring leases to protect themselves by making appropriate enquiry and inspection before acquisition. If a person in actual occupation is found on the land, the would be purchaser, by making enquiry, can have the rights of that person identified so that the consideration for their acquisition can be adjusted or the proposed acquisition can be abandoned. Alternatively, if the person found that actual occupation does not disclose a right that justifies his or her actual occupation, the would be purchaser will obtain good title against that person, and will be entitled after registration to recover possession".

63. The result is that I consider the defendant's rights to the site override the rights of the claimant as registered proprietor. That means *both that* the defendant is entitled to keep the tower there *and that* it has no obligation to pay the claimant for the use of that part of its land.

64. Before purchasing the lease the claimant had, but did not take, the opportunity to ascertain from the defendant the basis on which it claimed to be entitled to have its tower on the land, i.e. in terms of s17(g) to make the appropriate enquiry and in light

[9] [2004] VUCA 16



of the defendant's response to consider the impact of the tower on its proposed development of the land before deciding whether or not to proceed with the purchase.

65. Accordingly, had I found there was some legal basis on which prima facie some compensation for use of the land may have been payable, I would still have dismissed the claim because of the particular relationship between the claimant and the defendant having regard to the relevant provisions of the Land Leases Act.

66. For completeness, had I reached the stage of considering the amount of any compensation or "rental", I would have rejected the amount claimed by the claimant and upheld Mr Dick's independent, expert (and unchallenged) assessment of the market "rental". Valuation of land is to be assessed on an objective "willing buyer, willing seller" basis, not on the subjective basis the claimant advanced.

Result

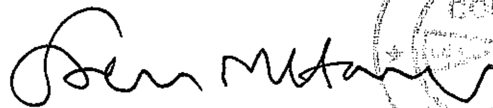
67. The claim is dismissed and judgment is entered for the defendant.

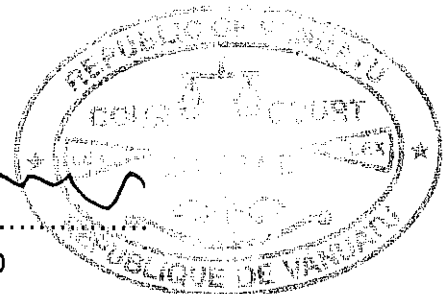
68. The defendant is entitled to costs against the claimant. Although there is some force in Mr Morrison's submission that increased costs should be awarded, the defendant made no application to strike out the claim, as might have been done. The defendant's defence of the case was not made more difficult and costly by the shortcomings in the claim. Costs should therefore be awarded at the usual level for a contested case which has been resolved in the defendant's favour after trial.

69. If costs cannot be agreed they are to be taxed by a Master.

Dated at Port Vila this 9th day of December 2022

BY THE COURT





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Justice S M Harrop