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

Civil Case No. 14 of 2010

BETWEEN: MELANESIAN RENTALS LIMITED
Claimant

AND: EVERGREEN LIMITED
First Defendant

Coram: Judge Macdonald

Claimant: Mrs M.N Patterson
Defendant: Mr S. Hakwa

Date of Hearing: 15 September 2010
Date of Decision: 12 October 2010

JUDGMENT

1. A company can only operate through its officers. It has no independent existence or form. In this case it is alleged that a director has signed a document in the name of the company, but his capacity to do so is now called into question.

The claim

2. The claimant and the defendant are local companies registered in Vanuatu. The claimant is in the business of hiring vehicles.

3. The claimant alleges that on 9 September 2009 it rented a vehicle to the defendant, the hire being made by one of its directors, Mr Malas, who signed the rental agreement. The hire was for one day at a hire rate of VT 12,900 and a daily insurance rate of VT 1,500. It was on the usual terms and conditions, except that as the defendant was an approved customer, payment was to be made on the return of the vehicle, rather than at the point of hire.

4. Unfortunately the vehicle was damaged in an accident the following day. As the vehicle was not returned the claimant had to travel to Mele to collect it.

5. The vehicle was then out of use for 34 days while being repaired.

6. The claimant alleges that the defendant breached the hire agreement in three respects:
   - the vehicle was not returned at the agreed time;
   - it failed to report the accident and the resulting damage; and
   - it failed to fill out the accident form as requested

7. The defendant has refused to meet the costs associated with the vehicle being damaged, which amount to VT 1,131,545 as follows:

• original hire	12,900
• insurance	1,500
• refueling	5,610
• repair costs	621,935
• lost revenue while vehicle being repaired	489, 600
	1,131,545

The defence

8. The defendant denies liability, pleading that it did not enter into any hire agreement with the claimant. By that it means that its director, Mr Malas, had no authority to bind the defendant to any such agreement, and on that day he was not acting as its agent.

9. In opening the defence case I recorded Mr Hakwa as saying "we accept that a vehicle was rented to Mr Noel Malas and there was an accident and there were repairs carried out".

10. In the course of the trial, however, I sensed that the position of the defendant shifted somewhat. Mr Malas said that because he was grossly intoxicated he had no recall of ever signing any rental agreement and for that reason denied that he did so. He even floated the possibility that somebody (presumably one of the claimant's

employees) had forged his signature on the rental agreement. He appeared to dispute that the signatures on the rental agreement were his. He claimed to have no recall as to being given the keys to the vehicle. He was at a restaurant and he suggested that it could have been an employee of the restaurant.

11. In closing submissions Mr Hakwa pointed to the lack of evidence to establish that Mr Malas had signed the agreement, and so he too was questioning its existence.

12. The problem for the defendant is that these matters were not pleaded and in my view should be disregarded. The defendant is bound by its pleadings.

13. However, even if the existence of the agreement was in issue, the defendant would have to rely on the acceptance of one or more highly improbable propositions, such as:

- that the claimant would give Mr Malas the vehicle without first getting him to sign a rental agreement;
- that the claimant would give the keys of the vehicle to an employee of the restaurant to pass onto Mr Malas;
- that if it was one of the claimant's employees who handed over the keys that such an event would have occurred despite Mr Malas' claim to being grossly intoxicated ; and
- that one of the claimant's employees would forge his signature.

14. As stated, they are highly improbable propositions, and on the evidence I heard I have no doubt that Mr Malas signed the rental agreement. I do not accept that he was grossly intoxicated at the point of signing the agreement. That must have happened later. My finding that he signed the agreement is in accordance with the pleadings in any event. I therefore turn to consider the issues that arise.

The issues

15. The primary issue is one of agency. Did Mr Malas have the apparent or ostensible authority of the defendant to enter into the hire agreement on its behalf? If he did,

was there any breach of the agreement? And, if there was, what the claimant's loss?

Law on agency

16. I take it that ***Freeman and Lockyer v Buckhurst Park Properties*** [1964] 2 QB 480 still reflects a correct statement of the law.

17. In that case the director in question managed the company's property and acted on its behalf. In that role he employed the plaintiff architects to draw up plans for the development of land held by the company. The development ultimately collapsed and the plaintiffs sued the company for their fees. The company denied that the director had any authority to employ the architects. The Court found that, while he had never been appointed as managing director (and therefore had no actual authority, express or implied) his actions were within his ostensible authority, and the board had been aware of his conduct and had acquiesced in it.

18. Diplock LJ identified four factors which must be present before a company can be bound by the acts of an agent who had no authority to do so; it must be shown that:

    1) a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;

    2) such a representation was made by a person or person who has 'actual' authority to manage the business of the company, either generally or in respect of those matters to which the contract relates;

    3) the contractor was induced by such representation to enter into the contract, i.e. that he in fact relied upon it; and

    4) under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to an agent.

Did Mr Malas have the authority to bind the defendant?

19. On the facts there are several matters that support a conclusion that Mr Malas did have such authority. The most significant is that the claimant is able to point to previous occasions when Mr Malas has hired vehicles in the name of the defendant. Mrs Du Shane a director of the claimant, referred in her first sworn statement (dated 20 July 2010) to two such occasions, namely on 11 December 2008 and 7 August 2009. On both occasions the defendant paid for the hire.

20. In her second sworn statement (dated 8 September 2010) Mrs Du Shane attached (as annexure "R") a list of 11 times that the defendant had hired vehicles between 2005 and 2009. On five of those occasions Mr Malas had signed agreements on behalf of the company. The list also reveals that at no stage had he ever hired a vehicle in his sole name or personal capacity.

21. In comparing the previous hire of vehicles with the present there appears to be absolutely no difference. There is nothing in the hire on 9 September 2009 to indicate that it was a personal hire. If it was then it was for Mr Malas to ensure that it was in his name. If that was the case I would assume that he would have known that payment had to be made in advance. There is also nothing to indicate that he did not have authority to bind the defendant, as he had undoubtedly done in the past.

22. I further note that there is nothing in the defendant's memorandum or articles of association to prevent the hire. There is also no statutory impediment.

23. Mr Malas referred to having hired vehicles from the claimant on many occasions in the past for his own personal or private use, but, unlike the claimant, he did not produce any documentation to support that. He claimed that whenever he arranged to hire vehicles on behalf of the defendant he always had to obtain the permission or authority from his brother, Mr Philip Malas, who was the Managing Director. That might be so but again no documentation to support that assertion was produced.

24. Mr Phillip Malas, gave evidence and emphasised that his brother had no authority to hire a vehicle. He was also not performing any duties on behalf of the company on that day.

25. Despite that I am satisfied on the balance of probabilities that Mr Malas,, as a director, had the apparent or ostensible authority to hire a vehicle on behalf of the company. In my view the four factors listed in ***Freeman and Lockyer*** have been met.

26. If there was, as a matter of internal policy, any reason for Mr Malas not having the authority to enter into the hire agreement on behalf of the defendant, then I agree with Mrs Patterson, that they were internal to the company. It was beyond the reach of the claimant and can have no bearing.

27. I accept too that the claimant had acted in good faith, and it was entitled to believe that Mr Malas had the authority to sign the agreement on behalf of the defendant, as he had done in the past.

28. In those circumstances I find that the defendant was the contracting party and is bound by the terms of the hire agreement.

Did the defendant breach the agreement?

29. Undoubtedly the defendant breached the terms of the agreement in the manner alleged in that:

- it failed to return the vehicle at the agreed time;
- it failed to report the accident and the resulting damage; and
- it failed to fill out the accident form as requested.

What was the claimant's loss?

30. The first three items, being the cost of the original hire, the insurance and the refueling are established. They were not challenged in any event.

31. As to the repair costs the need to obtain parts from overseas and the overall time taken to effect the repairs was challenged. Some confusion arose from the fact that what was plainly the final repair account was headed "quotation". There was also some question raised as to whether the defendant had been given a copy of any quotes initially obtained and the opportunity to indicate a preference as to which should be accepted. On that matter I accept that two quotes were obtained. Contact was in turn made with the defendant but there was no response.

32. I am also satisfied that the claimant did all it could to get the vehicle repaired. As Mrs Du Shane explained, it was in the claimant's interests to have the vehicle back on the road as quickly as possible.

33. In respect of the repairs I was impressed by the evidence of Mr Rivier who convinced me that the repair costs were fair and reasonable. He also satisfied me that to take 34 days to repair the vehicle was very quick by Vanuatu standards. That took account of the time needed to assess the damage, order the necessary parts, (most of which had to come from Australia), and then carry out the repairs.

34. As there was no evidence to the contrary I am satisfied that the repair costs of VT 621,935 should be allowed.

35. On the loss of revenue claim I acknowledge the evidence of Mrs Du Shane that the vehicle was hired out as soon as it was repaired. However, while on balance I accept that it would have been hired for most of the time, there can be no certainty that it would have been hired out for all 34 days. I also do not recall any evidence that the claimant's remaining fleet of vehicles was utilised for that whole period.

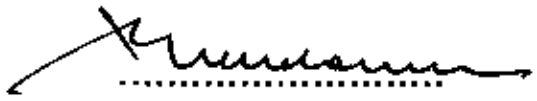
36. To reflect that uncertainly I propose to deduct 10% from the figure claimed, which takes it down to VT 440,640.

Result

37. The claimant is entitled to judgment in the sum of VT 1,082,585, together with interest and costs.

38. I assume that counsel can reach agreement on the interest and costs figures, but if not they are to be fixed by the Court.

Dated at Port Vila, this 12th day of October, 2010
BY THE COURT



J. Macdonald
Judge