IN THE SUPREME COURT OF

THE REPUBLIC OF VANUATU

(Civil Jurisdiction)

Civil

Case No. 19/438 CVL

BETWEEN: **Elcress Agra Products Limited**

Claimant

AND: **Paul Gambetta**

First Defendant

Republic of Vanuatu

Second Defendant

Date of hearing:	23 and 24 March 2020
Before:	Justice G.A. Andrée Wiltens
Counsel:	Mr N. Morrison for the Claimant
	Mr L. Huri for the Defendants
Date of Decision:	27 March 2020

JUDGMENT

A. Introduction

1. This Claim results from various alleged losses accrued over the period a rural lease was wrongfully cancelled by the First Respondent on behalf of the Second Respondent and continuing on until rightful occupation had been resumed.

B. Background

2. There is no dispute about the events central to this matter.

3. Firstly Elcress Agra Products Limited ("Elcress") was incorporated as a private company on 18 November 1986. The registered office address was C/- James Kluck & Associates, First Floor, Law Partners House, Fr Walter Lini Highway, Port Vila, Vanuatu.

4. On or about 1 July 2007, Elcress became the registered lessee of Lease 10/1241/001, a property comprising some 5,000 hectares of farm land on Epi Island. Elcress purchased the agricultural lease title from an entity called Lake Trust for VT 50 million. The lease was to run for 75 years, with an annual rent due of VT 1, 068,670.

5. On 20 April 2017, the Ministry of Lands received a letter of complaint regarding the registration of the lease, alleging that Lake Trust was not able to pass good title. The Ministry of Lands caused a check to be made and by letter of 10 July 2017 was advised by the Vanuatu Financial Services Commission that Lake Trust had not ever been registered. It was accordingly the opinion of the Lands Ombudsman that the lease "...must be cancelled".

6. That advice caused the Lands Department Director, on 5 September 2017, to issue a Notice pursuant to section 99 of the Land Leases Act [Cap 163] ('the Act") of the Director's intention to cancel the lease – PG 4. The Notice was addressed to both lessee and lessor.

7. The contentious issue between the parties relates to service of the Notice on the lessee, Elcress. The evidence from Mr Monvoisin, the General Manager of Elcress, was that he and his staff were completely unaware of the Notice until gleefully told about it by his Epi Island neighbours, after the lease had been cancelled. The neighbours were happy with that development as it enabled them to reclaim the land for themselves.

8. Mr Gambetta's evidence is to the effect that the Notice was sent by post to P.O. Box 130, the address supplied by Elcress on the Application for Registration of the lease dated 4 July 2007. There is a document produced by Mr Gambetta, two pages extracted from the Lands Department's service book, as PG 5. The first page deals with service on the lessor; the second page deals with service on Elcress.

9. That page records a date, which is difficult to read, but Mr Gambetta states it is 6 September 2017. It refers to the Notice to Cancel lease title 10/1242/001 and it shows the address to which the Notice was sent, namely "Elcress Agra Products Limited, PO Box 130, PORT VILA." There is a signature beside the address, under the heading Date/Time/Signature, and the date is recorded there as 6 September 2017.

10. Mr Monvoisin rightly points out that the signature is identical to the signature of the very next entry, which relates to the service of a document quite unrelated to this case. That evidence gives credence to Mr Monvoisin's comment that the signature is appended by the person who completes the mailing of the document – not the recipient of what is being served. Mr Monvoisin confirms the signature is not his, and he states that does it not belong to any of his staff. He maintains he did not ever receive the Notice, nor was it drawn to his attention by anyone else - even though it was addressed to what has always been and still is Elcress' main office mailing address.

11. Mr Gambetta stated that as there was no response by either the lessor or the lessee to his section 99 Notice, he cancelled the lease on 26 September 2017. There was no evidence led that the cancellation was advised to the lessor or lessee.

12. Once Mr Monvoisin was made aware of the lease cancellation by his Epi Island neighbours, he made application by way of Judicial Review ("JR") to challenge the cancellation. The JR application Civil Case No. 17/2796 was filed on 2 October 2017. It was dealt with by Justice

Chetwynd on 10 October 2017 – he ordered restoration of the lease on an interim basis to protect Elcress' investment.

13. Mr Gambetta accordingly restored the lease on 13 October 2017.

14. By way of consent orders the lease restoration was made final on 14 February 2018, with VT 300,000 costs awarded to the Claimant.

15. Mr Monvoisin, in his evidence, pointed to continuing agitation by his Epi Island neighbours throughout the period of the lease cancellation. He maintained that even after the interim restoration of the lease, he and his staff were unable to resume occupation of the lease. His neighbours prevented that by means of threats and they orally advised Mr Monvoisin that they were of a mind to appeal the interim orders. It was only after the final orders were made that Elcress was able to fully resume occupation and return to their farming operation.

16. Mr Monvoisin gave evidence that boundary fences were cut and torn down by his neighbours. As a result, he suffered the loss of 5 steers and had to effect repairs to the fence.

17. During the period that the lease was cancelled and before Elcress was able to resume occupation and farming of the land, much of Elcress' usual operations were unable to be performed. Elcress staff were unable to undertake their usual employment. However, Elcress continued to pay the staff – to ensure their continued employment once matters had been returned to normal. The staff are trained in the Elcress ways, are experienced in what they undertake, and would be difficult if not impossible to replace. The continuing wage bill is a loss that Mr Monvoisin sought to recoup by this action.

18. The other loss claimed resulted from the period of the lease Elcress was denied from enjoying.

C. <u>The Claim</u>

19. Mr Monvoisin claimed for:

- VT 300,000 for 5 stolen/lost steers;
- VT 5,167,963 for retention wages for staff unemployed during the period of lease cancellation, namely from 26 September 2017 to 14 February 2018;
- VT 223,965 for damage to fencing on the property; and
- VT 257,466 for loss of value of the lease from 26 September 2017 to 14 February 2018.

20. Additionally, interest and costs are sought.

21. The Claim names two defendants. However, the reality is that the Claim seeks recompense from the State, the Second Defendant only. Further, what is really being relied on is the indemnity set out in s.101(1) of the Act.

D. The Defence

22. The defence relies upon service of the section 99 Notice. The lack of response to that notice is submitted to have enabled the Lands Department Director to proceed as advised and cancel the lease. Further, it is submitted that in every aspect of this matter, Mr Gambetta has acted properly, in good faith and in compliance with the law.

E. Evaluation of the Evidence

23. Mr Monvisin was the only *viva voce* witness. He produced two sworn statements in addition, which were part of his evidence. Mr Gambetta's single sworn statement was relied on by the defence; he was not required for cross-examination.

24. I looked closely at Mr Monvoisin as he gave his evidence before me. I was more concerned with the consistency of his accounts than the manner in which he testified. I reminded myself that body language and assessments of witness demeanour are but a very small part of an overall analysis of whether a witness is (i) telling the truth and (ii) is an accurate reporter of facts. I was able to compare his account with the evidence of Mr Gambetta, and with the documentary exhibits that were appended to the sworn statements.

25. I accepted Mr Monvoisin as a witness of the truth who was attempting to recall accurately the events relevant to this case. His description of the conduct by his Epi Island neighbours was particularly compelling and entirely credible. His candour in fact harmed his case, as he freely advised that his farm manager had counted the cattle remaining on the farm after Elcress resumed occupancy and had informed Mr Monvoisin that there 5 cattle missing. That is of course classic hearsay. Mr Monvoisin could very easily simply have embellished his evidence by telling the Court that he had later checked the information he'd been given and that it was correct. That he didn't do so confirms for me that his evidence is credible and reliable.

26. Mr Monvoisin was clear when cross-examined about staff wages and answered all Mr Huri's questions with the calm and ready assurance of a Manager who knows his business. He explained where individuals fitted into the entire operation. I did not accept Mr Huri's implied suggestion that Mr Monvoisin was exaggerating this aspect of the Claim.

27. I noted there was no challenge to Mr Monvoisin's Claim for the fencing repairs, nor the loss of the value of the lease.

F. Discussion

28. There are three main issues to consider and determine: (i) the effectiveness or otherwise of the s.99 Notice, (ii) the admissibility and weight, if any, to be attached to the hearsay evidence, and (iii) the period in respect of which damages is alleged to accrued.

(i) Service

29. The Civil Procedure Rules deal with service on corporations. Rule 5.8(2) provides for service to be effected by giving a copy of the document to an officer of the company, or by leaving a

copy of the document at the registered office of the company. Neither of these two means of service was adopted in this case.

30. Section 108 of the Act deals with the service of Notices issued pursuant to the Act. A notice shall be deemed to have been effectively served if served personally, left at the person's last known of residence or business, or sent to the person by registered post to the last known postal address. The other provisions are not relevant. The s.99 Notice addressed to Elcress, as explained by Mr Gambetta, was not dealt with in any of these ways.

31. There was, accordingly, no effective service of the s.99 Notice. The submissions to the contrary by Mr Huri cannot be accepted. When it comes to service of such important documents, the letter of the law must be followed. It is simply insufficient to attempt service by some other means not provided for in the legislation.

32. Further, I accept the evidence of Mr Monvoisin that he did not get the Notice and was unaware of it until after the lease had been cancelled.

33. That determination ends the defence to the Claim, even though I accept that Mr Gambetta did not act improperly, illegally or in bad faith.

(ii) Hearsay

34. Mr Morrison sought to avail the Claimant of the "business record" exception to the hearsay rule. His submission was inventive but unpersuasive. There was no record – just an oral communication.

35. In the main, hearsay evidence is inadmissible and can carry no weight. However, in some situations the leading of hearsay evidence is permissible as an exception to the general rule and it can carry weight. One such situation is where undue expense or delay prevents *viva voce* evidence to be called. In this case, the witness would need to come from Epi Island, with infrequent modes of travel. I note that this is a civil matter and that sworn statements when filed become part of the evidence. In reality, therefore it would have been relatively straight-forward for the Farm Manager to present a sworn statement. If Mr Huri had wanted to cross-examine that could have been done by audio-visual link or even by telephone.

36. I took into account the decision in *R v. Wallis* HC Auckland CRI-2007-092-8480, decided in March 2009, where the expense and delay in locating 9 ex-staff members and 47 ex-pupils from a school was considered by Justice H. Williams. He concluded: "No doubt that would be expensive exercise, but not one where the expense would be "undue"...". The standard for this exception to apply can easily be seen to be set very high. In the circumstances of this case, I am not persuaded that the evidence was so difficult to obtain.

37. The Court cannot give weight to the hearsay evidence relating to the claimed loss of 5 steers. Accordingly that part of the Claim has not been established on the evidence.

(iii) Period

38. Mr Monvoisin gave detailed and elaborate evidence explaining that Elcress did not immediately resume its farming operation on 14 October 2017. I accept that evidence.

39. Accordingly, Elcress is entitled to seek recompense for the entire period its farming operations were impeded by the wrongful cancellation of the lease.

G. Decision

40. Judgment is hereby entered for Elcress against the Second Defendant in the sums of:

- VT 5,167,963, for retention wages for staff unemployed for the period from 26 September 2017 to 14 February 2018;

- VT 223,965, for damage to fencing on the property; and

- VT 257,466, for the loss of the value of the lease from 26 September 2017 to 14 February 2018.

41. Interest is payable on the gross sum of VT 5,649,394 from the date of the Claim, namely 1 March 2019, until it has been paid in full at the Supreme Court rate of interest, namely 5% per annum.

42. The Claimant is also entitled to the costs of this action. They are set at VT 125,000. The costs are to be paid by the Second Defendant within 28 days.

H. Enforcement

43. Pursuant to Rule 14.5(1) I now schedule a Conference at 8.30am on 5 May 2020, to ensure the judgment has been executed or for the judgment debtor to explain how it is intended to pay the judgment debt. For that purpose, this judgment must be served on the Second Defendant.

Dated at Port Vila this 27th day of March 2020
BY THE COURT

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Justice G.A. Andrée Wiltens

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