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

Civil
Case No. 19/2651 SC/CIVL

BETWEEN: Frederick Abet
Claimant

AND: Shefa Provincial Council
First Defendant

AND: Republic of Vanuatu
Second Defendant

Date of Trial: 24 August 2021
Before: Justice V.M. Trief
In Attendance: Claimant – Mr J.I. Kilu
First Defendant – Mr J. Tari
Second Defendant – Mr L. Huri
Date of Decision: 13 September 2021

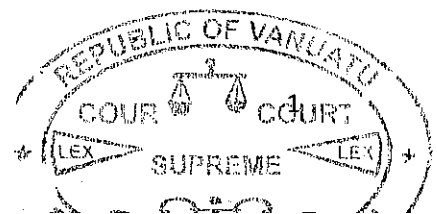
JUDGMENT

A. Introduction

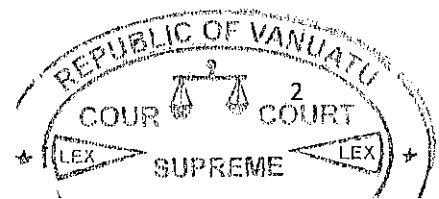
1. The Claimant Frederick Abet seeks payment of rents and mesne profits for premises occupied at Rovo Bay on Epi island and damages. The Claim is opposed by both the First Defendant Shefa Provincial Council (the 'Council') and the Second Defendant the State.

B. Background

2. The following background information was provided in the sworn statement of Paul Gambetta, Director of Lands [**Exhibit D2**].
3. In 2006, Mr Abet's father Philip Yapet Barango (now deceased) was declared the custom owner of the land at Rovo Bay on Epi island where the Council has its sub-district headquarters. At all material times, the Council occupied those premises.
4. On 2 February 2007, the lease over title no. 10/1113/001 between Mr Abet (lessee) and Mr Barango (lessor) was registered (the 'lease'). The leased area was 11.59 hectares.



5. In 2009, the Minister of Lands commenced the process of compulsorily acquiring the whole of the land described by the lease.
6. On 12 March 2009, the acquiring officer the Director of Lands issued notice pursuant to s. 4 of the *Land Acquisition Act* [CAP. 215] (the 'Act') of the Minister's intention to acquire the lease for a public purpose.
7. On 23 April 2010, the Director of Lands issued a notice pursuant to subs. 7(1) of the Act that the Minister had made a declaration that the leased land was required for a public purpose.
8. On 2 July 2009, Mr Abet commenced Civil Case No. 82 of 2009 ('CC 09/82') against the Council seeking an eviction order and mesne profits from 1 January 2007.
9. On 8 July 2010, the Director of Lands completed a valuation report of the lease in accordance with s. 9 of the Act. The total compensation stated in the report was VT24,398,667.
10. On 26 August 2010, the Supreme Court issued its judgment in CC 09/82. The Court ordered eviction but stayed it for 4 months to enable the compulsory acquisition of Mr Abet's lease, and ordered payment of VT4.3 million mesne profits for the period February 2007 to August 2010.
11. Mr Barango challenged the compensation amount in Civil Case No. 184 of 2010. By judgment by consent, VT24,925,434 compensation was agreed to be paid to Mr Barango as lessor and VT2,516,418 to Mr Abet as lessee in 4 instalments. Mr Abet received the payments which were completed on 28 June 2012.
12. On 19 September 2012, the Minister of Lands issued orders pursuant to subs. 16(1) of the Act to take possession of the lease.
13. On 1 October 2012, the Minister's order was gazetted.
14. On 11 December 2018, the Director of Lands canceled the lease registration pursuant to subs. 99(1) of the *Land Leases Act* [CAP. 163].
15. By the Further Amended Claim (the 'Claim'), Mr Abet seeks orders for the following:
 - i) Payment by the Council of accrued rents from 1 September 2010 to 11 December 2018, such claim not being statute-barred because the Supreme Court ordered in the CC 09/82 judgment that the Council would have to continue paying rents from 1 September 2010 until completion of the acquisition process;
 - ii) Payment by the Council of mesne profits from September 2010 to 18 December 2018 of VT23,150,012;
 - iii) That the Council pay VT3,000,000 common law damages for failure to comply with the judgment in CC 09/82 to complete the compulsory acquisition process and conclude an agreement with Mr Abet on the monthly rent to be paid for the Council's continued occupation of the lease; and



- iv) Interest and costs.
16. No allegations were made against nor relief sought against the State. The State was joined to assist the Court as to whether the compulsory acquisition process was completed in 2012 or 2018. In its Defence, the State denied that the Claim disclosed any cause of action against it. It sought dismissal of the Claim with costs.
17. By its Defence, the Council denied any agreement as to the monthly rent to be paid to Mr Abet, that the Claim for the period before 1 October 2012 was statute-barred and that the compulsory acquisition process was completed on 1 October 2012.
18. By his Replies to the Defences, Mr Abet alleged that the compulsory acquisition process was completed on 11 December 2018 through the cancellation of the lease and that ss 16 and 17 of the Act did not apply to the lease.
19. The issues between the parties are:
- i) Is the Claimant's claim partially statute barred and if so, from when? **[Issue 1]**
 - ii) Is the First Defendant liable to the Claimant for payment of rents? **[Issue 2]**
 - iii) When was the compulsory acquisition process completed? **[Issue 3]**
 - iv) Is the First Defendant liable to the Claimant for mesne profits or damages? **[Issue 4]**
20. I will consider each issue in turn.

C. Issue 1: Is the Claimant's claim partially statute barred and if so, from when?

21. Paragraph 3(1)(a) of the *Limitation Act* [CAP. 212] (the 'Act') provides:

3. (1) *The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say –*

(a) actions founded on simple contract or on tort;

(my emphasis)

22. Mr Abet filed his Claim on 2 October 2019. The claim for accrued rents is founded on contract and for mesne profits on tort.
23. Paragraph 3(1)(a) of the Act provides that the limitation period for such claims is 6 years from the date on which the cause of action accrued.
24. Accordingly, I answer Issue 1 as follows, "**Yes – the claims for payment of rents and mesne profits for the period prior to 2 October 2013 are statute-barred.**"
25. Mr Kilu submitted the claims for rent were not statute-barred because the Supreme Court ordered in the CC 09/82 judgment that the Council would have to continue paying rents from 1 September 2010 until completion of the acquisition process.
26. Any cursory reading of the *Limitation Act* or the case law will show that there is no exception to the para. 3(1)(a) limitation period including from a Court judgment. It beggars belief that Mr Kilu considered that the Court judgment constituted an

exception to the limitation period when the *Limitation Act* does not provide any such exception.

D. Issue 2: Is the First Defendant liable to the Claimant for payment of rents?

27. Following my answer to Issue 1, the First Defendant is not liable to the Claimant for payment of rents for the period prior to 2 October 2013.
28. From 2 October 2013 onwards, the Council will be liable for payment of rents if it and Mr Abet agreed terms particularly the amount of monthly rent payable. On his own evidence in his sworn statements filed on 2 October 2019 [**“Exhibit C1”**] and on 23 April 2021 [**“Exhibit C4”**], Mr Abet and the Council never agreed an amount for rent despite Mr Abet’s efforts to. It follows therefore that they never had an agreement and the Council cannot be held liable to Mr Abet for payment of rents.
29. My answer to Issue 2 is, **“No.”**
30. This is a simple point from the law of contract. It defies belief that Mr Kilu considered otherwise.

E. Issue 3: When was the compulsory acquisition process completed?

31. The compulsory acquisition process in relation to the lease commenced in 2009.
32. On 19 September 2012, the Minister of Lands issued Order No. 117 of 2012 pursuant to para. 16(1)(a) of the Act. Subclause 1(1) of the Order provided as follows:

1. Take possession and enter into occupation of land

(1) *The acquiring officer is to take possession of the land:*

(a) *described in title 10/1113/001; and*

(b) *located at Rovo Bay on North West of the island of Epi,*

for and on behalf of the Government of the Republic of Vanuatu.

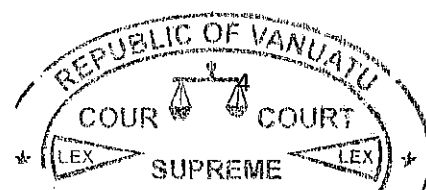
33. The Minister’s order was gazetted on 1 October 2012.

34. Sections 16 and 17 of the Act provide, relevantly, as follows:

16. (1) *At any time after notification is made and payment of compensation is made under section 14, the Minister may by order published in the Gazette –*

(a) *where the notification relates to the acquisition of any land, direct the acquiring officer or any other officer authorized in that behalf by the acquiring officer to take possession of that land for and on behalf of the Government; or*

(2) *Any officer directed by an order made under subsection (1) to take possession of any land shall, on or after the date of publication of that order in the Gazette, take possession of that land for and on behalf of the Government...*



17. When an order of the Minister under section 16 is published in the Gazette, then –

(a) where that order is in regard to the taking possession of a particular land, the land shall vest absolutely in the Government, free from all encumbrances, with effect from the date on which that order is so published;

...
(my emphasis)

35. Mr Tari and Mr Huri submitted that in accordance with s. 17(a) of the Act, the land subject to the lease vested absolutely in the Government with effect from 1 October 2012, the date on which the Minister's order under s. 16 of the Act was published in the *Official Gazette*. Accordingly, the compulsory acquisition process was completed on 1 October 2012.
36. On the other hand, Mr Kilu submitted that ss 16 and 17 of the Act does not apply to leases or to leased land. With respect, no such distinction is made within ss 16 or 17 of the Act. His submission has no basis in law. It is roundly rejected.
37. Mr Kilu also submitted that notwithstanding ss 16 and 17 of the Act, the compulsory acquisition process was not completed until 11 December 2018 when the lease registration was cancelled. He submitted that that was when Mr Abet's lease interest was brought to an end as leases can only be ended pursuant to the *Land Leases Act*, ss 99 (by the Director of Lands) and 100 (by the Supreme Court for fraud or mistake). Hence Mr Abet's claims for rents and mesne profits from September 2010 to 11 December 2018.
38. With respect, Mr Kilu's submissions are misconceived. Leases can be brought to an end by ss 99 and 100 of the *Land Leases Act* as well as in accordance with the Act. The *Land Leases Act* was passed in 1984; the Act in 1992. Parliament obviously intended that notwithstanding the *Land Leases Act*, a lease could be compulsorily acquired in accordance with the Act. Looking at the scheme of the Act as a whole, it is obvious that the compulsory acquisition process is completed on the gazettal of the Minister's order pursuant to s. 16 of the Act because subs. 17(1) of the Act provides that the land then vests absolutely in the Government.
39. The Minister can only make such order after the requisite compensation has been paid: subs. 16(1) of the Act. The compensation paid and received by Mr Abet for the lessee's interest compensated him for the loss of his interest in the lease (full and final payment made on 28 June 2012). The cancellation of the lease on 11 December 2018 was merely a formality to correct the contents of the Land Leases Register; Mr Abet had been compensated for the loss of his interest in the lease and the land that was subject to the lease had vested absolutely in the Government on 1 October 2012.
40. Finally, Mr Kilu submitted that the Minister's order published on 1 October 2012 directed the acquiring officer to finalize the acquisition process by taking possession of the land. However, the acquiring officer only did so on 11 December 2018 when the lease registration was cancelled. With respect, this submission completely overlooks s. 17 of the Act. Section 17 provides that on gazettal of the Minister's order pursuant to s. 16 of the Act, the land shall vest absolutely in the Government. From that point on, the Government owns the land. The Act does not require any physical

act of possession of the land including by cancellation of the lease. The submission that the acquiring officer took possession by cancelling the lease registration is therefore roundly rejected.

41. For the reasons given, my answer to Issue 3 is, "**On 1 October 2012.**"
- F. Issue 4: Is the First Defendant liable to the Claimant for mesne profits or damages?
42. It is undisputed that at all material times, the Council occupied premises on the leased land.
43. The Council will be liable to Mr Abet for mesne profits (the equivalent of unpaid rent) if it was given notice to quit but then did not vacate the property. Mr Abet did not evidence any notice given to the Council to quit so I must assume that he is relying on the 14 May 2009 notice to quit referred to in the CC 09/82 judgment.
44. The Council is not liable to Mr Abet for mesne profits because:
- i) The land subject to the lease had already vested absolutely in the Government on 1 October 2012. From that point on, Mr Abet ceased to have any entitlement to mesne profits; and
 - ii) Any claim for mesne profits has a 6-year limitation period: para. 3(1)(a) of the *Limitation Act*. Therefore Mr Abet's claim for mesne profits prior to 2 October 2013 is statute-barred.
45. Mr Abet seeks an award of damages against the Council for its alleged failure to comply with the judgment in CC 09/82 to complete the compulsory acquisition process and conclude an agreement with Mr Abet on the monthly rent to be paid for the Council's continued occupation of the lease.
46. The relevant paragraphs of the CC 09/82 judgment, at p. 5, are as follows:

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.

...

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 rents to be paid for the Defendant's continued occupation of the Claimant's leasehold ... , whichever occurs first; ...

47. With respect, these paragraphs of the judgment in CC 09/82 do not require the Council to complete the compulsory acquisition process nor do they require the Council to conclude an agreement with Mr Abet on the monthly rent payable for its

continued occupation of the lease. Accordingly, there has not been any failure by the Council to comply with the CC 09/82 judgment and the Council is not liable to Mr Abet for damages.

48. The proper course where the CC 09/82 judgment was not complied with was to pursue enforcement. That is, if after 4 months, compulsory acquisition of Mr Abet's leasehold had not been finalized or the parties had not concluded an agreement on the monthly rents to be paid by the Council, Mr Abet should have sought enforcement of the judgment. However, instead of doing that, he brought a claim for damages that was always doomed to failure as the judgment did not require the Council to act in the manner alleged.
49. With respect, Mr Kilu has completely misread the judgment in CC 09/82 and as a result, led his client down a path doomed to failure.
50. For the reasons given, my answer to Issue 4 is, "**No.**"

G. Costs

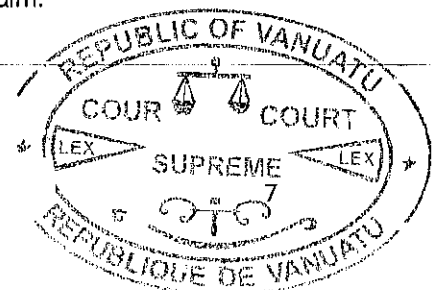
1. I consider that a reasonably competent lawyer would have advised Mr Abet not to bring the claims for accrued rents and mesne profits which were statute-barred, or the claim for damages when the judgment in CC 09/82 did not impose any requirement on the Council as alleged: rule 15.26(1)(b) of the *Civil Procedure Rules* (the 'CPR'). There was no legal merit in these claims: rule 15.26(1)(a) of the CPR. I am minded therefore to order that Mr Kilu personally pay half of each Defendant's costs of the proceeding.
51. Therefore in accordance with r. 15.26(3) of the *Civil Procedure Rules*, I hereby require Mr Kilu's written response **by 4pm on 13 October 2021** as to why half of each Defendant's costs of the proceeding should not be personally paid by Mr Kilu.

H. Result and Decision

52. In conclusion, I answered the issues as follows:
 - a) Issue 1: Is the Claimant's claim partially statute barred and if so, from when? "**Yes – the claims for payment of rents and mesne profits for the period prior to 2 October 2013 are statute-barred.**"
 - b) Issue 2: Is the First Defendant liable to the Claimant for payment of rents? "**No.**"
 - c) Issue 3: When was the compulsory acquisition process completed? "**On 1 October 2012.**"
 - d) Issue 4: Is the First Defendant liable to the Claimant for mesne profits or damages? "**No.**"

53. For the reasons given, the Claimant has failed to prove the Claim.

54. ~~The Claim is **dismissed.**~~



55. In accordance with r. 15.26(3) of the *Civil Procedure Rules*, I require Mr Kilu's written response **by 4pm on 13 October 2021** as to why half of each Defendant's costs of the proceeding should not be personally paid by Mr Kilu.
56. I will determine the issue of costs once I have received Mr Kilu's written response.

**DATED at Port Vila this 13th day of September 2021
BY THE COURT**

VM Trief

Justice Viran Molisa Trief

