IN THE MAGISTRATE'S COURT
OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 151 of 2003.

BETWEEN: GOVERNMENT OF VANUATU
Plaintiff

AND: ALICE LAURU
Defendant

JUDGMENT

Claimant's claim filed on the 14 July 2003 seek the following orders:

1. That the Defendant vacate the premises comprising dwelling house No. 166 at Independence Part forthwith.

2. Possession of the premises

3. Costs

4. Such further Orders as the Court deems fit

FACTS

The premises was previously allocated to Mr. Masing Lauru (Defendant's husband) about 1979 and they had lived in the premises until now. In 1999 Mr Lauru was made redundant, however, Defendant made arrangement to continue living in the premises. Following this arrangement Mr. Shem Lowoabu, senior Human Resourse Officer wrote to the Defendant on 7 July 1999 Ref.HO 59/99-SL adivising her that the premises had been allocated to her. On the 9th August 1999 the same officer wrote to Director General Finance informing him of the allocation of the premises to the Defendant and that a 12% deduction on rental be effected retrospective to 16 June 1999. However, despite her compliance with tenancy agreement, she had been given notices to vacate the premises. It is for her refusal to vacate the premises that this proceeding is instituted.

CLAIMANT'S CASE

On the 18th July 2000 Mr. Shem Lowembu, Senior Human Resource Officer – Officer In Charge of Government Housing wrote to Mrs. Alice Lauru informing her of Housing Committee's decision to revoke her tenancy and that she vacate the

premises. The reason for the revocation of her tenancy was that she was no longer performing on-call duties and that other doctors who may be required for on-call duties to be allocated the premises, thus the need for revocation of her tenancy. On the 26 September 2000 another notice to vacate the premises was sent to the Defendant. A further Notice to Quit dated 18 December 2002 was sent to the Defendant. So it appears the decision of the Claimant to revoke the Defendant's tenancy was that another doctor would be allocated the premises.

Claimant further in his submission says the Defendant is a licence and not a tenant. The Court was referred to authorities in support of this claim. As to who is a tenant reference was made to Hill and Redman's Law of Landlord and Tenant (15 Ed) at page 3 it is stated that the creation of tenancy at common law arises where one person (Landlord) with the intention confers to another (Tenant) exclusive possession of the building. In Halsbury's Law of England (Vol. 27, paragraph 5) it state that at common law the relationship of Landlord and Tenant is bases on contract. Therefore, if there is a written agreement (emphasis supplied) containing provisions which are consistant with a tenancy so that the substance of the agreement is a creation of a tenancy then an employee under such agreement is a tenant.

It was further submitted the Defendant is a licencee and not a tenant. In Halsbury's Law of Ebngland (4th ed., Vol. 27, paragraph 8) it was stated that *"a licence is normally created where a person is granted the right to use premises without becoming entitled to exclusive possession of them or the circumstances and conduct of the parties show that all that was intended was that the grantee should be granted a personal privilege with no interest in land..."*

In the English Case of Errington v Errington [1952] 1 All ER 149 at page 154 Lord Denning states: -

"The difference between a tenancy and a licence is, therefore, that in a tenancy an interest passes in the land, whereas in a licence it does not". Again in the case of Cobb v Lane [1952] 1 All ER 1199 at page 1202 Lord Denning stated that an employee *"is a licence if all that is intended was that he should have a personal privilege with no interest in land".*

Furthermore, under the Hill and Redman's Law of Landlord and Tenant (15 ed.) at page 17, it states: -
"The employement of words appropriate to a lease such as rent and rental will not prevent the grant from being a mere licence if from the whole document it appears that the possession of the property is to be retained by the grantor".

As to notice of revocation of licence Claimant refers to the case of Minister of Health v Bellotti [1944] 1 All ER 238 at page 245, Mackinnon L. J. states: -

"I think the rule of law is that the licensor can revoke his licence at any time, but the licencee has thereafter a reasonable time, having regard to all the circumstances, to comply with the revocation..."

Furthermore, Lord Greene, M. R. stated in the above case of Minister of Health v Bellotti [1944] 1 All ER 238 at page 242 that;

"where a licence is granted under a contract, it may well be that the contract will make express provision for those matters where it does those express provisions with regard to termination of the licence ... must be observed. Where the contract is silent... circumstances of the case are to be determined.

I will discuss these authorities a little later.

Defendant's case

On the 7th July 1999 Mr Shem Lowenbu, Senior Human Resource Officer of the Public Service Commssion wrote to Mrs Alice Lauru (Defendant) advising her of Housing Committee's decision (Meeting No. 2 of 1999) approving her residency of house No. 166 at Independence Park.

Following this approval Mr Shem Lowenbu wrote to the Director of Finance on 9th August 1999 directing Finance Department to commence rental deduction of 12% from the Defendant's salary retrospective to 16 June 1999. Since then she had not defaulted in her rental payments, she further says that rents are still being deducted up to this day.

However, the same Officer, Mr Shem Lowenbu on the 18th July 2000 wrote to the Defendant (Ref. PSC 1/3) and directed her to vacate the house. Again on the 26th September 2000 Mr Samuel J. George, Human Resource Officer, Public Service Commission, wrote to the Defendant informing her that on the 17th May 2002 PSC Housing Committee had decided that she vacate the house previously allocated to her. The reason for the change according to the officer was that Mrs Alice Lauru was no longer performing on-call duties and that the house is needed by another doctor. This is one of the reason if not the main reason claimant advanced to repossess the house.

Evidence

Claimant's case proceeded on the basis that the relationship of the parties is one of licensor and licencee, since there is an absence of written agreement. Claimant is of the view that since there is no written agreement between the Government and Mrs Lauru there could be no tenancy. It is further submitted that that *"If there is written agreement (emphasis supplied) containing provisions which are consistant with a tenancy so that the substance of the agreement is the creation of a tenancy then an employee under such agreement is a tenant."*

From the outset Claimant implies that the absence of any written agreement makes any arrangements between the Claimant and Defendant less than a tenancy.

Defendant says she took residency of the house following proper procedure and therefore in lawful occupation of the house, and as such she is a tenant and not a licencee. On the 7th July 1999 Public Service Commission through its Officer Mr Shem Lowenbu wrote to the Defendant to inform her that the Housing Committee has approved her tenancy of the house. The same officer again on the 9th August 1999 wrote to the Director General of Finance confirming the allocation of the house to Defendant and further requesting for a 12% salary deduction for rentals retrospective to 16th June 1999, (Note the retrospective effect of rental deductions which antedates the approval date of notification). It is clear that Defendant's occupancy of the house was made on the authority of the PSC with full knowledge of the arrangement. Defendant did not enter the house illegally as asserted by the claimant nor was her occupancy unauthorized. Provided that she is paying rent as consideration and not in breach of any other terms of the tenancy, she would have a legitimate reason to reside in the house.

The fact that no written agreement was made does not alter her status as a tenant. Unless there is a specific requirement for tenancy agreement to be in writing other forms of contracting may be employed. For example, oral or by conduct as long as there is clear intention on the part of Landlord to confer exclusive possession of the house to the tenant. The letters and rental deductions, manifest unequivocably the intentions of the parties to create a binding agreement, thus are consistent with the creation of tenancy. I think the law is well settled in respect to leases less than three years duration, which may be created orally. Any periodic tenancies say yearly, monthly or weekly would come under this category. This has been the common law position and may have found its way into the modern day statutes.

There is no evidence from the Claimant to prove or show that the relationship of Claimant and Defendant is that of licensor/licensee. Claimant has assume that Defendant is a licensee. This assumption may have been derived from the pleadings in the statement of claim. This is because the facts relied upon in the statement of claims are not entirely correct, when the true facts of the case are examined. Claimant's reliance on this distorted facts may have led to the submissions categorizing the Defendant as a licensee and not tenant. This observation is also evident in the Defence final submissions (*see Defence final submission dated 30/3/04).*

Claimant's own witness Mr Shem Lowenbu (Sworn Statement of Shem Lowenbu) states that he wrote to the Defendant authorizing her to occupy the house (paragraph 3, 4, copy of the letter marked Annexure SL1) The same officer, wrote to the Director of Finance to deduct 12% of Mrs Lauru's salary. She has been paying rents since 16 June 1999 and continuing to do so now.

There is no evidence of Mrs Alice Lauru defaulting on her tenancy. Then why give her Notice to vacate. Claimant's witnesses, Mr Shem Lowonbu and Hosea Tally gave evidence to the effect that Notice to Vacate Government house was issued for purpose of reallocation of the house to a Doctor, as Mrs Alice Lauru is no longer performing on call duty. This appears to be the main reason why Defendant was given Notice to vacate the house. If this is the only reason relied upon for the removal of Defendant then it may not amount to a common law principle and ground for terminating the tenancy. However, if the reason for the reallocation of the house for a Doctor is justified, further issue arises. Where is the evidence to show that the house is required for a Doctor. No evidence was called from say Director General, Medical Superintendent etc... to confirm that the house is required for on call Doctor. This factual evidence is crucial since the intended reallocation of the house to a Doctor is of interest to the Health Department. Any evidence from the Health Department would have given more weight to the Claimant's claim.

I now discuss the authorities referred to by Claimant.

Claimant proceeded on the basis that the relationship of the parties is one of licensor and licencee. The authorities Claimant referred to above, it is submitted supports this view. Reference was made to Halsbury's Law of England (4th Ed) Vol. 27 para.8 which states, "*a licence is normally created where a person is granted the right to use premises without becoming entitled to exclusive possession of them or the circumstance and conduct of the parties show that all that was intended was that the grantee should be granted a personal privilege with no interest in land...*"

It has always been accepted that a person found in exclusive possession of premises is a tenant., However, that may not now be the case, since the decision in **Errington v Errington [1952] 1 KB 290**. In that case a father bought a house, raising part of the money on mortgage, and allowed his son and daughter-in-law to live it saying that if they paid off the mortgage instalments the house would become theirs. Before the instalments had all been paid the father died, having by his will left the house to his widow. The widow brought an action in trespass against the daughter-in-law but it was dismissed first by the county court judge and also on appeal to the Court of Appeal.

In the above case Lord Denning at pp 296, 297 says: -

"*The difference between a tenancy and a licence is, therefore, that, in a tenancy, an interest passes in the land, whereas, in a licence, it does not. In distinguishing between them, a crucial test has sometimes between supposed to be whether the occupier has exclusive possession or not. If he was let into exclusive possession, he was said to be a tenant, albeit only a tenant at will..., whereas if he had not exclusive possession he was only a licencee:... The test has,*

however, often given rise to misgivings because it may not correspondent to realities. The test of exclusive possession is by no means decisive.

The first case to show this was Booker v Palmer [1942] 2 All E.R. 674, 677 where an owner gave some evacuees permission to stay in a cottage for the duration of the war, rent free. It was held by the Court of Appeal that the evacuees were not tenants, but only licencees.

In the case of **Cobb v Lane [1952] 1 ALL ER 1199**, a mother allowed her son into possession of a newly purchase home. The son claimed that by entry into occupation he become a tenant at will... and that having remained in possession in that capacity for at least 13 years, he had gain a possessionary title to the premises the Court of Appeal held, that the son was a mere licencee.

However, there is still some debate as to the real test, to be accertain whether an occupier is a tenant or licencee. "*the comments of Lord Denning in the case mentioned above should be read in the light of his Lordship's comments in* **Facchini v Bryson [1952] 1 TLR 1386,** where an employer had led an employee into possession under a written agreement. The court held that the agreement had all the features of a tenancy agreement, and that therefore, despite a clause which read, "*nothing in this agreement shall be construed to create a tenance,*" the parties were in the relationship of landlord and tenant. In the case above the court (Lord Denning at 1389) referred to Errington v Errington and others after and says that "*in all the cases where an occupier has been held to be licencee there has been something in the circumstances, such as family arrangement, an act of friendship or generosity, or suchlike, to negative any intention to create a tenancy".*

It is a simple case where the employer let a man into occupation of a house in consequence of his employment at a weekly sum payable by him. The occupation has all the features of a service tenancy, and the parties cannot by the mere words of their contract turn it into something else. Their relationship is determined by the law and not by the lable which they choose to put on it.

In Addiscombe Gorden Estates Ltd –v- Crabbe [1958] 1 QB 513 by Jenkins LH (with whom Parker and Pearce L.JJ agreed) who, after describing the facts in Errington v Errington as "*very usual circumstances*", and after referring to Lord Denning's opinion in Errington v Errington that the test of exclusive possession "*is by no means decisive*", said [1958] 1QB 513, at 528:

I think that wide statement in Errington v Errington] must be treated as qualified by his observation, in Facchini v Bryson, and it seems to me that, save in exceptional cases of the kind mentioned by Denning LJ. In that case, the law remains that the fact of exclusive possession, if not decisive against the view that there is a mere licence, as distinct from a tenancy, is at all events a consideration of the first importance (my emphases).

Garden Crabbe 1 QB

In Addiscombe Gorden Estates Ltd v Grubb [1958] 1 913, 513 at 524, 525, the Court of Appeal held that on agreement, whereby the owners of certain tennis courts and clubhouses purported to grant a *"licence"* to occupy, on its true construction created the relationship of landlord and tenant. One of the clause in the agreement is the right of grantor to enter and inspect the state of repair of the premises.

Exclusive possession test has also gain favour in Australian Courts. Thus in the case of Radaich vb Smith (1959) 101 CLR 209 after reviewing the English cases referred to above, held that the relationship of landlord and tenant existed despite the deed describing the arrangement as a *"licence"*. It is the substance of the deed that matters. This case follows the English case of Facchini v Bryson (above) and Addiscombe Gorden Estates Ltd v Crabbe (above). Other cases which has been held that even though parties have expressly intended the grant to be "*licence*" the courts have nevertheless found to be tenancy, for example the cases of Street v Mountford [1958] 809; Lewis v Bell (1985) 1 NSW LR 731; AG Securities v Vaughan [1988] 3 WLR 1205.

After coming this far I have come to my sense and enquire, is it really necessarily to look at authorities referred to above. I raise this query in the light of the relationship of the parties. This is a simple case. The parties are two, Government and Employee. Someone has said *"in the case of residential accommodation there is no difficulty in deciding whether the grant confers exclusive possession. An occupier of residential occupation at a rent for a term is either a lodger or a tenant. The occupier is a lodger if the landlord provides attendance or service, which require the landlord or his servants to exercise unrestricted access to and use of the premises. A lodger is entitle to live in the premises but cannot call the place his own."* In Allan v Liverpool Overseers (1874) LT 9 QB 180 at 191-192 Blackburn J said: *"A lodger in a house, although has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and though his goods are stored that, yet he is not in exclusive possession in that sense, because the landlord is there for the purpose of being able, as landlord commonly do in the case of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger."* (Cited in Real Property Commentory, and Material Sappiden CM; Stein R.T, Butt P.J., Certoma G.L. Third Edition, LBC 1990, at 516.

If on the other hand residential accommodation is granted for a term at a rent with exclusive possession, the landlord providing neither attendance no services the grant is a tenancy; any express reservation to the landlord of limited right to enter and view the state of the premises and to repair and maintain the premises only serves to emphasize the fact that the grantee is entitle to exclusive possession and is a tern ant (cited Real Property, p. 516, cited above).

In the present case Mrs Alice Lauru was given exclusive possession of the premises. She was granted possession for a term at a rent (that is monthly rental). She is not an owner, in fee simple, a trespasser, a mortgagee in possession, an object of charity or a service occupier. The grant may be express, or may be inferred where the owner accepts weekly or other periodical payments from the occupier.

What is then the effect to the "Notice served on Defendant directing her to vacate the premises. Claimant referred to the case Minister of Health v Ballotti [1944] KB 298. Assuming that Mr Alice Lauru was a licencee then she would come close to the defendants in the case just referred to. On the facts of that case it was apparent that the relationship of the Minister of Health and Ballotti was of landlord and licencee. And the unruly behaviours of the defendants may have been just cause for the Minister to issue notice in the form of letters to the defendant, to vacate the premises. The facts and circumstances of that case are to be distinguished from the present case. The relationship of the parties and the circumstances in which the defendant took possession of the house could not be inferred as coming within the ambit of landlord and tenancy. In such instance a strong inference of a licence is obvious. If Mrs Alice Lauru is a licencee then her case would be similar to the case of Minister of Health –v- Ballotti. The facts and circumstance in the present case is clear that a tenancy is intended. At common law reasonable notice determines the licence. However, if Mr Alice Lauru is a tenant she may have some recourse if tenancy is unreasonably determined.

Moreover, claimant submits that the relation of licensor and licencee is one based on common law. Regardless of whether the relationship is that of licencee or tenant since there is no law in Vanuatu dealing with Landlord and Tenant, any relationship of landlord and tenant, landlord and licencee would be governed by contract. As is common in contract, there may be terms and conditions, rights and obligations and damages if there are breaches.

If this is a tenancy and I think it is, it is a tenancy having a periodical nature, unlike a tenancy at will. Periodical tenancies may be implied from the manner of payment of rent. For example, where rent is paid and accepted on a weekly basis then (in the absence of agreement to the contrary) a periodical tenancy from week to week will arise ; where rent is paid and accepted on a monthly basis, a tenancy from month to month will arise etc. A lease for a periodic tenancy continues indefinitely until either party terminates it by giving notice equal to the length of the period and terminating at the end of a complete period, in this case would be one month.

What is the nature of landlord's "*notice*". Is it any notice given for the landlord's convenience, or there must be one resulting in determining the tenancy for cause. Unless there is sufficient cause to terminate a tenancy any purported termination may amount to a breach of a covenant. In the present case the

tenancy was not in writing and so the rights and duties of the landlord and tenant may not be ascertained, however, the essential terms as to parties, premises, rent and duration is known. In the absence of any expressed provision the position of the parties are as follows (see Megarry's Manual of the Law of Real Property, Sixth Edition by David J. Hayton London, Tevens and Son Limited, 1982 pp 363-365).

For the landlord:

- Implied covernant for quiet enjoyment
- Obligation not to derogate from his grant
- In certain cases obligation as to fitness and repair

For the tenant:

- Obligation to pay rent
- Obligation to pay rates and taxes
- Obligation not to commit wastes
- Landlord's right to view

If on the other hand, the parties have merely agreed that a lease containing the "*usual covernants*" shall be granted or if there is an agreement that a lease shall be granted, no reference made to the covernants it should contain, then subject to any contrary agreements by the parties, the lease must contain whatever covernants may be "*usual*" in the circumstances, and if it does not, it may be rectified to accord with the agreement.

The following covernants and conditions are "*always*" "*usual*" (see Hampshire v wickens (1878) 7 Ch.D.555).

On the part of the landlord:

- Covernant for quiet enjoyment...

On the part of tenant:

- Covernant to pay rent
- Covernant to pay tenant's rates and taxes
- Covernant to keep premises in repair and deliver in same condition
- Covernant to pemit landlord to enter and view the state of repair...
- Condition of re-entry for no-payment of rent, but not for other breaches.

The defendant, Mrs Alice Lauru could fall under any one of the above situation. There is simply no evidence to show of any breaches of her covernants to the landlord. The landlord may have been in breach of its obligation to the tenant, eg for quiet enjoyment. Thus in the case Kenny ⅄ Preen [1963] 1 Q.B.499, the landlord was asserting that the tenants title, her right to possession of the premises, although initially valid, had been wholly determined by a notice to quit. That is a case the facts are quite similar to the present case, except in that case

physical interference was involved, where as the present case does not. It was submitted for the landlord that the evidence does not reveal any breach of the covernant, because the landlord only made communications to the tenant and did nothing amounting to physical interference with the tenants possession and enjoyment of the premises. This submission was rejected, Pearson L.J. says at "In my view that course of conduct by the landlord seriously interfered with the tenant's proper freedom of action in exercising her right of possession, and tendered to deprive her of the full benefit of it, and so would in itself constitute a breach of covernant, even if there were not direct physical interference with the tenant's possession and enjoyment." The landlord was awarded norminal damage. In McCall v Abelesz [1976] Q.B. 584, Lord Denning M.R. said:

It is now settled that the court can give damages for the mental upset and distress cause by the defendant's conduct in breach of contract... It covers therefore any acts calculated to interfere with the peace or comford of the tenant, or his family. Similarly, the New Zealand Court of Appeal has said that "breach of a covernant for quit enjoyment can occur without actual physical interference": Kalmac Property Consultants Ltd v Delicious Food Ltd [1974] 2 N.Z.L.R 631 at 637.

What has been said above illustrate the extent of the tenant's rights in case of breach of his or her possession for quiet enjoyment. The tenant's rights may extend beyond the borders of common law. Therefore it may be possible for tenants to sue under statutes or even equity, thus extending the corridors of claims. Certain rights, duties, obligation, etc... may be conferred by legislations even though there appears to be no law dealing with landlord and tenant. So it would appear that the common law respecting landlord and tenant may have been modified by legislation and therefore rights etc... of tenants would be protected. For example Article 95(2) of the Constitution would bring all laws of England (on landlord and tenants etc...) immediately before Independence applicable. Thus the courts may grant other relief other than the common law. For example in the present case if the landlord had breached its covernants, tenant's normal recourse under common law would be in damages only and not insist on possession. If this observation is correct than courts may grand equitable relief to a tenant if landlord defaults, one of which include refusal to grant possession to the Claimant. In the present case Complainant has not satisfied the Court of the reasons as to why Defendant has to give up her possession.

Conclusion

Considering all the evidence presented I find in summary the following:

1. Public Service Commission through its agent/officers authorized Mrs Alice Lauru to occupy house No. 166 at Independence Park.

2. Public Service through its agents/officers authorized Finance Department to deduct 12% of Mrs Alice Lauru's salary in rental payments effective from 16 June 1999. She had not defaulted in her payments till now.

3. If not in writing tenancy may be created orally or by conduct of parties for example by landlord's acceptance of rent payment.

4. There is clear evidence of intention to create relationship of landlord and tenant in the relationship of employer and employee. Mrs Alice Lauru is a tenant and not a lodger. She is in exclusive possession of the premises.

5. There are no evidence of breaches of any tenancy covernants etc., nor was there any evidence of commons law breaches on the part of the tenant.

6. The purported notice was based on the wrong reason (house required by a doctor) which is not a common law principal, otherwise there is no evidence from the Health Department to confirm claimant's assertion.

7. The evidence, facts, circumstance, and intention clearly support the view that the relation is that of landlord and tenant. Defendant is in exclusive possession and there is no circumstances shown to negative that status.

8. Claimants without analysing the true relationship of the parties proceed on the assumption that defendant is a licencee, hence its evidence and submissions were directed to that issue.

9. The authorities referred to by claimant relates to either, family arrangement, charity or friendship. In the present case the relation is that of employer and employee. Employee is either a lodger or tenant. Defendant is in exclusive possession , paying rent, for a known duration, which otherwise negative in some material way may be proof of tenancy.

10. I find defendant to be a tenant and not licence as asserted by claimant.

After considering all the evidence, submission and the summary/conclusion alluded to above I find for the defendant.

ORDER

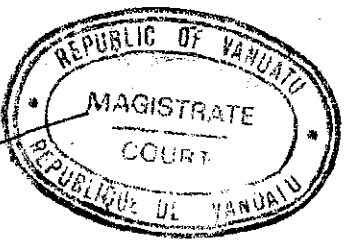
1. Judgment entered for Defendant

2. Defendant to have her cost assessed at VT 10.000.

3. Liberty to appeal.

Dated at Port Vila this 20th day of July, 2004.

BY THE COURT



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Magistrate