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

Civil Case No.30 of 2009

BETWEEN: REX MCGRATH
Claimant

AND: (VANUATU) SEA TRANSIT LTD

First Defendant

AND: ROBERT HORTON and DESLEY HORTON
Second Defendant

Coram: ***J. Weir***

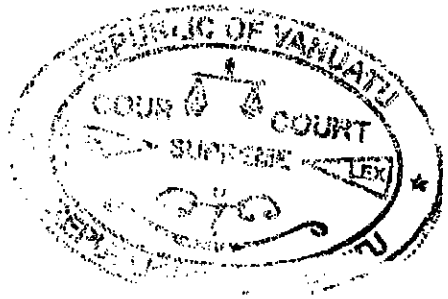
Counsel: ***Mr. D. Yawha for the Claimant***
Mr. N. Morrison for the defendant

JUDGMENT

Introduction

The Claimant, Rex McGrath is seeking judgment against the 1st and second defendants in the sum of VT24,339,836 arising out of an alleged employment contract. He is also the defendant in proceedings issued in the Port Vila Magistrates Court for possession of land owned by he 1st Defendant Company in these proceedings. Those proceedings have been consolidated in this current proceeding in the Supreme Court.

The Defendants in this action deny there was an employment contract and counterclaim for possession of the company land which they allege the claimant has illegally occupied since June 2008 & seek damages for trespass and his continued unlawful occupation of the land.



BACKGROUND TO THE DISPUTE

The 2nd defendants are 2 of 4 directors of Vanuatu Sea Transit Ltd (VAST) the 1st defendant company. They are in dispute with the other 2 directors of that company who, it seems have had little to do with the operation of VAST for some years.

VAST owns as its principle asset a leasehold property title no.11/0A21/011 located at Paray Bay, Port Vila. It is, apparently, the only privately owned deep water port in Port Vila.

As a result of the 2nd defendants dispute with their co directors, the 2nd defendants, who reside in Australia, arranged for their Vanuatu Business partner, Mr. Peter Napwatt, to stay at the property in a building constructed by them in or about 2001. Because of commitments in Santo, it became necessary for Mr. Napwatt to relocate to Santo in December 2007.

Shortly prior to this, the Claimant and the 2nd defendants came into contact in Australia. Each alleges that the other made the initial approach, but in my view this is not an issue which requires determination.

As a result of their meeting in Australia the parties had discussions about the Claimant taking up residence at Paray Bay after Mr. Napwatts departure with a view to him starting up a business there.

In order to explore the viability of the business venture, the 2nd defendants and the Claimant travelled to Port Vila on the 10th November, returning to Australia on the 17th November. All expenses were met by the 2nd defendants.

What was actually agreed to by the parties during that trip to Port Vila has been the subject of substantial debate, but what is clear is that the parties did reach agreement that the claimant could stay at the property and commence a fiberglass boat building business. It is, however, unclear as to the specific terms of this agreement.

It is common ground that the claimant had previously operated a similar business in Australia which had collapsed, and also that

another company owned by the 2nd defendants had previously supplied him with boat steering equipment in that business.

It is also common ground that the Claimant returned to Port Vila in mid December 2007 at his own cost and took up residence at the property at Paray Bay.

THE DISPUTE

(1) THE TERMS OF THE CLAIMANTS TENANCY OF PARAY BAY

It seems that the initial understanding was that when the Claimant was pursuing his own business interests, he would at the same time be doing work on the property at Paray Bay which was beneficial both to him and the defendants. This was alluded to in his email to the defendants dated 21/11/07 (RCM1 Claimants 1st sworn statement)

"P.S.Bob I'm (sic) am more than capable of putting the roof on the shed, fixing the main roof, fixing water pipes, leaks and everything else. It would be a pleasure to do these things as appreciation for what you are doing for us. We can take our time, get acclimatized at our pace before the pressure comes on"

The second defendants responded by email the same day (also RCM1) effectively taking up the claimants offer. The letter concluded:

"The important thing for us to do now, is to get the minutes of our special meeting about our arrangements to Garry Blake. To do this, we need back the copy of what we discussed with you, and check if it is o.k. We had only 2 copies and left one with Gary. Then we will move on to greater and better happenings together....."

Mr McGrath was cross examined on notes made about that meeting which were recorded by Gary Blake (the 2nd

defendants accountant in Port Vila) at his office in Port Vila on 13th November.

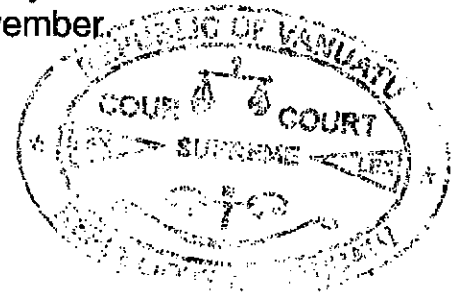
It was put to him that there was an agreement that the Claimant would have a rent free period of 3 months, where he would only be responsible for water and electricity expenses, but after that there would be a monthly rental of AUD1500.00 for the following 3 months of April, May and June and then a more formal lease agreement would be prepared, if it was viable.

Mr. McGrath denied that there was ever any discussion along those lines and questioned whether he would attend such a meeting the day after he arrived. He was also questioned about what the defendants allege were the formal minutes of a meeting of the second defendants and Peter Napwatt dated 11th November 2007. Those minutes are annexed to this judgment marked "*A*" and outline in more detail the arrangement the second defendants allege was discussed at Mr. Blakes office on the 13h November. Mr. McGraths response was that the minutes were fraudulent and he said that the 1st time he was given a copy of these minutes was in June 2008.

I found Mr. McGrath to be quite unconvincing in his responses to this line of questioning for the following reasons.

(i) In so far as the meeting on the 11th November was concerned, while alleging that the document was a *"fraud",* he freely admitted receiving a copy of that document in June 2008 yet nowhere after that date is there any correspondence, or any evidence of him taking issue with what is outlined in that document.

(ii) In so far as the meeting of the 13th November at Mr. Blakes office was concerned, he was evasive, simply saying that the terms were *"never discussed"* and further said "would I do this the day after arrived in Port Vila?" He did not directly deny that such a meeting took place and the meeting was in fact several days later as the parties flew into Port Vila on the 10th November.



(iii) It is also noteworthy, that the substance of the proposed arrangement between the parties was repeated in a letter addressed to the Claimant dated 10th November 2007, but emailed to his son Scott McGrath at an Australian address on 22nd November. This letter is annexed to this judgment marked "*B*".

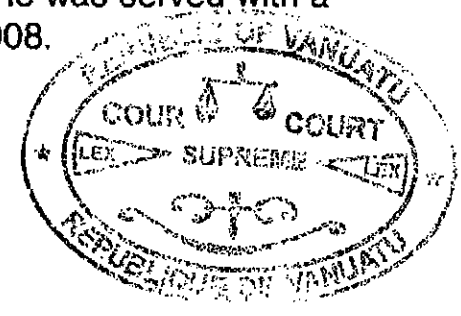
Mr. McGrath questioned the bona fides of this letter as well, saying that his son was not involved at that stage and was residing in a flat on the gold coast. Mr. McGrath also said that around about that time he was in Phuket at a wedding.

That response however does not explain the exchange of emails between the defendants the Claimant and his son Scott dated 21/11/07 annexed to the Claimant 1st statement marked RCM1. This exchange of emails clearly took place after the return of the parties to Australia, and in context, refers to the meeting which took place in Port Vila.

The "wedding" which Mr. McGrath referred to in his oral evidence before the Court seems to have taken place after that exchange of emails as evidenced by his email dated 23rd November to the defendants where he referred to getting things moving "When we get back from the wedding" – see RCM2 defendants 1st affidavit.

Mr. McGrath does not contest that by email of the 18th June, the defendants notified him that it was not viable for them to commence a tenancy agreement with him and that the property would then be listed for sale.

Neither does he dispute that he received a further email dated 5th August 2008 requiring him to vacate the premises at Paray Bay by the 11th August 2008. Nor does he dispute that he was served with a Notice to quit the property on the 14th October 2008.



Regardless of this documentary trail, Mr. McGrath remains in occupation and relies on what he says was an oral agreement to lease the property which formed part of a wider oral employment contract between himself and the defendants.

Mr. McGrath has not filed a statement of defence to the defendants counterclaim for possession of their property and damages, but the defendants do not take issue with that. In his written submission, counsel for the Claimant has filed 2 letters which he attempts to rely on as some form of justification for his continued occupation of the property. Counsel for the defendants quite property objects to those letters as they formed no part of the evidence before this Court and they are ignored for the purposes of this judgment.

2. THE EMPLOYMENT CONTRACT

The Claimant alleges that during the initial visit by the parties to Port Vila between 10th November and 17th November 2007 they reached an oral agreement whereby he would act as the company's manager. The remuneration package, as pleaded was as follows:-

(i) Payment at the rate of VT475,000 per month for a period of 3 years.
(ii) Furnished accommodation.
(iii) 2% of annual turnover for 1st year of employment, 3% thereafter.
(iv) Travel expenses.

The only evidence that Mr. McGrath provides in support of this agreement is at paragraph 11 of his 1st sworn statement and paragraph 14 of his 2nd sworn statement. Apart from those 2 paragraphs he also relies on correspondence where the defendants have referred to him as their manager. In particular, he relies on a letter written by the defendants to the Vanuatu Foreign Investment Board dated 4th February 2008 (exhibit RCM5 Claimants 2nd statement) where the defendants twice referred to him as their manager.

However, the email correspondence between the parties prior to that letter puts that terminology into context. The facts were that the

business license of VAST had not been renewed for the ensuing year and without that business license, there could be no arrangement whatsoever between the parties with regard to the property at Paray Bay.

This was referred to in an email written by Mrs. Horton to Mr. McGrath dated 29th January 2008 – (exhibit RCM4 Claimants 2nd, sworn statement)

In that context Mrs. Hortons version of the undertaking, in my view is the more correct one as outlined in paragraph 19 of her sworn statement.

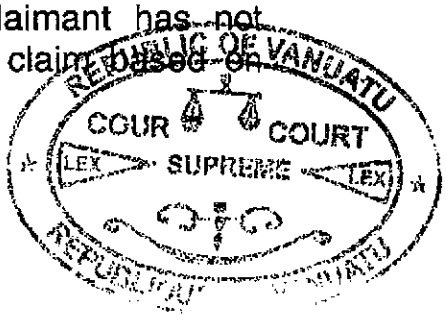
Furthermore, the claimant appears to accept this situation himself. At paragraph 20 of his 2nd statement the claimant said:-

> *".....it was decided that the best way to sort these licenses out was for the Hortons to tell VIPA, I was the manager of VAST and I could then complete the necessary paper work with the least of fuss....."*

The Claimant, Mr McGrath, points to the reclaiming of 4 metres of the foreshore to improve the property as a deep water port as having special significance. The photograph produced indicates that there has been some significant improvement to the property, but the emails once again indicate that this improvement was carried out by Mr. McGrath without obtaining the full approval of the defendants. The evidence in support of this is fully captured at paragraph 6.4 of counsel for the defendants submissions.

In his written submissions, counsel for the Claimant has referred to a number of cases, and relies on the basic submission that the terms of claimants contract as pleaded, were implied conditions. The cases he cites are of no assistance in support of that submission.

It matters not whether one applies the officious bystander test, the business efficacy test or the test of reasonableness to this submission by counsel for the claimant. The claimant has not discharged his evidential burden in relation to his claim based on implied conditions in an oral employment contract.



Furthermore, in questions from the bench he admitted that he had never prepared invoices for items 3-17 in his particulars of claim – at best they could only be regarded as a reconstruction of some costs allegedly incurred well after the battle lines had been drawn. Indeed, as he admitted some of those costs would have been on a "Quid Pro Quo" basis with Highway stabilizers Ltd, a company which was apparently subleasing part of the property at Paray Bay from him.

He further admitted that his claim for materials used in work on the property (items 1 - 19 inclusive) had already been paid for by the defendants from monies they advanced to him, initially to assist him in obtaining his own business license with VIPA.

In conclusion, quite apart from the complete lack of any documentary information to support his claim, I once again found Mr. McGrath was not a credible witness just as he was not in relation to the lease of the property. In my view, Mr. McGrath has not even established that there was an employment contract between himself and the defendants, let alone the implied conditions as pleaded.

I make the following orders:-

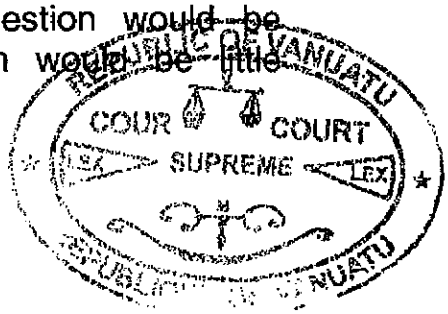
1. The claimants claim is dismissed.

2. There will be judgment for the defendants on the claim and on their counterclaim in the following terms.

   (i) these will be an order in terms of paragraph 1 of the defendants counterclaim.
   (ii) The counter claimants are entitled to possession of lease title 11/0A21/011 forthwith.

DAMAGES

Mr. Glen Creig gave uncontested evidence that a conservative monthly rental valuation of the property in question would be VT350,000 per month and that rental valuation would be little changed in vatu terms since 2007.



In his written submissions, counsel seeks damages from the 31st October 2007 based on the notice to quit issued. In my view the counter claimants have been wrongfully deprived of that income and there will be judgment accordingly for 30 months lost rental at VT350,000 per month, a total of Vatu 10,500,000.

The parties are to attempt agreement on costs, but failing such agreement, costs are to be taxed.

DATED at Port Vila 24th day of May 2011.

BY THE COURT

J. WEIR
Judge

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