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

Civil Case No. 192 of 2009

BETWEEN: WALTER FURET
Claimant

AND RENE AH POW
First Defendant

AND: GRAZIELLA LEONG
Second Defendant

AND: LEONG PROPERTIES LIMITED
Third Defendant

Before: ***Justice D. V. Fatiaki***

Counsel: *Garry Blake for the Claimant*
Daniel Yawha for the Defendants

Date of Judgment: *3rd June 2014*

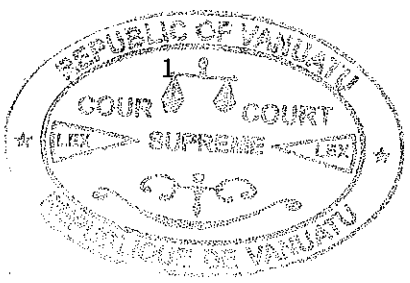
JUDGMENT

1. This case concerns the construction of a commercial lease agreement ("*the lease*") between the claimant, representing **Boucherie Fur**et (Furet) and the first defendant representing **Au Bon Marche** (ABM). The second and third defendants are joined in the action as they have interests in the head lease of the ABM property.

2. The lease was executed on 23 June 2005, but had a commencement date of 8 November 2003. The lease concerns the occupancy of a portion of the ABM Supermarket located at No. 2 area in Port Vila. The present dispute between the parties arose on 27 May 2009 when ABM delivered a letter to Furet terminating the lease and requiring delivery up of possession on 31 December 2009.

3. At trial the case presented by the claimant did not address all the issues raised in the amended Supreme Court claim. At trial Furet contended that the notice to terminate the lease was not validly given as the lease, properly construed, gave Furet a minimum term running to the end of October 2013 (ie. a 10 year term) which could not be terminated by notice sooner than that date. On this construction of the lease the notice that had been given by ABM was not a valid one.

4. ABM on the other hand asserted that the lease was for an indefinite term but could be terminated at any time by giving 6 months notice.



5. Furet obtained an interlocutory injunction, subject to an undertaking as to damages, preventing its eviction until these conflicting constructions of the lease was decided upon by the Court.

6. Even though the minimum period for which Furet contends has now passed, Furet faces a considerable claim under its undertaking for damages for losses allegedly incurred by ABM for being kept out of the leased premises if ABM's interpretation of the lease is upheld.

7. The lease was originally executed by Michel Furet, the father of the claimant, but he died early in 2009, and the claimant brings this proceeding as his executor.

8. Michel Furet, was a French man with a very limited understanding of English. From 1978 he carried on the business known as "*Boucherie Furet*" in a portion of the ABM premises at No. 2. He did so under a lease governed by French law. The ABM supermarket premises was destroyed in an earthquake in 2002 and for a time there after he moved his business operations elsewhere. When the ABM premises were rebuilt in 2003, he moved again into a designated area in the new Supermarket.

9. ABM sought to obtain a new lease from Furet. Protracted and painstaking negotiations took place over the terms. It was not until June 2005 that Furet was prepared to sign a lease on terms which he and ABM thought had been agreed between them. The lease had been drawn up in the English language by Mr Geoffrey Gee. Mr Gee was the lawyer instructed initially by ABM to draft the lease, but by coincidence he was also the lawyer who normally acted for Furet. In the latter stages of the negotiations Mr Gee explained the proposed lease terms to both ABM and Furet.

10. The operative terms of the lease are contained in three schedules. Schedule One contains *"TERMS"*, Schedule Two contains *"CONDITIONS"* and Schedule Three identifies the area of the Supermarket subject to the lease.

11. Schedule One in material respects reads:-

"PERIOD	*The Lease shall be for an indefinite period subject to commencing on the 8th of November, 2003.*
AREA	(Not presently relevant)
RENTAL PAYMENTS	*THE LESSEE shall for the first year of this Lease pay to the Lessor THREE HUNDRED THOUSAND VATU (VT 300,000) plus VAT monthly in advance on or before the 5th day of each and every month during and thereafter in each successive year until 31st October 2010 at a rate increase of 5% above the preceding year annually. For the period November 2010 to October 2013 the rent will remain fixed at the rate payable as at end of October 2010. From November 2013 the Lessor and Lessee shall negotiate new rental terms and based on market value at the time.*

RENT REVIEWS	*As set out in the Rental Payments herein.*
OUTGOINGS	(not presently relevant)
BOND	*NIL*
USE	*THE PREMISES are to be used solely as a Retail Butchery."*

12. There is no issue over the description of the premises in Schedule Three.

13. Of the many Conditions set out in Schedule Two, one in particular, **Clause 21**, is critical to the dispute between the parties. It reads:

> "***21. EITHER party may terminate this Lease upon giving 6 months notice in writing to the other party.***"

14. ABM contends that the letter purporting to determine the lease was validly given as **Clause 21** is clear and unambiguous. The lease is, as Schedule One states ... *"for an indefinite period"*, ***ie:*** one that has no specified term or expiry date, but under **Clause 21** it can be brought to an end by either party giving 6 months notice. For absolute clarity of meaning, **Clause 21** could have added the words *"at any time"* but ABM contends that the words in clause 21 are clear enough without that refinement.

15. Furet on the other hand contends that to read the lease as ABM contends makes no commercial sense. Furet had been operating its business in the ABM Supermarket, apart from the earthquake interruption, for close on 35 years. Why? Furet asks rhetorically, would a prudent businessman enter into a lease that could be terminated at the whim of the landlord 6 months later. Moreover the lease provided a formula for rental payments extending to the end of October 2013 which indicates an intention that the lease would run at least to that date.

16. Furet contends that to make good commercial sense of the agreement which the parties recorded in the lease, the lease should be construed to mean that it could not be terminated on notice at any time before the end of October 2013. That is to say, *"the indefinite period"* indicates that the lease was intended to run for a long time; the rental formula anticipates a minimum term of 10 years, and therefore the lease could not be terminated until after that minimum term had elapsed.

17. In the alternative Furet contends that these features of the lease at least show that the language used by the parties is ambiguous or susceptible of more than one meaning, and reference should therefore be made to the evidence of surrounding circumstances to assist with the interpretation. Those surrounding circumstances it is said support Furet's construction.

18. As a final fallback position, if the construction contended for by ABM is correct, Furet raises a plea of *"non est factum"*, and asserts that as Michel Furet did not understand English he was under a disability that prevented him from understanding the words of the lease which had a meaning radically different from his understanding namely that he would be getting a lease for a minimum of 10 years. That this was his understanding is said to be established by evidence from his family and employees who say they were told by Michel that he had signed a lease which secured the premises for at least 10 years.

19. It is convenient immediately to dispose of two matters raised in the early stages of this case.

20. First it was pleaded that the first defendant lacked legal standing to enter into the lease. This plea was withdrawn at the end of the trial. It is now conceded that the first defendant entered into the lease with the necessary authority to do so and on behalf of the third defendant which holds the head lease.

21. Secondly, whilst the lease in **Clause 33** provides that it is governed by the laws of the Republic of Vanuatu, an argument was foreshadowed by Furet that the tenancy was governed by French law principles such that the lease by law had to be for a minimum term of 9 years (though subject to the right of a lessee to terminate on notice at the end of each 3 year period of the lease, and subject to limited rights in the landlord to terminate for specific purposes). However at the conclusion of the trial counsel for Furet announced that no distinction between French law and English law principles would be pressed, and the closing submissions adopted English law principles.

22. At trial evidence was led about the detailed negotiations that took place before the lease was signed, and drafts of different proposed leases were tendered, including drafts in the French language which followed the French New Code of Commerce. Evidence was also tendered about discussions between the parties to the effect that Michel Furet was insisting on a minimum 10 year term. The admissibility of much of this evidence is doubtful except perhaps in respect of the "*non est factum*" plea.

23. The law is clear that parole evidence of this kind which discloses the wishes and personal intentions of the parties is not admissible on the construction of a contract. The parties to a written contract reduce their agreement into written form, and their mutual intentions must be ascertained from the written words they have used.

24. The first step in ascertaining what their recorded agreement means is to read the words used by them in their plain and ordinary meaning. If the language used in the contract permits of only one meaning, that meaning must be given to the contract and taken as expressing the intention of the parties. If the language carries a clear and unambiguous meaning, a Court is not justified in disregarding it simply because the contract would have a more commercial or business like operation if construed in a different way – **Western Export Services Inc and Others v. Jireh International Pty Ltd** [2011] HCA 45, 282 ALR 64.

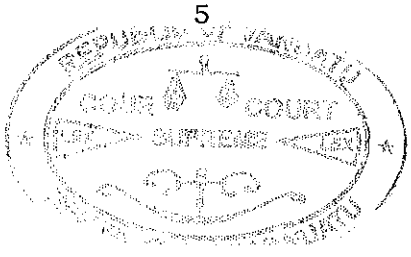
25. On the other hand, if the written contract, read as whole, is ambiguous or capable of more than one meaning, then the Court is permitted to look beyond the language used to the surrounding circumstances and context in which the contract is to operate.

26. In the leading case in Australia of **Codelfa Constructions Pty Ltd v. State Rail Authority of NSW** [1982] 149 CLR 337 Mason J with the concurrence of Stephen and Wilson JJ, after an extensive review of leading cases in the United Kingdom, said at 352:

> *"The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But is not admissible to contradict the language of the contract when it has a plain meaning. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although, as we have seen, if the facts are notorious knowledge of them will be presumed.*
>
> *It is here that a difficulty arises with respect to the evidence of prior negotiations. Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible. But in so far as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable. The point is that such statements and actions reveal the terms of the contract which the parties intended or hope to make. They are superseded by, and merged in, the contract itself. The object of the parol evidence rule is to exclude them, the prior oral agreement of the parties being inadmissible in aid of construction, though admissible in an action for rectification.*
>
> *Consequently when the issue is which of two or more possible meanings is to be given to a contractual provision we look, not to the actual intentions, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework or facts within which the contract came into existence, and to the parties' presumed intention in this setting. We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time consuming but it would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the written contract."*

27. I have set out the above statement of the law at length as it is directly relevant to this case. The High Court of Australia has reaffirmed Codelfa on numerous occasions since 1982: Royal Botanic Gardens and Domain Trust v. South City Council (2002) 240 CLR 45 and Western Export Services Inc and Others v. Jireh International Pty Ltd cited above. See also Byrnes v. Kendle [2011] HCA 26 at [98] – [99]; 279 ALR 212 at 237.

28. It is therefore necessary in this case to consider whether the words in the lease are ambiguous or capable of more than one meaning. In my opinion they are both for the



reasons advanced by counsel for Furet. It is strange indeed that a commercial lease stated to be for the conduct of a retail butchery business, and for an indefinite term with a rental formula precisely fixing rent for 10 years, should also provide for termination on 6 months' notice that could theoretically be given without reason the day after the lease is executed. The combination of the statement that the lease is "*... for an indefinite period*" coupled with the rental formula implies that the parties intended the lease to run at least until the end of October 2013.

29. Furthermore the lease had ample provisions within it for ABM to bring the lease to an earlier and quick end should Furet not pay rent or not comply with the conditions requiring appropriate conduct and care of the premises. **Clause 21** is plainly not there to provide ABM with protection against risks and contingencies of that kind. In my opinion the lease is reasonably capable of two constructions – the one being that propounded by ABM, and the other being that propounded by Furet.

30. The Court must therefore look at the "*surrounding circumstances*" in which the lease was made and was intended to operate. In this regard the parties had been in a working relationship for some 35 years. After the earthquake Furet had refitted the area of the Supermarket where it operates at considerable cost. The refit was obvious to ABM to see even if it was unaware of the actual costs involved. To vacate the leased premises would also involve considerable costs. It must have been apparent from that "*objective*" framework that Furet would have required much more time than 6 months to fully recover its setup costs.

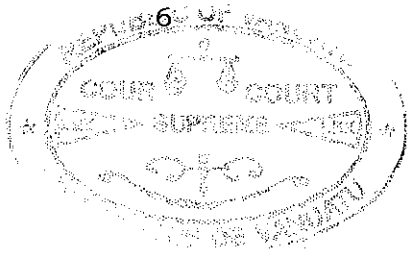
31. Of lesser significance also is the fact that Furet had previously occupied the butchery under a lease based on French law which ensured to the tenant a minimum secured tenancy probably of at least 9 years duration. The early drafts of the new tenancy agreement proffered by ABM to Furet for his consideration followed the French form. I consider this indicates that ABM itself was recognizing that its tenant would be expecting a term that could not be brought to an end in as little as 6 months time.

32. In my view when the surrounding circumstances are considered, the meaning which the parties must have intended by their language is that advanced by Furet. In other words the Butchery was to have a minimum term running to the end of October 2013 (but subject of course to Furet complying with the tenants normal obligations as to rent and behavior required under the conditions of the lease). **Clause 21** means that the right to terminate the lease on 6 month's notice is subject to this minimum term which expires at the end of October 2013.

33. As the Court holds this to be the correct interpretation of the lease, the plea of *"non est factum"* does not arise and need not be considered.

34. The Court will therefore make declarations to reflect the above construction of the lease.

35. The defendant's counterclaim for damages was not pressed at trial as the same damages would fall to be assessed under the claimant's undertaking as to damages given for the interlocutory injunction application in the event that ABM's construction was upheld.



36. For the foregoing reasons the Court orders:

(1) Declaration that upon the proper construction of the lease dated 23 June 2005 the claimant is entitled to occupancy and quiet enjoyment of the demised premises until at least 1 November 2013;

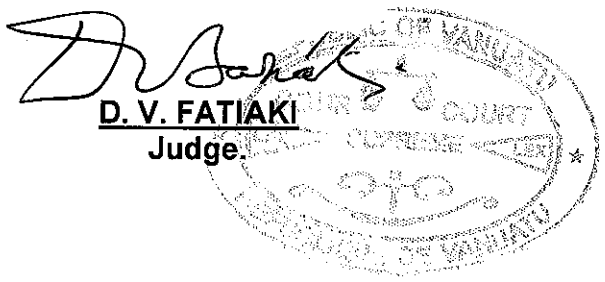
(2) The defendants' notice given on 27 May 2009 requiring the claimant to deliver up possession of the demised premises on 31 December 2009 was an invalid notice not permitted by the conditions of the lease;

(3) The counter claim is dismissed;

(4) The defendants must pay the claimant's costs for the action on the standard basis.

Dated at Port Vila, this 3rd day of June, 2014

BY THE COURT



D. V. FATIAKI
Judge.