

BETWEEN: Don Ken
Claimant

AND: The Republic of Vanuatu
Defendant

Date of TRIAL: *27th day of July, 2018 at 9:00 AM*
Date of JUDGMENT: *12th day of October, 2018 at 8.30 AM*

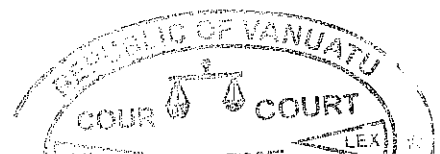
Before: *Justice Oliver A. Saksak*

Counsel: *George F. Boar for the Claimant*
Sakiusa Kalsakau for the Defendant

JUDGMENT

Introduction/Preliminary Matters

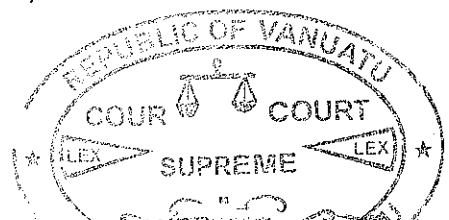
1. The Court heard evidence from witnesses for the claimant and the defendant on 27 July 2018 and issued directions requiring written submissions be filed upon request by both counsel.
2. The claimant was required to file and serve his written submissions by 21 August 2018. He filed written submissions in compliance on 14 August 2018. The defendant was required to file and serve their written submissions by 11th September 2018. They have not done so.
3. Counsel for the claimant has pressed the Court for judgment through his letters dated 11th September, 19th September and an email dated 10th October 2018. None of those correspondences were copied to the State Law Office. Nonetheless Mr Boar informed the Court in his letter of 19th September that they had served a copy of their written submissions on the State Law Office.



4. This is a claim for expenses incurred by the claimant for renovation works on a Ministerial House commencing in 2011. It is therefore little wonder why the claimant has pressed for judgment about a month after the expiration of the 21 days given to the defendant to file their submissions. That is a valid plea. There is no reason to allow further time to the defendant for their submissions.

Background Facts

5. The claimant became a Minister of State in 2010 with the portfolio of Ni-Vanuatu Business Development. As such he was entitled to official housing under the Official Salaries Act [CAP 168]. He was not allocated a government house. In early 2011 he accompanied by his driver and his political adviser and had a meeting with the then Housing Officer Vital Taiwia. In that meeting the claimant sought permission to move into the Ministerial House (the House) at Colardeau Area to occupy it and to do repairs. There were no funds at the time for the Government to do the repairs. It was verbally agreed by the Housing Officer that repairs be done by the claimant and that he be refunded his expenses later.
6. Upon that verbal authorisation the claimant occupied the House after he did some initial repairs for two months. He then moved into the House and did the rest of the repairs along the way.
7. There was a reshuffle of Ministerial positions and the claimant became the Minister of Health for a short time and then moved to be the Minister of Public Utilities and Infrastructure. But he remained in occupation of the House in issue until 2015 when Cyclone Pam struck and caused damage to the House. The claimant continued to do repairs to the damage caused. He engaged Ramkorte Construction to do the repairs and renovations on the House. He paid the sum of VT10,800,000 to the construction company. He engaged a valuer to value the renovation works to the market value of VT11,791,845.
8. The claimant claims reimbursement from the defendant for the sum of VT11,791,845 and interest thereon at 10% per annum from 15 April 2016 when he filed his claims. He claims costs at VT1,500,000.



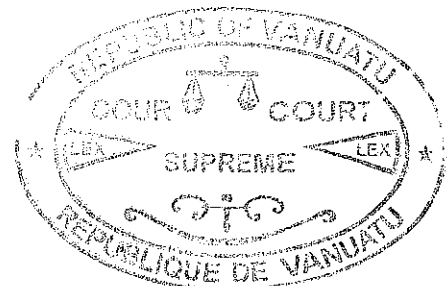
9. The defendant filed a defence and counter-claim on 9 August 2018. They deny ever giving approval for the renovation works and deny the claimant is entitled to any refund or compensation for renovation works done to the House by the claimant. By way of counter-claim the defendant claims the claimant was a trespasser and sought orders for his eviction and damages and mesne profits.
10. The defendant has been partly successful in their counter-claims in that the Court had issued an eviction order against the claimant who continued to occupy the House even after he had ceased to hold a Ministerial position. The claimant has since vacated the House.

Issues

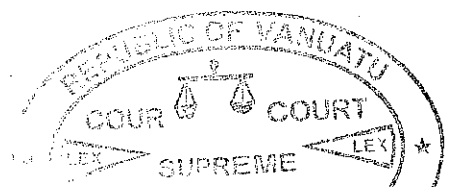
11. The remaining live issues are –
- (a) Whether the claimant had an entitlement to the House and whether at the time he had approval to do repairs and renovation to be later reimbursed by the Government?
 - (b) If there was no agreement, whether the equitable doctrine of waiver and estoppel be applied to explain the relationship existing between the claimant and the defendant's agents at the time?
 - (c) Whether the claimant has proved his expenses of VT11,791,845 to establish his claims for refund?
 - (d) Whether the claimant should pay mesne profits to the defendant for residing in the House?

Discussions

12. I begin to discuss the issues in light of the evidence adduced by the claimant himself and his witnesses namely Jackson Soken, Kallan Bellial, Roslyn Ken and Rocky Adams. For the defence, I consider the issues having regard to the evidence of Vital Taiwia, Sam Namuri, Menzies Samuel and Jacques Gideon.



13. The first issue: whether the claimant had entitlement to Government Housing and whether he had approval to do repairs and renovations to the House to be later reimbursed?
14. There are two limbs to this issue. First his entitlement. His evidence in chief and in cross was clear. In 2011 to 2012 he was the Minister of Ni-Vanuatu Business. In 2012 he became Minister of Health and then reshuffled to be the Minister of Youth and Sports. Then from 2015 to 2016 he became Minister of Public Utilities and Infrastructure. After elections in 2016 he did not hold any Ministerial position but maintained his position as Member of Parliament. He remained in the House in issue until he was ordered to vacate in 2017.
15. The defendant admitted at paragraph 13 of their defence and counter-claim that in 2011 the claimant was allocated a government house by reason of him being appointed a Minister thereby entitling him to housing benefit under sections 3.1(a) and (b) of the Manual.
16. The defendant pleaded in their defence at paragraph 15 that notices to vacate the house were issued to the claimant when he had ceased to be a Minister on 2 May 2013, 12 November 2013, 30 March 2016 and 9 June 2016. Those notices are disclosed in the evidence of Jacques Gideon in his sworn statement dated 19th September 2016 as annexures "JG1", "JG2", "JG4", and "JG5".
17. The first notice gave the claimant one month notice from 3 May 2013 to 2 June 2013. Despite that clear notice, the defendant did not take any action against the claimant after that period. The second notice ("JG2") gave the claimant a dateline of 17 November 2013. Nothing was done by the defendant after that date. The third notice ("JG4") gave the claimant a dateline by 30 April 2016 and the fourth notice gave a dateline of 23 June 2016 ("JG5").
18. Despite those notices, there is no evidence the actions threatened to be taken by the defendant were ever taken. It was only after the claimant had filed his claims on 15 April 2016 that the defendants filed their counter-claims with their defence. Had the defendant file a claim for trespass in July 2013 after they issued the first notice on 3 May 2013, that action would have stopped the claimant doing repairs and renovations after that date. But their failure and/ or



omission allowed him to continue to reside in the House and to do repairs and renovations on the understanding that he had the agreement or approval to do so.

19. The defendants have pleaded section 44 of the Staff Manual in their defence. However the claimant's entitlement to official housing is clearly provided under the Official Salaries Act as amended from time to time. The claimant was entitled to government housing from 2011 as an official of Government or State until his appointment as Minister of the State ceased in 2016. As such the notices issued on 2 May 2013 and 12 November 2013 were invalid and irrelevant. But in the event they were, my view is that the failure and/or omission of the defendant to act on them as notified has become a waiver or estoppel for the defendant to claim for mesne profits for those periods in 2017.

20. The second limb is whether the claimant had approval to do the repairs and renovations he did?

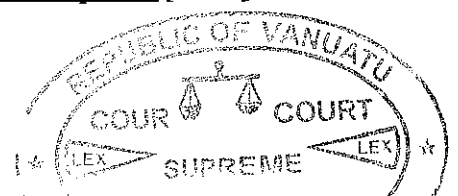
The claimant's evidence is clear that he together with his driver and political adviser met with Vital Taiwia in 2011 and got his verbal agreement to move into the House, do repairs and to be refunded later. The evidence of Kallan Bellial confirms the claimant's evidence. The evidence of Vital Taiwia is unreliable and not credible to be believed.

21. From those evidence I find that –

(a) The claimant had entitlement to official government house as State Minister under the Official Salaries Act [CAP. 168].

(b) The claimant had verbal agreement to occupy the House and to do repairs and renovations at his own costs to be later reimbursed. Based on those findings, I answer the first issue in the affirmative. I have read the submissions by Mr Boar in relation to this first issue. I agree with those submissions entirely.

22. The second issue raised is in essence an alternative to their being no agreement. I have discussed this aspect under paragraph 17 of the judgment. I have read the submissions of Mr Boar in relation to this issue. I agree with them entirely. I note in particular the case of Ranche De La Falaise v. Republic [2013] VUSC



162 where Fatiaki J quoting from Nichols Seddon's Government Contracts Federal State and Local at paragraph 27 of his judgment where it is said:

"Additionally, governments who have failed to observe procedures should not be allowed used to take advantage of their own wrongs to escape otherwise valid contracts."

23. I have discussed the evidence of the notices issued and the failures in taking the measures notified in paragraphs 15 and 16 of this judgment. Those notices cannot be used or relied upon to excuse the action of Vital Taiwia in giving the approval to the claimant in 2011.

24. I therefore accept Mr Boar's submissions that in the circumstances of the case the equitable doctrine of waiver and estoppel applies to the relationship of the claimant and the defendant. The second issue is therefore answered in the affirmative.

25. The third issue is whether the claimant has proved his claim of VT11,791,845? The evidence of Jackson Soken is clear that the claimant paid him the sum of VT10,800,000. The evidence of the claimant shows receipts and invoices totalling VT11,791,845. Rocky Adams conducted an assessment and valuation and confirmed that amount. Mr Sam Namuri accepted in cross the proposition put by counsel that the Government should reimburse the claimant That is sufficient to answer this issue in the affirmative.

26. The final issue is about mesne profit. For the defendant to be entitled to mesne profits they had to show the periods the claimant was not occupying Ministerial positions corresponding to the notices they issued. There is no evidence to that effect. If there was any period that was relevantly claimable, it was the period in 2016 but first there is no evidence of that period and how much the claimant should have paid in rents. Secondly this House was not occupied in 2010 or 2011 prior to the claimant taking approval to move in. The reason is simple. The House was in a state of disrepair, that it was not habitable and/or rentable. As such why charge rental? Thirdly it is the clear evidence that the claimant did repairs and renovations to the House which the defendant had clear



responsibility to repair and maintain and have it furnished for rent. For the reasons stated under paragraphs 20 and 21, the defendant cannot take advantage of their failure to now enrich themselves from the mesne profits that were non-existent at the time because the House was in disrepair and was not fit for habitation, let alone be rentable. Under the Official Salaries Act the claimant was entitled to a rent free furnished house. He owed nothing to the Government from 2011 to 2015.

27. For those reasons the last issue is answered in the negative and the defendant's counter-claim for mesne profits is hereby dismissed.

28. Mr Boar submits the claimant is entitled to 10% interest on the sum of VT11,791,845. This interest rate is not pleaded in the claim. The rate pleaded is 5% per annum from 15 April 2016 to date of judgment. The Court allows interest at the rate of 5% per annum as the standard rate. The interest amount is calculated to be VT589,592 which shall be added to the sum of VT11,791,845.

29. Finally costs is claimed at VT1.5 Million. This amount is not itemised to give an opportunity to the defendant to respond. Therefore this relief is declined. Costs is however awarded in favour of the claimant against the defendant on the standard basis as agreed or be taxed by the Master.

The Result

30. The claimant succeeds in his claim for reimbursements, interests and costs. The following orders are issued –

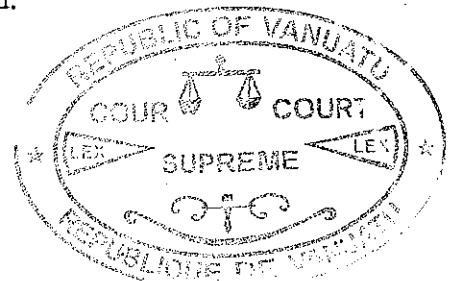
(a) Judgment be entered in favour of the claimant for recovery of the sum of –

(i) VT11,791,845

(ii) Interest = VT589,592

Total = VT12,381,437.


(b) Costs on the standard basis as agreed or be taxed.

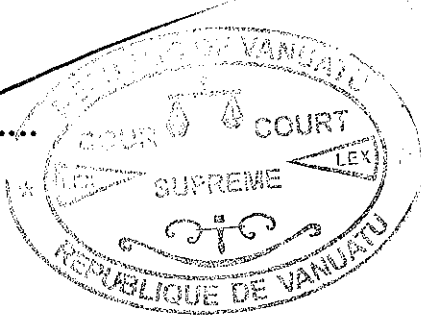


(c) The counter-claims to mesne profits, damages and costs by the defendant be dismissed.

DATED at Port Vila this 12th day of October, 2018.

BY THE COURT


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Oliver Saksak
Judge



The seal of the Supreme Court of Vanuatu is circular. It features a central emblem of a scale of justice. The text 'REPUBLIC OF VANUATU' is written along the top inner edge, and 'REPUBLIQUE DE VANUATU' along the bottom inner edge. The words 'COURT' and 'COURT' are positioned on either side of the scale, with 'SUPREME' centered below it. The word 'LEX' is written on a banner to the right of the scale.