IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 19/545 CoA/CIVA

BETWEEN: IRIRIKI ISLAND HOLDINGS LIMITED
Appellant

AND: OAKDAYLE PTY LIMITED
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John von Doussa*** ***Hon. Justice Ronald Young*** ***Hon. Justice Oliver A. Saksak*** ***Hon. Justice Daniel Fatiaki*** ***Hon. Justice Felix Stephen***
Counsel:	*J. C. Malcolm for the Appellant* *M. Fleming for the Respondent*
Date of Hearing:	*3rd May 2019*
Date of Judgment:	*10th May 2019*

JUDGMENT

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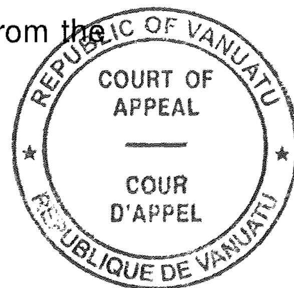
1. On 11th February 2019 the Supreme Court ordered that summary judgment be entered against the appellant in favour of the respondent for AUD$259,673.80 together with indemnity costs to be assessed.

2. The appellant seeks to have the summary judgment set aside and the matter returned to the Supreme Court for trial. The order for indemnity costs is also challenged. The grounds of appeal are discussed later in this judgment.

3. The notice of appeal was filed a few days late and an extension of time is opposed. Despite the respondent's opposition which was not pressed during the oral argument the appeal was heard on its merits as the likely success of the appeal will determine whether an extension should be granted.

Background

4. The following summary of the background facts is substantially taken from the judgment in the court below.



5. The respondent ("*Oakdayle*") alleged it has owned apartments 204 and 205 in Strata Plan 0002 on Iririki Island since 2006. It agreed, pursuant to a contract entered into on 3 October 2009 and extended for a further 5 years from 3 October 2014, to appoint Iririki Island Holdings Ltd ("IIHL") as agent for the letting of the two apartments on certain terms.

6. The contract entered into between IIHL and Oakdayle was described as a Pooling Agreement; and at Clause 5.3, it provided that the Agent (IIHL) guaranteed that the Owners (Oakdayle) would receive $24,242 per annum minimum, with provision for annual CPI adjustments. The contract was for an initial 5-year term which would automatically re-new for a further 5 years unless either of the parties gave notice between 6 and 3 months from the end date of the first term.

7. Oakdayle alleged IIHL had not paid its distributions of rental due in accordance with the contract and sued to recover them.

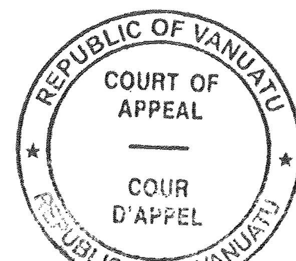
8. Oakdayle achieved Default Judgment on 21 June 2018 - due to IIHL taking no steps in the matter initially. That was subsequently set aside by order of this Court on 18 October 2018 on an application by IIHL with a sworn statement in support by its director Mr Pettiona. A defence was then filed.

9. The Application for Summary Judgment was filed on 12 December 2018.

10. Justice Aru held a conference in relation to the Summary Judgment application on 13 December 2018. He directed that Oakdayle file and serve written submissions by 15 January 2019 – which it did. He directed IIHL to file and serve its response and submissions by 5 February 2019; and he scheduled the application to be heard on 6 February 2019. IIHL did not comply with those directions.

11. Instead, on 4 February 2019 it filed a sworn statement by Mr Yaddehige – alleging that new information to refute Oakdayle's claim had come to light and would be filed in future. Further, on 6 February 2019, 10 minutes before the scheduled hearing, a further statement by Mr Pettiona was filed seeking an adjournment on the basis that new relevant information had come to light and would be filed if the opportunity was given. Mr Yaddehige confirmed this in his further sworn statement of the same date.

12. The claimant sought payment of rental distributions for the period from March 2015, including escalation payments on the agreed annual payment, and interest at 5% on the unpaid amounts. The calculations put forward in the application for summary judgment claimed a total of AUD$144,704.68 for each unit, a total of AUD$289,409.72.



The Supreme Court Hearing

13. On the hearing of the application the Supreme Court identified either from the pleadings or from sworn statements filed by the appellant the following defences raised against the claim:

    - The Pooling Agreement had been terminated by IIHL in 2015 by virtue of a text message to Oakdayle. Mr Pettiona made a more formal attempt to terminate the Pooling Agreement by letter dated 1st April 2016 on the ground that Oakdayle had breached the by-laws of Iririki Island by not informing the body corporate councilors that there had been a change of control of Oakdayle brought about when one of its former directors (Mr Sztrochlic) had become bankrupt and ceased to be a director and shareholder. His interest in Oakdayle had been taken over by his wife.

    - Iririki Island Resort was closed between March 2015 until 1 July 2016 due to damage caused by Cyclone Pam. As no income was being generated from the apartments there were no funds to distribute. During this time apartments 204 and 205 were not up to standard and could not be let.

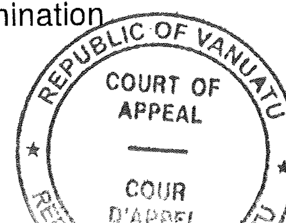
    - The new information foreshadowed by Mr Yiddehige's sworn statement filed on 4th February 2019 that was to come from a former managing director of IIHL would allege that the Pooling Agreement was cancelled orally by agreement between him and Mr Sztrochlic in 2014.

    - If any monies are due under the Pooling Agreement they would be allocated towards outstanding body corporate fees allegedly owed by Oakdayle.

14. The judge below was particularly critical of what he described as a "*sliding approach*" in the appellant's grounds of defence not all of which were advanced in the pleadings. He expressed concern about the veracity of the last minute assertion that the Pooling Agreement had been orally cancelled in 2014. Nevertheless the judge discussed and ruled on each of the defences that he had identified.

15. The judge rejected the allegation that the Pooling Agreement had been orally terminated in 2014. He considered it not credible that only two people would know of this. The alleged termination had not been raised in the pleadings or until the last moment and the alleged cancellation was inconsistent with the continued operation of the Pooling Agreement up until Cyclone Pam.

16. The claim that the Pooling Agreement had been terminated in 2015 by text message was also rejected. The Pooling Agreement did not permit termination



in this way partway through a five year period, and, in any event, the wording of the text message could not be interpreted as a termination. The subsequent letter from IIHL in 2016 was also written partway through the five year extension period and could be of no effect.

17. The claim that Oakdayle was no longer part of the Pooling Agreement because Mr Sztrochlic had become bankrupt was held to be without merit. There was no change of ownership or control as units 204 and 205 at all times remained owned by Oakdayle.

18. On the impact of Cyclone Pam the judge said:

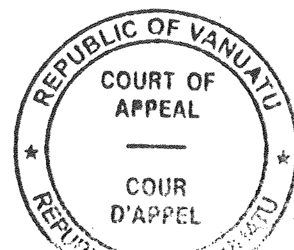
> *Lastly, the contention that Cyclone Pam ended the pooling arrangements completely ignores the fundamental contract – Oakdayle allowed IIHL to let out its 2 apartments in return for a guaranteed annual return. Nowhere in the contract is there any provision whereby IIHL could reduce or cease those payments due to insufficient tenants or insufficient rental returns. IIHL was contractually bound to pay the annual amounts, and it guaranteed to do so. I reject this as a viable defence to the Claim.*

19. The judge concluded that there was no arguable defence to any part of the claim and ruled that summary judgment should be entered. The itemized claim for monies due to the respondent was considered, and adjustments made to limit the claim to the end of January 2019 (whereas the respondent's calculations projected a loss to 30th June 2019).

20. On the question of costs the respondent's counsel argued that the litigation had been prolonged unnecessarily without any clear basis for refusing the payment of a certain debt, and notwithstanding attempts at resolution by the respondent. The judge accepted that argument and awarded indemnity costs. These were later assessed to include the full amount of costs incurred by the respondent with several different lawyers engaged in the course of the litigation. The total costs awarded were VT2,514,244.

The Appeal

21. The notice of appeal raises only two grounds. The first concerns the way the application for summary judgment was called on for hearing on 6th February 2019 and the failure of the court to adjourn the hearing. The second concerns the refusal of the Supreme Court to consider new sworn evidence that was submitted by the appellant immediately before the hearing commenced. Further grounds were subsequently raised in sworn statements challenging the order for indemnity costs, the merits of the summary judgment application on the ground that there were arguable defences to the whole or parts of the claim, and that the judgment sum was not correctly quantified.



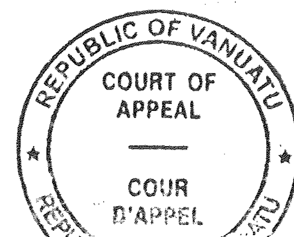
22. The first ground of appeal concerning the way the matter was called for hearing was not pressed before this Court, and was in any event without merit. The application had been listed for hearing on 6th February 2019 in good time for the appellant to have prepared for it. Early on the morning of 6th February 2019 counsel for the appellant was advised that the judge listed to hear the matter would not be able to sit that day. Counsel stopped her preparation, but later the Court advised that another judge would hear the matter that afternoon. Whilst written submissions argue that the Court should have granted an adjournment, as the appellant should have been ready for the hearing that day, no prejudice can be demonstrated by the re-listing of the hearing, and none was suggested before us.

23. The second ground stated in the notice of appeal concerns the refusal of the judge to accept a further sworn statement by Mr Pettiona which the appellant sought to file ten minutes before the hearing commenced. In that statement Mr Pettiona sought an adjournment on the basis that highly relevant information had come to light that would be filed if the opportunity was given. That would be to the effect that a former managing director had orally agreed to the cancellation of the Pooling Agreement in 2014. As already noted the judge below considered the credibility of this proposed new information and rejected it. In our view error by the judge has not been demonstrated. The last minute sworn statement should have been filed much sooner, and in any event the foreshadowed evidence was not believable. This ground of appeal was not pressed in oral argument.

24. In oral argument counsel for the appellant raised a new issue. He argued that Oakdayle was not a party to the Pooling Agreements as they had been signed in the name of Mr Sztrochlic. That argument is untenable. It flies in the face of the whole course of conduct of the parties who have throughout treated Oakdayle as the contracting party. Mr Sztrochlic obviously acted as agent for Oakdayle which was then immediately substituted as the real contracting party.

25. Counsel also argued for the first time that there was uncertainty as to which of two options Oakdayle accepted when agreeing to the Pooling Agreements. The options provided for different methods of rental distribution to the unit owner. Again this argument is untenable as the parties throughout have acted on the basis that Option 2 was the selected option.

26. On the question of the amount of the claim counsel questioned whether it was correct to include 5% interest on overdue distributions. The Pooling Agreement does not provide for interest on overdue payments. The 5% allowance was included in the respondent's calculations as it is the standard rate used on judgments in the Supreme Court. The respondent took the view that in one way or another 5% would be payable. Either it could be included from the outset in



the calculations, or it could be added later on the judgment. Counsel for the appellant accepted that this was so, and did not press the point further.

27. The allegation that the Pooling Agreement had been terminated by the text message or by letter was raised in argument but not pressed. Counsel accepted that the appellant could not validly terminate the Pooling Agreement partway through a five year period. The conclusion of the judge below on these points was clearly correct.

28. A ground of termination not discussed in the Supreme Court was raised. It was said that after the units were repaired following Cyclone Pam the respondent retained the keys to each units with the consequence that the units were not available for lease and were effectively withdrawn from the Pooling Arrangement. The Court pointed out that on the evidence IIHL oversaw the repairs and must have held the keys to the units. The point was not pressed further.

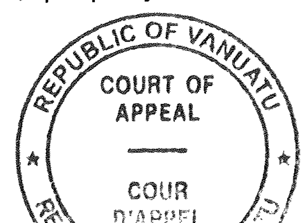
29. The proposition that no money was payable to the respondents as the appellants would apply whatever distributions were unpaid to outstanding charges due to the body corporate was raised. This had not been ruled on by the judge below. We consider the proposition is misconceived. The body corporate is an entity quite distinct of IIHL. Clause 8(6) of the Pooling Agreement provides:

> *The owner must pay all local government rates, taxes, charges, assessments, Body Corporate levies ... and such other charges for the Owners apartment promptly as and when they become due and payable. The Owner may engage the Agent to pay these charges on its behalf or if the Owner does not pay such charges then the Agent may pay these charges on the Owner's behalf from any money the Agent collects for the Owner ...*

30. This Clause permits the agent (IIHL) to pay outstanding charges on the owner's behalf. If it had done so it would be entitled to be reimbursed, but this has not happened. The Clause does not permit the agent to offset outstanding body corporate charges against distribution of rental income.

31. The remaining merit issue argued by counsel concerned the consequences of Cyclone Pam on the operation of the pooling agreement. The argument that the cyclone damage and the loss of rental income could alter the appellant's obligation under the pooling agreement was dismissed in the Supreme Court for the reasons we have set out in paragraph 18 above.

32. It is the case that the Pooling Agreement does not contain a "*force majeure*" Clause or a similar express Clause relieving the appellant from the obligation to make distributions to apartment owners in the event of catastrophic loss or damage to the apartments which prevents their anticipated use. However the appellant's argument is that the terms of the Pooling Agreement, properly interpreted, have this effect.



33. Counsel raised for discussion whether the cyclone damage amounted to a frustration of the Pooling Agreement. If that were so the Agreement would have been brought to an end at the time of the cyclone. It is not suggested by either party that this occurred. The appellant's case has been conducted on the footing that the Agreement were otherwise cancelled and the respondent's case has been conducted on the footing that the Agreement continued to operate without interruption.

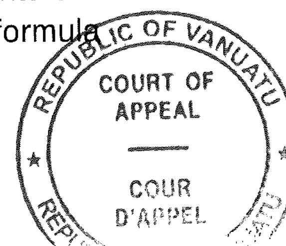
34. The proper interpretation of the Pooling Agreement is a question of law. If the correct interpretation has the effect for which the appellant contends, then this Court should adjust the judgment sum accordingly, not refer the matter back to the Supreme Court for trial on the ground that there is an arguable defence.

35. By the Pooling Agreement the apartment owner appoints IIHL as its leasing agent: preamble A and Clause 1. Without more, it could be expected that the appointment would contemplate that there would be a suitable apartment available for rent, and that the owner would receive a benefit from the actual letting of the apartment, the corollary being that if no suitable apartment was available there would be no return to the owner. It is necessary to consider whether this expectation is reflected in the detailed terms of the Pooling Agreement.

36. The Pooling Agreement contemplates that there may be periods of time when an apartment will not be in the rental pool. For example under Clause 2.1 for an apartment to form part of the rental pool it must be fully furnished with fixtures and fittings of the standard required by the agent. If it is not, under Clause 2.2 it does not enter the rental pool, the owner acknowledging that the apartment remains in the rental pool only whilst it complies with Clause 2.1.

37. Under Clause 15 the owner is responsible for fair wear and tear of the apartment including its fixtures and fittings. During time when required works occur to meet this obligation "*the apartment will be taken out of the rental pool*": Clause 15.1(b). And should the maintenance works be performed to an inferior standard "*the apartment shall be taken out of the rental pool until such time as the works are completed ...*".

38. The Pooling Agreement provides for the distribution of accommodation rental to the owners, subject to various outgoings. Under Option 1 there is a formula contained in Clause 5 whereby the owner receives a share of the Net Pool Accommodation Revenue (as defined in Clause 4.1.1) which reflects in the formula component "*AE*" the number of nights the apartment is available for letting during the distribution period. "*AE*" is the owners apartment entitlement. The apartment entitlement is calculated by multiplying the number nights the apartment is available by a pre-determined factor. Under the Option 1 formula



for such times as the apartment is not in the rental pool, there will be no distribution entitlement. If the respondent's Pooling Agreement was subject to the Option 1 distribution terms, the respondent's Cyclone Pam argument is plainly correct.

39. Under Option 2 the distribution entitlement arises under Clause 6, and is materially different to an owner's entitlement under Option 1. Clause 6 does not contain a formula with an *AE* component. It simply provides:

If the Owner has selected Option 2 in Item 5 of the Reference Schedule, subject to Clause 17.3 the Owner will received the following amounts as a fixed draw from Gross Pool Accommodation Revenue for:

(a) Type A Apartment AUD$41,211 per annum; and
(b) Type C Apartment AUD$24,224 per annum;

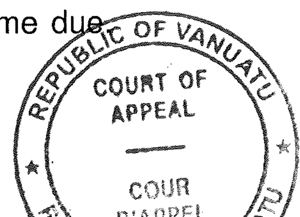
40. Clause 17.3 permits limited use of the apartment by the owner. The respondent's apartments were Type C. Under Clause 6.2 the annual entitlement is to be paid in twelve equal instalments monthly in arrears.

41. The respondent's claim asserts an entitlement for a Type C units, throughout the whole period that the strata plan development on Iririki Island (the Complex) was out of action as a result of Cyclone Pam.

42. Although Clause 6 does not expressly qualify the owners' distribution entitlement by an *AE* factor, it does provide that its distribution will be received "*as a fixed draw from Gross Pool Accommodation Revenue*". Gross Pool Accommodation Revenue is defined in Clause 28.1 to mean "*all the monies ... collected by way of revenue in the Distribution Period from all the apartments in the Rental Pool*". During the period when the complex was not operating after Cyclone Pam, there was no Gross Pool Accommodation Revenue and therefore there could not be a distribution from that source. So understood, we consider that the appellant's submissions is correct. In the events which happened the respondent is not entitled to distribution during the period March 2015 to June 2016 inclusive as no Gross Pool Accommodation Revenue was received by IIHL.

43. The judgment sum entered by the Supreme Court must therefore be amended to exclude the rental and interest sums included during this period.

44. The calculation of the respondent's claim, including interest, was projected forward to 30th June 2019. The trial judge adjusted the final component covering the full 2018 – 2019 year by deducting 5/12ths so that the award operated to 31st January 2019. However he did not adjust interest calculations for the earlier period that assumed interest to 30th June 2019. Moreover he did not adjust the interest calculations which run from the 1st day of each year period whereas the interest should not accrue until each unpaid monthly entitlement became due



This adjustment can simply be made by allowing 5% interest on one half of the first years entitlement (see: Jefford v Gee (1970) 2KB 130 at 146).

45. These adjustments render the calculation complex. We have endeavoured to make necessary adjustments but we reserve leave to apply to the Supreme Court to correct any manifest errors in our calculations should they be discovered. The judgment sum we assess excludes entirely the period March 2015 to June 2016 inclusive.

46. Our amended calculations are for judgment which operates up to but not beyond 31st January 2019. We have followed the components in the calculation identified in paragraph 44 of the judgment under appeal. Our calculations are as follows:

Judgment Sum

Period March 2015 – June 2016 inclusive .... NIL

Period 1/07/2016 – 30/06/2017 .... AUD$28,305.29

Interest thereon
2016 – 2017 – ½ x 5% 707.63
2017 – 2018 – 5% 1,415.26
2018 – 2019 – 7/12 x 5% 825.57

Period 01/07/2017 – 30/06/2018 ....28,928.01

Interest thereon
2017 – 2018 – ½ x 5% 723.20
2018 – 2019 – 7/12 x 5% 843.73

Period 30/06/2018 – 31/01/2019 ....17,212.17

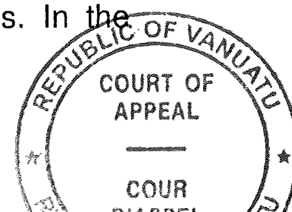
Interest thereon ½ x 7/12 x 5% 502.02

Entitlement per unit .... AUD$79,762.88

Entitlement on 2 units .... AUD$158,925.76

47. As the appellant has made out a substantial ground of appeal, leave to appeal out of time is granted. The appeal will be allowed and the judgment sum decreased to AUD$158,925.76.

48. The remaining question concerns the challenge to the award of indemnity costs. An award of costs is in the discretion of the trial judge. Rule 15.5(a) of the Civil Procedure Rules provides that a court may award indemnity costs if the other party deliberately or without good cause prolonged the proceedings. In the



present case this provision was the basis of the application made by the respondent. To overturn the exercise of the judge's discretion the appellant must show that the judge made a mistake of law, took into account some irrelevant fact, or left out of account a relevant fact. The appellant has not demonstrated such an error and we find no reason to overturn the award of indemnity costs. We are not persuaded that any of the amounts claimed are excessive. The quantum of the award is confirmed.

49. As the appellant has been partly successful and partly unsuccessful in the appeal we consider the proper order for costs in this Court is that each party bears its own costs.

50. The formal orders of the Court are:

(1) Leave to appeal out of time is granted;

(2) The appeal is allowed in part. The judgment sum awarded to the respondent is reduced to AUD$158,925.76. That judgment operates from the day judgment was entered in the Supreme Court;

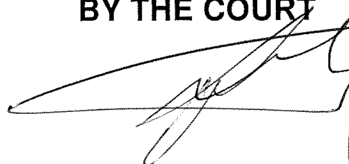
(3) The award of indemnity costs in this Supreme Court against the appellant is confirmed in the sum VT2,514,244;

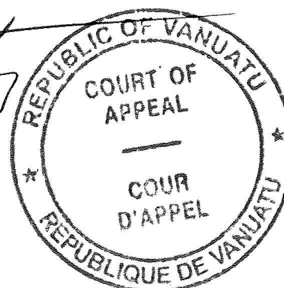
(4) There is no order for costs of the appeal in this Court;

(5) Liberty to apply to a judge of the Supreme Court to correct this Court's calculations of the judgment sum if either party considers the calculation reflect error.

DATED at Port Vila, this 10th day of May, 2019.

BY THE COURT





Vincent LUNABEK
Chief Justice.