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

Civil Appeal
Case No. 20/3279 COA/CIVA

BETWEEN: **Astrid Kersten and Others**
Appellants

AND: **Ifira Land Corporation Limited**
First Respondent

AND: **Ifira Trustees Limited**
Second Respondent

Date of Hearing:	***10 February 2021***
Before:	***Chief Justice V. Lunabek*** ***Justice J. Mansfield*** ***Justice J, Hansen*** ***Justice O. Saksak*** ***Justice D. Aru*** ***Justice G.A. Andrée Wiltens***
In Attendance:	***Ms A. Kersten, with Ms H. Bonke as her McKenzie friend, for the Appellants*** ***Mr S. Kalsakau for the Respondents***
Date of Decision:	***19 February 2021***

JUDGMENT

A. Introduction

1. This is an appeal against a Supreme Court decision declining to grant mandatory orders extending a 50-year lease by a further 25 years. It was the Claimants' case that consent to an extension and the necessary documentation to enable registration of the same were unreasonably withheld. Associated damages were also claimed but denied.

B. Application to Adjourn

2. Mr Kalsakau sought an adjournment on the basis that he was only instructed on the morning of the hearing and had had no opportunity to prepare or to even file a Notice of Commencing to Act. The application was "strenuously" opposed by Ms Kersten, due to an alleged history of delay by the respondents in their dealings with the matters at hand.

3. The respondents have had ample time to prepare for the appeal hearing and could have instructed Mr Kalsakau at any time since December 2020 when the appeal was filed and served. They also failed to comply with the Court's directions. That these matters were not attended to falls at the feet of the respondents, not Mr Kalsakau.

4. A possible remedy for the delay and the imposition on the appellants if an adjournment were granted would be to order costs against the respondents. However, that is most unusual when dealing with an unrepresented appellant, so that if the adjournment were granted in this instance, there would be no repercussions on the respondents for their high-handed lack of action until the last possible moment.

5. Accordingly, the application to adjourn was declined.

C. Fresh Evidence

6. The appellants' representative, Ms Bonke, has filed as part of this appeal an application to adduce further evidence. On 7 September 2020, following the hearing of the dispute, but prior to the judgment being published on 21 October 2020, the appellants unilaterally and without leave filed two further sworn statements by persons who were not witnesses at the original hearing.

7. The primary judge, correctly in our view, did not consider that belatedly produced material.

8. The appellants' application now was to present those sworn statements plus some additional material to the Court of Appeal. Initially the application involved filing a third sworn statement, but that was not pursued.

9. This Court, in *Salwai v Bulekone* [2012] VUCA 19, identified four pre-requisites to the admission of fresh evidence:

   - the evidence could not have been procured by the exercise of reasonable diligence for use at the trial;
   - the evidence is relevant and otherwise admissible;
   - the evidence is apparently credible; and
   - there is a significant possibility that the evidence, if believed, would have an important influence on the result of the case.

10. The application in this instance appended the sworn statements by one of the appellants and the former Valuer-General – the further material was referred to in oral submissions but otherwise not identified. The evidence of both witnesses and the other material sought to be produced was undoubtedly available at the time of trial, and does not significantly advance the evidence in support of the Claim.

11. Accordingly, the application to adduce further evidence is declined.

12. The Court notes that Ms Bonke filed yet another application for leave to submit further evidence on 16 February 2020. She did not appear at the hearing except as a McKenzie friend and has no ability to seek to file material on behalf of Dr Kersten. Further, the Court has heard the appeal on the basis of the material presented to it prior to the hearing. It is also unclear whether this application has been served on Mr Kalsakau. In any event, this material is simply too late to be considered by the Court. This application is accordingly also declined.

D. The Decision

13. The Claim was based on the interpretation of one particular clause of the lease entered into on 30 July 1980 between the previous Lessees and Ifira Trustees Limited. The lease was subsequently transferred to the appellants in 2015. Ifira Land Corporation Limited was included in the Claim as it was alleged to manage the day to day affairs of Ifira Trustees Limited.

14. The relevant clause of the lease reads as follows:

> *"3.1 ON the expiration of the terms of this Lease the Lessee shall have the right to obtain a new Lease of the leased land for a further term of twenty-five years (25) years subject to the same agreements and conditions as this Lease but excluding the right to renew for any further term as provided in this clause at a rent to be determined by agreement between the Lessor and Lessee and failing agreement by a valuation of the unimproved value of the leased land undertaken by the Referee in the manner provided in the Land Leases Act 1933."*

15. Clause 3.2 is also relevant in that it provides for reviews of the annual rent payable to occur every five years during the duration of the lease.

16. Application was made by the Claimants in August 2017 for the lease to be extended for a further 25 years from 2030 in pursuance of clause 3.1 of the Lease. Eventually, the Claimants were advised that this was possible upon payment of a premium of VT 2.5 million, together with a fee of VT 230,000 to execute the Consent and a further VT 50,000 to process the Consent and Variation of Lease.

17. The Claimants considered the proposed premium and costs charges were excessive and pursued the option of having the matter considered by the Valuer-General, as they considered was provided for in clause 3.1 of the lease. The Valuer-General's view was that the appropriate premium was VT 1.5 million. The Claimants accordingly sought Court orders compelling Ifira Trustees Limited to sign the Consent and Variation of Lease in return for the payment of VT 1.5 million.

18. The primary judge found that clause 3.1 dealt only with the rent payable pursuant to the lease, not the premium. That analysis was based on distinguishing annual "rent" payable

under the terms of the lease, and a one-off "premium" frequently payable at the commencement of a lease being entered into between the Lessor and the Lessee.

19. Accordingly, the primary judge held that the assessment by the Valuer-General did not assist the Claimants as it was directed solely to the appropriate premium to be paid, not the assessment of annual rent. That resulted in the situation where the pre-condition to extending the Lease from 50 to 75 years, namely "...at a rent to be determined by agreement" was not met. In those circumstances the primary judge held that there was no legitimate basis on which to compel Ifira Trustees Limited to sign a Consent or Variation of Lease.

20. The Claim for damages necessarily also failed.

E. The Appeal

21. The Court questioned Ms Kersten with a view to understanding the true nature of the dispute.

22. The following issues were discussed:

- On its face, the lease does not provide for the payment of a premium;
- Further, the land in question at Malapoa was not public land, with the result that there was no premium payable to the Minister of Lands pursuant to the Land Leases Act;
- The Valuer-General's report dealt solely with the issue of premium and made no mention of annual rent;
- The right was for a new lease, not an extension or variation of lease;
- The right to a new lease arose on the expiration of the current Lease, namely 20 July 2030;
- The right to a new lease on the same terms as the current lease, save for the right of further extension, was subject to the annual rent being either agreed or settled by the Valuer-General;
- When the negotiations regarding the further 25 years commenced in 2017, and indeed up to the present, there was no agreement as to annual rent to be paid;
- With the annual rent payable being reviewable, it is premature in 2017 or 2021 to agree to setting the annual rent as at 2030– there is also still a rent review to occur in 2025 pursuant to the current lease.

23. Ms Kersten was concerned that the process to secure the further 25 years had been instigated at the behest of Ifira Land Corporation Limited and seemed interminable from her perspective. She was reluctant to have to wait until much closer to 2030 to attempt to set

the annual rent as she feared the process would not be completed for some time. She was also concerned with her ability to sell the property without a longer period of security of tenure.

24. Mr Kalsakau was given leave to file responding submissions as to the ability of the respondents to charge a premium in return for the new lease to be issued in 2030 assuming there is agreement in relation to the rent. The Court considers that premiums are due only in the case of public land.

25. Mr Kalsakau responded that there is no provision in the lease enabling Ifira Trustees Limited to seek a premium payment. He was also unable to point to any legislation which enabled Ifira Trustees Limited to seek a premium in return for entering into a new lease for a further 25 years.

26. Mr Kalsakau pointed to what might be termed "a common practice" for custom owners to seek premium payments when new leases are entered into, which over time has become a general expectation that that will occur. Mr Kalsakau submitted that the practice has over time become an implied term of leases.

27. With respect, we do not agree. While certain terms are capable of being implied into contracts such as leases, as set out in *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur (Australia) Ltd* (1986) 160 CLR 226, the payment of a premium is not within such category.

28. The lease in this case binds the parties to their present agreement. That does not involve the payment of a premium. The lessees are legally entitled to give notice in early 2030 of their intention to take up their option of a new lease running for 25 years from 20 July 2030. If their suggested 2030 annual rent proposal is not accepted, or even responded to, by Ifira Trustees Limited, the lessees are entitled to seek a binding assessment of the appropriate 2030 - 2035 annual rent by the Valuer-General. If there remains some dispute or lack of agreement, it is at that point that the mandatory orders sought should be applied for.

29. Finally, we comment that it was inappropriate to have allowed a "representative" the right of audience when not a practicing lawyer. That was compounded by the fact that the representative also provided the only evidence in support of the Claim – with the result that the matter was determined as if it was the representative's claim, not the appellants' claim.

F. Result

30. It follows that the Court considers that this case was brought prematurely.

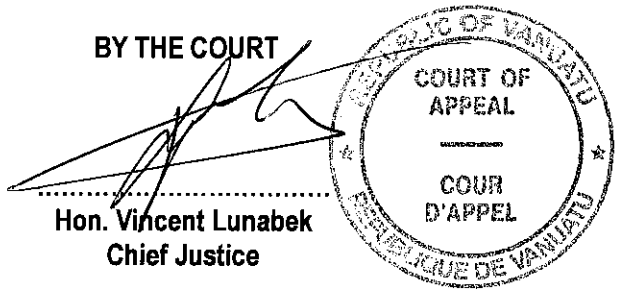
31. Accordingly, the Court determined that the appeal should be dismissed.

32. Costs would ordinarily follow the event, but for the fact the entire proceedings were launched prematurely, and the respondents belated involvement in the appeal. In addition the

circumstance giving rise to the appeal is the respondents' claim to a premium on renewal. As we have made clear, the respondents have no contractual or statutory or other entitlement to such a premium, either at present or when the right to seek a new lease is exercised. Accordingly, there is no order as to costs.

Dated at Port Vila this 19th day of February 2021

BY THE COURT



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Hon. Vincent Lunabek
Chief Justice