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

**CIVIL APPEAL CASE NO. 10 of 2013**

**BETWEEN: FAMILY DON WILLIAM, FAMILY KENWAY WILLIAM, FAMILY TONY WILLIAM, COLLEN PETER, KERRY JOHNNY, FELIX KEITH, GROWFORD KELSIN**
Appellants

**AND: WILLIAM WILLIAM EZRA**
Respondent

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice Bruce Robertson
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Robert Spear
Hon. Justice Dudley Aru

Counsel: Mr. Saling Stephens for the Appellants
Ms. Jane Tari and Ms. Jessica Palo for the Respondent

Hearing: 11 November 2013

Judgment: 22 November 2013

# JUDGMENT

1. In a decision delivered on 7 March 2013 Justice Saksak ordered the Appellants as a group to pay a total sum of VT3, 745,170 together with costs on a standard basis.

2. This followed a defended hearing in the Supreme Court on Luganville on 6 September 2012. The Court had permitted parties to provide written submissions within 21 days but no one had done so. The Judge determined that he would dispense with written submissions and decide the matter on the basis of what he had heard in Court

3. His Honour summarised the claim of the now Respondent before him as:-

(a) Trespass and threats on 4 June 2010.

(b) Threats and abusive language on 5 August 2010.

(c) Loss of use and loss of earning from coconuts on the 002 lease.

(d) Loss of use and earning from coconuts on the 009 lease.

(e) Loss of use and earning from cocoa planted on the 009 lease.

(f) Theft of 30 cooking dishes.

(g) Damage to garden crops, fruits and trees.

4. The statement of claim dated the 6 August 2010 was a little unusual in that it began by reciting an allegation about two specific instances in June and August 2010 which were alleged to be trespass and threats. It was later alleged that damage had been done to the claimant's crops and property in 2008 and 2009. It was the latter matters which gave rise to the real substance of the dispute.

5. The Judge noted the evidence which had been advanced before him which was compressed the statement of the Claimant and of John Bisson an expert who provided evidence of his inspection of damage of the property.

6. It is clear that as presented by the defendants (now the appellants) the real issue in the Supreme Court was whether the activity had taken place on land over which the claimant had rights. The thrust of the defence was that the land in question had been sold to AHC Ltd and therefore there could be no claim for damage on that land or to William Ezra for trespass.

7. There was the specific claim about the theft of 30 cooking dishes about which the Judge found there was insufficient evidence. He dismissed that claim and we do not consider it further.

8. The notice of appeal which was filed on 5 April 2013 included the too common comments that the grounds of appeal would be provided at a later stage.

9. Rule 5 of the Court of Appeal Rules 1973 provides that an appellant cannot without leave of the Court of Appeal, "urge or be heard in support of any grounds of objection not stated in his notice of appeal."

10. It follows that the notice of appeal when filed must contain the grounds. This too frequent practice of suggesting that they will be provided later is unacceptable. An initial document formulated like this is of not in compliance with the Rules. The point has not been taken here and we do not determine this case on that basis. However the legal profession is put on notice.

11. The grounds of appeal which were filed later were as follows:-

    1. That the presiding judge in the Court below had erred in law and/or facts or of mixed facts and law as follows:-

        (a) Failed to give any consideration and/or weight to the appellants' evidence.

        (b) Wrongly gave consideration and weight to an assessment report dated 17 April 2009 which was already outdated and had no factual basis to support the award of VT 3,695,170 made in favour of the respondent.

        (c) Wrongly made an award of VT 50,000 for emotional stress when there was no factual basis to support the said award.

        (d) Further or other grounds as may be advanced by counsel.

12. In our view the suggestion under (d) (above) that there may be other grounds that counsel may later introduce, as if an appeal is an evolving process, is untenable.

13. More importantly, for the purposes of this case, it is clear that in this appeal the matter is advanced on a very different basis than that which was advanced in the Supreme Court. In the normal situation that is not a permissible approach. An appeal

is a challenge to the case which was run in the Court below. It is not open to the parties to come along and run a new and different case.

14. Dealing with the specific matters which has been raised, the sworn statements tendered in the Supreme Court by the now appellants were basically on the question of whether or not the claimant had the right to be on the land and did not go to the substance of the trespass. The substance of the trespass was not denied by the appellants (defendant) No evidence which was relevant to the assessment being made by the Judge has been pointed to as having been either rejected or overlooked; and no specific error is alleged even now. There is nothing in this ground of appeal.

15. Secondly, there was a challenge by the appellants to the evidence of the expert. In this Court the respondent sought to adduce additional evidence from Mr. Bisson. It may be that this Court could have received it because Mr. Bisson had not been challenged or cross-examined in any way in the Court below, yet submissions are now made about the accuracy of his evidence.

16. We do not find it necessary to determine that point or read the new material because of what occurred before the trial judge. There was uncontradicted evidence from Mr. Bisson as to what he found when he inspected the site. It makes no sense to say that the report was out of date. It was an assessment which was made in 2009 about two years after the commencement of the damage to the claimed property. That damage had continued throughout that span was accepted in the trial. It was unchallenged evidence on a relevant fact. We find no substance in this ground of appeal.

17. We have been troubled by the fact that in this litigation generally (which has taken unwarranted and ordinate time in the Supreme Court and the Court of Appeal over many years) the cases have been run on the basis of family membership. Here John William was said to have acted for and on behalf of all the appellants. He said so

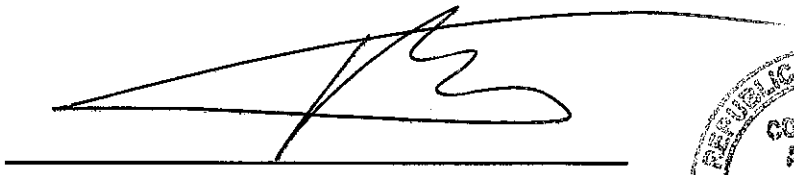
specifically in three statements filed in this matter. The generic approach has not been raised as a challenge before us and we accept the respondent's submissions that the appellants jointly were liable for the damages awarded in the judgment of the Supreme Court further Don William (as the family representative he claims to be) has primary responsibility for that liability.

18. The other issue relates to the award of damages for emotional stress of VT 50, 000.

19. When the current series of events is viewed as part of the long-standing dispute between these two brothers, and the repeated threats and animosity over the ongoing dispute as to the right of the claimant to the land and the damage to gardens and crops, we see no basis for saying that an award of VT 50, 000 was not totally within the discretion of the learned trial Judge. We do not accept that there was a need for medical evidence to justify this token award. It was a modest and balanced response to the ongoing behavior and activity.

20. We find no basis for interfering with the assessment of the Judge in the Supreme Court. The appeal is dismissed and the respondent is entitled to normal costs.

**FOR THE COURT**



**Hon. Chief Justice Vincent Lunabek**