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

Civil Appeal
Case No. 17/2461 CoA/CIVA

BETWEEN: STEVEN REMY trading as Santo Earth Works
Appellant

AND: KYONG SIK JANG trading as JK General Machinery
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John von Doussa*** ***Hon. Justice Ronald Young*** ***Hon. Justice Paul Geoghegan***
Counsel:	*J. Tari for the Appellant* *J. Kilu for the Respondent*
Date of Hearing:	*15th February 2018*
Date of Judgment:	*23rd February 2018*

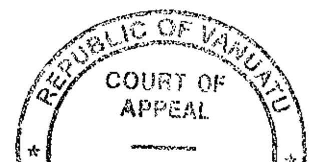
JUDGMENT

1. This matter concerns a challenge to an award of damages assessed in favour of the respondent by the Supreme Court on 9th August 2017. This is the third time proceedings between the parties have come to the Court of Appeal over the same subject matter.

Background

2. The claim arises out of the wrongful seizure by the appellant Steven Remy trading as Santo Earth Works (Mr. Remy) under a Mareva Order of three items of plant hire equipment owned by the respondent (Mr. Jang), namely an excavator, a truck, and a forklift.

3. Mr. Remy had taken action against another company to recover an outstanding trade debt. The mareva order was intended to freeze the property of the debtor



company, but Mr. Jang's equipment was wrongly included in the order as if it were the debtor's property. Mr. Remy obtained judgment against the debtor company and by enforcement warrant sought to execute against the company's frozen property. Mr. Jang's equipment was seized by the Sheriff, and under further order of the Court was delivered to Mr. Remy who treated the equipment as his own.

4. Mr. Jang sought legal assistance from, in turn, four different lawyers to assist him to recover his equipment. Eventually the fourth lawyer succeeded in obtaining from this Court orders which set aside orders made in the Supreme Court and directed the return of the equipment to Mr. Jang: see Kyong Sik Jang v. Santo Earth Works & Ors. [2014] VUCA 16 (Civil Appeal Case 12 of 2014; 25th July 2014).

5. The equipment had become the subject of the mareva order on 1st October 2012, and was returned to Mr. Jang on 30th August 2014.

6. Mr. Jang then brought Supreme Court proceedings against Mr. Remy pursuant to an undertaking as to damages given when obtaining the mareva order and for conversion seeking damages for the wrongful seizure of his equipment. His entitlement for damages was upheld by the Supreme Court, and judgment was entered in his favour for damages to be assessed.

7. In due course the Supreme Court assessed the damages at VT59,705,000. Mr. Remy appealed, contending that the award was grossly excessive. The Court of Appeal agreed. The assessment was set aside and the case returned to the Supreme Court to re-assess damages. This was the second time the parties came before this Court. See Steven Remy v. Kyong Sik Jang [2016] VUCA 47 (Civil Appeal Case 3420 of 2016; 18th November 2016).

8. Following a further trial the damages were assessed in favour of Mr. Jang at VT9, 163,000 together with interest at a commercial rate fixed at 12% and costs. Again Mr. Remy was dissatisfied with the judgment and appealed seeking to have both the judgment and the award of interest reduced. This time Mr. Jang was also dissatisfied with the judgment and instructed his lawyer to file a cross-appeal seeking an increase in the award. Hence the third appeal to this Court.

9. We deal first with a procedural issue. Mr. Jang's lawyer failed to lodge the cross-appeal within time, and did not do so until two days before the appeal came on for hearing. However, notice of his intention to cross-appeal had been given to both to Mr. Remy's lawyer and to the Court in October 2017, and Mr. Remy's lawyer was in a position to immediately respond when he received the cross appeal by filing a submission opposing both the late filing of the cross-claim and the merits of the appeal if time were extended. Oral application was made by counsel for leave to extend time and to have the cross appeal heard forthwith. Mr. Remy's counsel could not point to any prejudice caused by this late application. The Court granted leave and accordingly both the appeal and the cross-appeal are now to be decided.

The first Assessment of Damages

10. At the first assessment Mr. Jang claimed loss of income from the date his equipment became the subject of the seizing order until it was returned plus lawyers' fees, travelling expenses and interest. Mr. Jang advanced a claim that assumed each item of equipment was hired out by him in the course of his business at hourly rates he nominated for the full 22 months and 9 day period based on an 8 hour working day and a 30 day calendar month. The judge discounted these calculations to allow for the likelihood that the equipment would only be hired out for part of the time. The judge said he reasoned that the excavator would be hired out for only 10 – 15% of the time, the forklift for 50 – 60% of the time and the truck for 60 – 70% of the time. This process of reasoning led him to the damages for the loss of profit. Added to this loss were lawyers' fees paid to the first three lawyers instructed by Mr. Jang namely fees of VT1,780,000, VT609,000, and VT70,000 respectively, in all VT2,459,000.

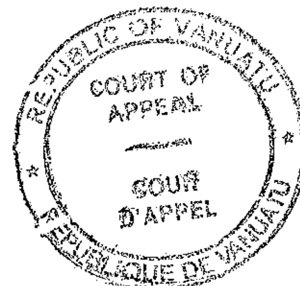
11. The judge noted in his reasons that whilst it was for Mr. Jang to prove his damages, it was difficult for him to establish a pattern of hiring of the equipment as he had just imported it and was about to start a new business. The evidence produced by each party was barely more than wishful estimates on Mr. Jang's part as to likely hire demand, and untested assertions made by Mr. Remy that demand would be very limited. There were differing estimates about demand. This evidence was not tested by calling witness or by cross-examination.

Recognizing the short-comings in the evidentiary material the judge said he had to take a pragmatic approach, which he did by the process of reasoning he adopted.

12. Before the Court of Appeal, the evidence suggested that the equipment had been purchased second-hand in Korea by Mr. Jang for VT10 million. In finding that the loss of profits award was excessive the Court of Appeal considered that the award translated into an extra-ordinary return of five times the costs of the machinery over a period of less than 2 years. This indicated some unidentified error inherent in the assessment. The appeal was allowed on this basis, not because some particular error could be demonstrated from evidence before the Court. The evidence was simply insufficient to do so. The Court of Appeal noted:

> *"22. The judge was critical about the paucity of evidence led by the parties, and acknowledged that he was endeavouring to make a fair assessment based on the very limited information he had. During the hearing of the appeal, the appellant's counsel was invited several times by the Court to indicate a fairer alternative basis for calculating the damages for loss of profits including using the appellant's own hire rates as disclosed in his invoices but all were met with little success and an are unhelpful submission that the respondent had the burden of establishing his loss and the amount.*
>
> *23. In light of the foregoing the award by the trial judge is set aside. We have considered the possibility of making a fresh assessment in this appeal but given the serious short-comings in the evidence including the absence of any expert assistance, such an assessment would be to engage in unacceptable speculation which this Court must decline to do."*

13. These comments were there to be followed up by the parties and their lawyers before the re-assessment of damages took place. Whilst it is trite law that a party who asserts a loss must identify that loss and prove it, the Court process allows a respondent to adduce evidence. If the respondent fails to answer evidence adduced by the claimant, however unsatisfactory the respondent might think that evidence to be, the respondent runs the risk of an adverse finding on the particular topic. In such a case the need to adduce relevant evidence is not all one sided.



Evidence adduced at the Second Assessment

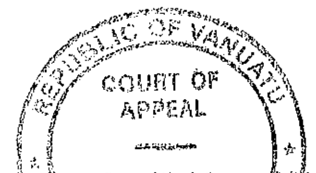
14. Both Mr. Jang and Mr. Remy filed further sworn statements. Mr. Jang explained that whilst the equipment had been purchased for about VT10 million, it had been repaired at a further cost of VT10 – 15 million before being shipped to Vanuatu. On that basis the capital value of the equipment at that time of seizure would have been in the order VT25 million which is in line with a valuation of VT25 million produced by Mr. Remy in earlier proceedings. Submissions later filed on Mr. Jang's behalf said that the capital value of the equipment was VT40 million, but this is wrong as it double counts the repair costs.

15. Beyond providing an evidentiary base on which the Court could assess the capital value of the equipment at VT25 million the further sworn statements added little of assistance.

16. Mr. Jang again set out a claim formulated in much the same way as his first claim but with reduced working hours. He also challenged a further sworn statement filed by Mr. Remy alleging that Mr. Remy's evidence about use of the equipment was "*lies*", and produced evidence of greater use of the equipment by Mr. Remy than he had sworn to. Mr. Remy for his part again asserted his earlier criticisms of the likely hire charges and periods of use that Mr. Jang had estimated.

17. Regrettably these additional sworn statements did not fill the gaps in the evidence that the Court of Appeal had identified. They did not include evidence of actual use of the equipment in either Mr. Remy's business, or in Mr. Jang's business after the equipment was returned to him. No expert evidence was adduced from persons engaged in similar hiring enterprises. There was no expert evidence about expected rates of return on capital, about interests rates, about anticipated rates of depreciation, or about likely overhead or running expenses. The trial judge commented as follows:

> "17. I remind the claimant that he has to prove his case on the balance of probabilities. He was told of this in the Supreme Court before the last decision was made, he was reminded of his obligations by the Court of Appeal and he was again reminded of what was required during conferences and direction appointments prior to this decision. Whilst I appreciate that it is sometimes very difficult to produce hard facts and figures, particularly in a case like this where a fledgling business tries to calculate what ***might*** have happened, the claimant could have sought the professional assistance of, for example, an accountant. Expert evidence could



have been provided about amortisation, reasonable rates of return and profit margins but there has once more been a distinct lack of assistance in that regard. The claimant could have provided witness evidence from an established plant hire equipment operator. That happened to a very limited degree with evidence about hire rates but a business man who was well established in this kind of operation could have provided much clearer assistance to the Court. Otherwise the Court has to work with what it is given".

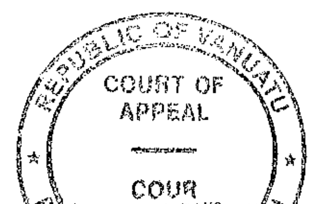
18. The difficulties facing the judge were added to by the trial process decided upon by the parties' lawyers. The trial judge recorded that process at the outset of his reasons:

"2. Directions were given for a fresh hearing on quantum which was fixed for today 9th August. Before the hearing started counsel approached me in Chambers and requested that the matter be dealt with on written submissions and by reference to a court bundle prepared by the Claimant (and agreed by the Defendant) and the appeal book which was before the Court of Appeal in November last year".

19. The judge followed that course, but it offered no solution for resolving the challenge to Mr. Remy's credit. For this purpose oral evidence and cross-examination of Mr. Jang and Mr. Remy was necessary to decide whether Mr. Remy's sworn statements were "*lies*" and to assess the weight to be given to the conflicting estimates of the parties.

The second assessment

20. In the absence of expert evidence that would have enabled a reliable assessment based on an expected rate of return on the value of the equipment the judge endeavoured to calculate loss of profits by applying hourly rates nominated by Mr. Jang to his assessment of likely hours of use, and then making a deduction of 40% from the gross income so calculated to allow for various overheads. That deduction was not based on evidence (as there was none) but on a percentage deduction made by the Court of Appeal in EZ Company Limited v. Republic of Vanuatu [2017] VUCA 19; Civil Appeal Case 1500 of 2017; 21 July 2017). The nature of the hiring in that case was somewhat different, and in our view the application of a 40% deduction as appropriate in this case is open to doubt. In the absence of evidence from the parties about expenses, it is understandable



that the judge adopted this figure, but it means that yet another step in the assessment process was speculative.

21. As a separate item in the award the judge allowed the costs of the first three lawyers engaged by Mr. Jang, VT2,459,000. These payments had not been questioned in Mr. Remy's final submissions. Interest was then allowed at a commercial rate of 12% from a mid-point in time between the seizure and return of the equipment. The adoption of that mid-point reflects the fact that the loss was occurring progressively through that period.

Merits of the appeal and cross-appeal

22. In the appeal Mr. Remy complains of two specific components in the judgment namely the award of the lawyers' fees and the rate of interest. He argues that the lawyers' costs were part of the earlier litigation and would have been covered by costs awards that were made in Mr. Jang's favour. As to the interests he simply asserted that the standard court rate of 5% should have been awarded.

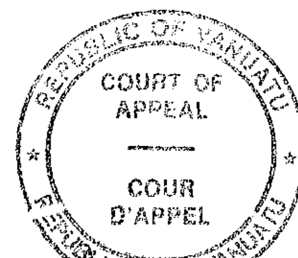
23. In the cross-appeal Mr. Jang complains that the judge adopted hours of use that were far too low and consequently grossly under estimated his loss. He argues that the assessment should have been in the order VT40 million.

24. Where an appeal court is asked to find that an award of damages is too high or too low the ultimate question which the court must determine is whether the appellant has established on the evidence that the final judgment sum is manifestly incorrect. Whilst the court may be assisted in its consideration of the award by a party demonstrating particular error relating to a particular component included or excluded in the final award, the demonstrated error does not mean that the appeal must automatically succeed. It is the final figure, not individual components, that must be wrong. It may be that the appeal court considers that a particular component was wrongly assessed but that when viewed overall the award still reflects a reasonable assessment of the claimant's damages. An award of damages is likely to consist of many components which require an exercise of judgment on the part of the court. The process of assessment is usually not capable of precise arithmetical or scientific calculation and of

necessity will reflect a degree of judicial discretion. In this case it seems possible that the lawyers' costs included in the judgment had already been the subject of earlier court orders, although this is not reliably established by the evidence which for the most part comprised only receipts for payments to the lawyers without any indication as to why the fees had been rendered. But even if the fees were wrongly taken into account, this does not establish that the final award for damages was wrong. The difficulty faced by Mr. Remy in his appeal is that on the paucity of evidence led at trial and the way the trial was conducted it is not possible for Mr. Remy to demonstrate that the final judgment was excessive. Whilst it is not for this Court to speculate, we consider that taking into account depreciation that would occur rapidly on hire equipment in rough tropical use, and current commercial interest rates, a party hiring such equipment would expect a rate of return of between at 20 – 30%. If the capital value of the equipment was in the order of VT25 million as the evidence now suggests, Mr. Jang's loss over the period the equipment was frozen would be significantly above the judgment sum of VT9,163,000. This suggests that the judgment was if anything on the low side.

25. As to the challenge to the award of interest of 12%, that stands on a different basis. That raises a question of law: what is the correct basis to award interest on damages that are intended to compensate for a loss of profits in a business enterprise? That question has been considered by this Court in the EZ Company case. The Court followed the reasoning of the High Court of Australia in Hungerford v. Walker [1989] HCA 8; (1989 171 CLR 125). In EZ Company, evidence was led that the claimant was paying interest at the rate of 17% to its banker. In this case there was no evidence about interest rates. This was clearly a case where interest at commercial rates was appropriate. The 12% rate applied is a considerable discount on the rate applied in EZ Company, and in the absence of evidence on the question it cannot be said that the interest rate adopted was wrong.

26. The cross-appeal faces similar difficulties. Given the paucity of evidence and the trial process which are adopted Mr. Jang is unable to demonstrate that an award of VT9,163,000 is manifestly inadequate.



27. In the result we consider both the appeal and the cross-appeal should be dismissed. The judgment in the Supreme Court stands.

The role of the Court of Appeal

28. The failure of both the appeal and cross-appeal is the result of seriously inadequate presentation of the cases of each party. Evidence filed by each party was inadequate and failed to address essential issues. At the trial, the parties failed to assist the Court by calling witnesses and testing the conflicting assertions of the parties by cross-examination.

29. The overriding role of the Court is to ensure that justice is done. But it must be done according to law and the established principles that govern the trial process.

30. When a court is required to assess damages, the court starts from the principle that it is for the Claimant to identify the losses which are claimed, and to lead evidence to establish them. However experience shows that in reality the claimant frequently falls short in fulfilling this requirement, and the greater the shortfall the more difficult it is for the damages to be assessed on a reliable basis.

31. If the court is not satisfied by evidence that any significant loss has resulted from the respondent's wrongdoing the claim will be dismissed on the ground that the claimant has not discharged the onus of proving loss and damage.

32. The more frequent situation is that the circumstances of the claimant and the nature of the wrongdoing will satisfy the court that some loss must have been suffered by the claimant, but the state of the evidence fails to scope out the extent of the loss or to provide the evidence necessary to enable the loss to be reliably quantified in money terms. In this type of case the court in the quest for justice will endeavor to quantify the damages suffered as best it can on the limited evidence available. Of necessity the court will have to make broad common sense estimates based on experience and likelihood to fill gaps left in the evidence.

33. This is the situation which the trial judge faced in each of the assessments. In cases of this kind an appellate court will be reluctant to interfere with the award

entered in the court below and will do so only when it is satisfied that the final judgment sum is outside the range of damages that was open on the limited evidence before the trial court. In the appeal against the first assessment this Court was satisfied that the judgment sum of over VT59 million could not be so justified, and allow the appeal. But the amount awarded on the re-assessment is of a different order, and, as we have noted, the Court is not satisfied that the judgment was either too high or too low.

34. Litigants and their lawyers must realize and fulfill their obligation to properly present their cases in a timely manner according to the recognized procedural processes. If they do not they must realize that the consequences of their failure will rest on them and this Court cannot redeem their disappointment by simply ordering that the result be set aside and that the trial process be repeated afresh.

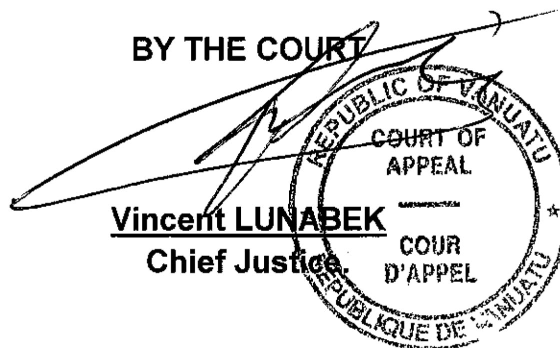
35. The outcome of the appeal and cross-appeal in this matter illustrates the point, and should be taken as a guide as to the likely outcome of other badly conducted cases which come to this Court by way of appeal.

Decision

36. The appeal and cross-appeal are each dismissed. There will be no orders as to costs.

DATED at Port Vila, this 23rd day of February, 2018.

BY THE COURT



Vincent LUNABEK
Chief Justice.