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

Civil Appeal
Case No. 23/2927 COA/CIVA

BETWEEN: FRANÇOIS CHANI
Appellant

AND: HARBOUR VIEWS LIMITED
First Respondent

AND: OCEAN LOGISTICS LIMITED
Second Respondent

AND: REPUBLIC OF VANUATU
Third Respondent

Date of Hearing:	***13 May 2024***
Coram:	***Hon. Chief Justice V. Lunabek*** ***Hon. Justice J.W. von Doussa*** ***Hon. Justice R. Asher*** ***Hon. Justice O.A. Saksak*** ***Hon. Justice D. Aru*** ***Hon. Justice W.K. Hastings***
Counsel:	***L. Raikatalau of Ferrieux Patterson Lawyers for the Appellant.*** ***N.G. Morrison of Ridgway Blake Lawyers for the First and Second Respondents*** ***L. Huri for the Third Respondent***
Date of Judgment:	***17 May 2024***

JUDGMENT OF THE COURT

Introduction

1. After a hearing that lasted for five days on 28 September 2023, the Supreme Court delivered a judgment dismissing a claim for negligence by the appellant Francois Chani against the respondents Harbour Views Limited (***"Harbour Views"***), Ocean Logistics Limited (***"Ocean Logistics"***) and the Republic of Vanuatu (***"the Republic"***) for an excavation creating a twenty-metre wall on his boundary. Mr Chani appeals this decision.

2. The claim did not plead as a cause of action either nuisance or the loss of a right of support. It was based on the tort of negligence. The primary judge followed the traditional approach to considering a duty of care in negligence actions which was set out by the United Kingdom House

of Lords in *Caparo Industries PL v Dickman*,[1] which was followed in Vanuatu in *Siri v National Bank of Vanuatu Limited*[2] and the other cases referred to in that judgment. The three-stage test as set out in *Siri* was:[3]

(i) Was the damage to the plaintiff reasonably foreseeable?, and

(ii) Was the relationship with the plaintiff and defendant sufficiently proximate?, and

(iii) Is it just and reasonable to impose a duty of care in such a situation?

3. Harbour View and Ocean Logistics conceded a duty of care. The Republic did not and the primary Judge agreed with this. She found that the relationship between Mr Chani and the Republic was not sufficiently proximate and concluded that it did not owe a duty of care to Mr Chani.

4. The bulk of the Judge's consideration was in relation to whether, on the facts, there had been a breach of any duty of care owed to Mr Chani. She held that there had not been any such breach of duty of care. It is that finding which is the focus of this appeal.

The amended notice of appeal and submissions

5. The amended notice of appeal was based on several fairly broad grounds. It was stated as the first ground that the Court erred in accepting that an unqualified geotechnical civil engineer's evidence was sufficient to provide a basis for the Court's decision. The evidence on which the Court relied upon should have come from a witness with geotechnical expertise.

6. As the second ground it was said the Court erred in accepting the issuance of quarrying and environmental permits when they were tainted by a lack of an Environmental Impact Report and a clear absence of geotechnical evidence.

7. As a third ground it was said that the Primary Judge was wrong to apply a standard of proof on the balance of probabilities "*solely on the Claimant*", when in the circumstances, there was insufficient information provided by a qualified geotechnical expert.

8. As the fourth ground it was claimed it was a mistake to draw conclusions based on the statements of unqualified civil engineers as to slope stability without proper geotechnical expertise.

9. It was said at paragraph 12 of the appellant's submission:

> *The issues that arise from this appeal centre around the inherent limitation in the basis of the court's decision, and the process used in preferring evidence in the specific circumstances of the case. Accepting a civil engineer's unqualified assessments of geotechnical evaluation could not have been justified for the reasons provided by Mr*

[1] *[1992] AC 605.*
[2] *[2022] VUCA 12 at 26.*
[3] *Paragraph 27 of Siri.*

*Mainguy (i.e., they can investigate geotechnical matters prior to erecting buildings). Clearly, the complaints raised by the appellant during the excavation **did not** concern the evaluations prior to erecting a building or assessing foundations for building pre-build...*

[Emphasis added by counsel]

10. It was submitted that the Court erred in law and in fact by not accepting that the issuing of quarry and environmental permits for ground levelling works of this type, ought as a matter of caution, to have involved geotechnical assessments. The subject area was susceptible to landslides and rock falls during earthquakes and severe weather conditions, and the excavation should never have proceeded without appropriate geotechnical assessments. It was submitted that "*in the circumstances, the Court erred in law and in fact, where the standard of proof on the balance of probabilities was attributed solely on the claimant ...*". It was argued that it was not open to the Judge to have preferred evidence between civil engineers if the assessments required were of a geotechnical nature.

New evidence

11. Approximately five weeks before the appeal hearing an application under r27(2) of the Court of Appeal Rules to file new evidence not before the Supreme Court was filed. The evidence was first of a Brisbane geotechnical engineer Andrew Middleton, as to the need for a geotechnical engineer to have reviewed and reported on the site before excavation. He expressed certain views about the risks of the excavation. Second there was the evidence of a private Investigator William Pakoa, referring to signs set up at Wharf Road after March 2023 warning of landslides and rock falls in the area. There is also a sworn statement of Breeanna Emelee, an associate lawyer working for Mr Chani's present lawyers going no further than exhibiting largely public documents.

12. We accept the application to file Ms Emmellee's affidavit, as we can discern no prejudice to the respondents in doing so. We will deal with the application to produce new substantive evidence later in this decision, after setting out the background facts and considering the existing evidence. The Primary Judge's summary of the history has not been specifically challenged.

Background

13. Mr Chani is a registered proprietor of a leasehold title located in the Nambatri area of Port Vila. His property is located next door to a leasehold property registered in the name of Harbour Views. Both properties front directly onto Wharf Road. Prior to the excavation in question both Mr Chani's property and that of Harbour Views were situated on hillside sloping down to Wharf Road.

14. In early 2020 Harbour Views was considering excavating its title to create a flat site level with Wharf Road, which would enable construction of an office building which would have access for vehicles and pedestrians to Wharf Road. In March 2020 Mr Bonn, the Group President and CEO of the company that includes Harbour View and Ocean Logistics, approached Mr Chani in person to discuss the broad idea of excavating the Harbour Views property for the purposes of the

construction. It was agreed that further discussions would take place when the company that would carry out the excavation and building, Ocean Logistics (which was associated with Harbour Views) was clearer on its plans.

15. In May or early June Mr Bonn, and an associate Mr Griffin, met with Mr Chani and discussed the plans. Mr Chani's property had a number of buildings on it, including a rented building that offered accommodation which was right on the boundary shared with the Harbour Views property. Mr Chani said that he was aware when he bought the property the structure had been built on the boundary without respecting the 3 metre set back rules of the Municipal Council. He also thought that his building might encroach somewhat on to the Harbour View's property. As part of the discussions it was noted that the excavation set back would be no more than 50 cm.

16. There were further meetings on 27 June 2020 and 2 July 2020. At no time during the discussions did Mr Chani protest at the excavation on his boundary. An environmental permit and quarry permit were obtained.

17. In June 2020 Ocean Logistics commenced its excavations. Approaching the properties from the Wharf Road, the excavation was up to the left side of Mr Chani's boundary. Most of Harbour View's property was excavated to create a flat platform that was level with the road. This meant that there was a cliff face cut into the coral rock approximately 20 metres in height, both on the common boundary between Mr Chani's property and that of Harbour Views Limited, as well as the other property or properties directly neighbouring the excavated area. Excavations continued, although there was a pause at one stage, and stopped only when the excavation was finished in September 2020.

18. Mr Chani filed his claim on 18 March 2021.

The engineering evidence

19. Mr Chani did not call any geotechnical engineers at the hearing. Both he and his wife gave evidence, but neither of them are geotechnical engineers nor have geotechnical experience.

20. A freelance environmental consultant, Abel Williams, was called. He had prepared an environmental report on the assessment of the excavation dated 4 June 2021. He referred to a breach of a 5 metre zone. He did not set out any qualifications of an engineering nature. Ultimately the Judge found that his evidence did not assist her.

21. The other relevant witness called by Mr Chani was an engineer Raysen Vire. He has a Bachelor's Degree in Engineering from New Zealand. He describes himself as a "*civil engineering consultant*", and he prepared an engineering assessment on the structural aspects of the property on 17 May 2021.

22. His observations were very general. He thought that the building on the edge of Harbour View's excavation was not safe for occupancy and should be vacated and demolished as soon as possible. He said that the coral face would weather and eventually collapse. He referred to the

existence of a 5 metre buffer zone, and presented to the Court a calculation of the amount of material removed.

23. The Judge found that the reference to a 5 meter zone was not supported by the documentary evidence or by the relevant legislation. The Judge's view was that Mr Vire's calculation of the quantity of material excavated was not based on the actual dimensions of Harbour Views' property. He had also calculated the volume of limestone excavated without taking into account that the volume would be higher after it had been turned into loose material. Importantly, the Primary Judge considered that his evidence was not reliable or credible and did not give it weight.

24. The first engineer called for Harbour Views and Ocean Logistics was Cyrille Mainguy. He is a qualified and licenced civil engineer. He stated without contradiction that part of his education and training involved a knowledge of geological structures and geotechnical theory as to land movement. As part of his experience in Vanuatu he had worked with clients doing excavation works on different islands and with differing soil structures.

25. He had been called on to inspect the excavation works during July 2020 and had provided an email report on 20 July 2020 which he had exhibited. He did not believe there was a need for a security wall. He stated:

> 1. *There are no specialised geotechnical engineers in town and most civil engineers would have minimal knowledge of the type of soil encountered in the country.* ***We (civil engineers) do undertake geotechnical investigations on land prior to buildings being erected in Vanuatu as we cannot get a specialised geotechnical engineer in town every time a building is constructed. Therefore, civil engineers can make comments on geotechnical issues;***
>
> 2. *Coral rock in Efate is quite stable and solid and vertical cracks are encountered everywhere especially in the areas of Nambatu and Nambatri.*
>
> 3. *Vertical cuts in coral are also common on Efate.*
>
> [Emphasis added]

26. He went on to say that the vertical cracks or soil pockets visible under the building at the top of the hill are not unstable. There is a crack at the bottom of the hill on Council land which is of more concern being a visible crack along the front face towards the road.

27. Mr Mainguy deposed that after a year the works appeared to be in good order and there had been no slumping.

28. The Judge found that his evidence was unchanged in cross-examination and he clearly explained his evidence which was consistent with that of others. The Judge found him a reliable and accurate witness and accepted his evidence.

29. Another engineer was called for the defendants, Harold Qualao. He is the principal engineer of Qualao Consulting Limited. He has a degree in civil engineering and a Master's Degree from the University of Birmingham (UK). He referred to authorities in the course of his evidence. He spoke in support of the stability of excavation. He commented:

"The rocks in this escarpment are characterised by a shallow soil cover overlying the raised coral limestone, which has seen little weathering, thus despite the discontinuities associated with coral formations it makes very competent foundation material ..."

30. He went on to say that there is no solid information to justify a fear that there will be some slipping on the property. He spoke in detail of the geology and geography of the area in which he appears to be an expert. He discussed how water drains through the coral limestone with ease and that there is no water retained in the body of it that might adversely affect the internal bonds. He thought the likelihood of any failure was negligible. He disagreed with Mr Vire's report referring to underground cracks, saying the discontinuities are not cracks.

31. The Judge noted that his evidence was not damaged by cross-examination and was consistent with another witness. He clearly explained his evidence and the basis for his comments and the judge found him to be a reliable and accurate witness.

32. A final further expert witness was Camillia Garae, the Commissioner of the Department of Geology and Mines. Mrs Garae has a Bachelor's Degree and Master's Degree in earth science. She gave evidence about the Department receiving an application for a quarry permit, and the issuing of that quarry permit.

33. On 8 July 2020 she had met with Mr Chani at the Harbour Views' property to evaluate the stability of the cracks in front of the public land facing Wharf Road. Mrs Garae's view was that the cracks were the result of mechanical weathering and that the crack did not need benching or stabilising. Mr Chani did not agree and the quarry company agreed to bench the crack. However, Mr Chani disagreed with such remedial work, so it was not done. In a further statement she deposed that the geology of the Port Vila area was underlined by Pleistocene raised reef limestone. She referred to other similar excavations that had been carried out. She confirmed that the new slope on the boundary between Mr Chani and Harbour Views' property was not a 90 degree angle cliff face but was sloped.

34. She was of the view that the full substrate of the raised reef was solid with no pockets within that substrate. She also considered that a full year after the excavation, there was no slumping and she believed the construction site was safe. She deposed that the current cliff face, as it stood, had not collapsed during the earthquake events experienced from October 2020 to April 2022 of magnitude 5 to 5.8. There had been no evident change in the cliff face. This showed that the substrate was solid and able to withstand earthquakes. She noted that other excavated cliff face structures do not have retaining walls, indicating the stability of the limestone substrate. She disagreed with Mr Vire's calculation as to the amount of material removed during the excavation.

35. The Judge considered her a reliable and accurate witness and noted that her evidence was consistent with the evidence of other witnesses.

36. It is also relevant to note the evidence of Loic Dinh who was the general manager of Entreprise Dinh Van Tu Limited, the company which carried out the excavation. He has worked in the Port Vila area his entire life and has extensive experience in operating excavators and with excavation

and quarry work on Efate Island. He noted that throughout 20 years undertaking major excavation works he had never experienced a collapsed wall on any of his projects.

37. Mr Dinh had obtained the permits and licences for the quarry work. There had been no problems during the excavation, although in the third week of June Mr Chani had contacted him with concerns regarding the position of the property boundary in relation to the excavation. The concern was not about the excavation or its steepness, but whether his house encroached. The work was stopped for a period and then, after a survey had been carried out, the work continued. The company offered, free of charge, to help stabilise the ground owned by the Republic in front of Mr Chani's property. Mr Chani did not agree to this.

38. The Primary Judge, in summarising findings and accepting the uncontradicted evidence of Mr Qualao and Mrs Garae, found that the area was made of raised coral reef limestone and with other excavated areas along the same escarpment, had withstood earthquakes and excavation. This was central to her finding that there was no negligence.

Criticism of the Judge's engineering findings

39. In addition to the amended grounds of appeal there remained earlier grounds criticising the Judge's rejection of Mr Vire's evidence as not reliable or credible, and in finding that the evidence of Mr Mainguy, Mr Qualao and Mr Dinh were reliable and accurate witnesses. It was stated that the Court should not have accepted their evidence.

40. The judgment was also challenged on the basis that the claimant was wrongly said to have not established any breach of duty of care by the defendants and that the Primary Judge had wrongly found that the claimant had failed to prove any damages.

41. We do not accept the specific criticisms of the Judge's findings. The Judge's consideration of the engineering evidence was most thorough. The reasons for preferring the respondent's evidence over that of the appellant were clearly explained, as set out above, and having considered her reasons alongside the evidence, we can only agree with her conclusions. The single engineering witness for the claimant gave evidence that was wrong in a number of fundamental respects, and very general. In contrast the engineering evidence for the respondents appears to have been thorough and accurate, and the reasons for the opinions given are easy to follow. Further, the Judge heard these witnesses and was in a good position to assess their reliability and credibility. We therefore reject the challenge to the Judge's findings of fact in relation to the engineering evidence.

42. This brings us to the challenge to the Judge's finding that the claimant had failed to prove a breach of the duty of care. The reasons that she set out for the finding were clearly expressed, and we have covered much of the analysis in our review of the engineering evidence. The burden of proof was undoubtedly upon Mr Chani as the claimant. The engineering evidence he presented to the Court was not accepted. Moreover, it was relevant in the assessment of his allegations of a breach of the duty of care, that in the time since the excavations were done, now approaching four years, there has been no evidence of any slipping or subsidence.

43. We can therefore understand why the Judge held that a breach of the duty of care by the respondents to Mr Chani had not been proved. On the material before the Judge, we would uphold the judgment. However, we must deal with the application to adduce new evidence, referred to at the outset of this decision.

The application to call new evidence

44. We consider the application in the context of the evidence that we have reviewed and the decisions that we have made on the basis of the evidence before the Judge. The approach to adducing fresh evidence on appeal has been covered in a number of decisions. Rule 27(2) of the Western Pacific Court of Appeal Rules 1973 provides:

> *"27(2) The Court of Appeal should have full discretionary power to receive further evidence upon questions of fact, either by oral examination in court, by affidavit or by deposition taken before an examiner or commissioner:*
>
> *provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds."*

45. The correct approach has been discussed in many cases in Vanuatu, generally in the criminal context.[4] It is clear that there are three requirements which apply in civil appeals:

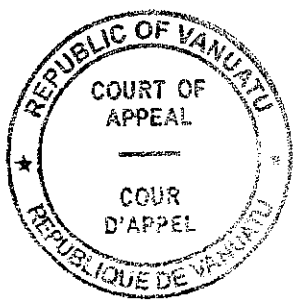
a) The new evidence could not have been obtained with reasonable diligence for use at the original hearing;

b) If given, the new evidence would probably have an important influence on the result of the case (although it need not be decisive);

c) The new evidence is apparently credible.

46. What is clearly apparent from the proposed evidence of Mr Middleton is that it all relates to matters which could have been dealt with at the time of the trial. It could have been obtained with reasonable diligence for use at the original hearing.

47. In his eight pages of detailed geotechnical evidence with numerous exhibits he gives the opinion that a geotechnical engineer should have inspected the slope before any excavation works, discusses the geological setting to the excavation, and gives his views on instability risk. He sets out the assessment processes that an engineer should initially undertake when assessing stability, and deals with a degree of risk that could be acceptable.



[4] *Vira v Public Prosecutor CA 18 February 2022, Adams v Public Prosecutor 2008 VUCA 20*

48. In his assessment (which was a desktop assessment as he never visited the site) he is critical of Mr Qualao's evidence saying that he underestimated the instability risk for the Chani property. Further investigations should have been conducted. In his view a failure of the slope is possible. He puts it no higher than that.

49. His report constitutes a major development of the evidence that was presented to the Court. Plainly, if the evidence was admitted, it would be relevant, possibly highly relevant. It is evidence that is both cogent and credible. But it was not given at the trial, and if it was adduced, fairness would dictate the respondents have a chance to respond. That would necessitate a further hearing. Indeed the relief sought by the appellant is an order for a new trial. That would be the only realistic way of dealing with such detailed further expert evidence.

50. We reiterate that the evidence of Mr Middleton was evidence that could have been adduced at the hearing. While there may have been some difficulty in getting outside geotechnical help during the time of Covid when the excavation took place in mid 2020, it is not suggested that there would have been any difficulty in getting Mr Middleton or his equivalent to give evidence at the time of the trial in July 2022.

51. We must add that the evidence, without any disrespect to Mr Middleton, who is undoubtedly a highly qualified geotechnical engineer, does not show that there has been any injustice in the conduct of the case and the ultimate failure of the appellant' case. We have already traversed the evidence of the engineers called by the respondents, who were experienced in building on the various strata on Efate, and who we accept had local geotechnical expertise. Their civil engineering degrees would have qualified them to develop an understanding of local geotechnical conditions and risks. They said they had that experience, and that was accepted by the Primary Judge. Indeed it is to be noted that Mr Middleton cannot claim such hands-on experience in Port Vila, and in that respect his evidence might warrant being given less weight than that of the local experts.

52. We can see no reason to doubt the Judge's reliance on the engineers called for the respondents at the hearing. She may have reached a different view if Mr Middleton had been called. But he was not called, and after a lengthy hearing she reached her decision. We decline to accept the new evidence by way of affidavit from Mr Middleton.

53. We also decline to accept the evidence of Mr Pakoa about the warning signs that had been erected. This is for the simple reason that the evidence is of no probative value. Mr Pakoa is not an expert on the danger of slips, and the evidence about what is said on signs is hearsay evidence that does not warrant being given any weight. Accordingly the application to adduce his evidence is also declined.

Conclusion

54. We have no difficulty in dismissing the appeal. The Primary Judge's findings are detailed and persuasive, and no error has been shown. The findings that we have set out also support the judge's dismissal of the claim against the State. There is nothing to support the contention that the State was negligent, even if it did owe some duty of care.

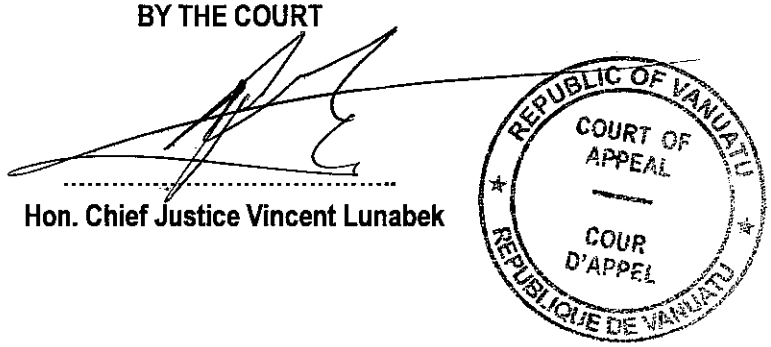
Result

55. The appeal is dismissed.

56. The first and second respondents are entitled to costs as is the third respondent. As the first and second respondents took the primary burden of argument, costs are fixed in favour of the first and second respondents at VT150,000 and in favour of the third respondent at VT75,000.

DATED at Port Vila, this 17th day of May 2024

BY THE COURT



.....

Hon. Chief Justice Vincent Lunabek