IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU

Civil Appeal Case No.2 of 2001

(Appellate Jurisdiction)

BETWEEN: SELINA TAHI

Appellant

AND: ALBERTINE KWEMOLI

Respondent

Coram: Before Mr Justice Oliver A. Saksak
Clerk: Ms Cynthia Thomas

Counsels: Miss Marie Hakwa of Counsel for the Appellant
Mr Bill B. Tamwata for the Respondent

Date of Hearing: 23rd July, 2001 at 2 p.m.

## RESERVED JUDGEMENT

This appeal arises out of the judgment and orders of the Senior Magistrate's Court in Civil Case No.64 of 2000. In that proceeding the Respondent was the Plaintiff. She sued the Defendant, now Appellant for a total sum of VT980,000 made up as follows –

| | | | |
|---|---|---|---|
| (a) | Costs of repairs | - | VT180.000 |
| (b) | Initial deposit | - | VT100.000 |
| (c) | Loss of future earnings estimated at VT100.000 per month for 6 years and 7 months at the least | - | VT700.000 |
| | | | VT980.000 |

The Court below heard evidence from both Parties and their witnesses on 21st November, 2000. Judgment was entered for the Respondent on 23rd November, 2000 for the total sum of VT349.000 made up as follows –

(a) VT299 - Agreed amount to be paid by Appellant to the Respondent.
(b) VT50.000 - as punitive damages.
(c) 12% interest to the date of settlement.
(d) Costs.

The Defendant appealed against that judgment and orders by lodging a Notice of Appeal on 22 February 2001. The Original Memorandum of Appeal had 13 grounds of appeal. The Appellant filed an Amended Grounds of Appeal on 24th April, 2001 removing and deleting paragraphs 1 – 13 inclusive of the original grounds and maintaining at least three grounds. On the date of hearing of the appeal Counsel for the Appellant sought leave to further amend the grounds by deleting the grounds in paragraph 2 of the amended grounds. The only remaining grounds were:-

1. That the learned Senior Magistrate erred in law in purporting to award punitive damages in the sum of VT50.000 against the Appellant.

2. That the learned Senior Magistrate erred in law in purporting that the Appellant was liable to pay the sum of VT299.000 and/or any other sum to the Respondent.

In respect of the second grounds Miss Hakwa argued and submitted that the Respondent had not pleaded breach of contract in her statement of claim dated 21st September 2000. Under that circumstance the proper course for the learned Senior Magistrate was to have the Respondent's claim struck off. The second limb of that argument was a submission in the alternative that if this Court should find to the contrary, that there was clear evidence that by paying VT100.000 to one Joe Halili, the Appellant had partially performed or honoured her contractual obligations. If that were the case, it was submitted that the sum of VT100.000 be deducted accordingly from the VT299.000.

In relation to the punitive damages, Miss Hakwa submitted that according to the accepted principles of law where no claim is founded on tort, there was no basis for an award of VT50.000 as punitive damages. She relied on the authority of Kenny v. Preen [1962] C.A at p.44.

In reply Mr Tamwata submitted that this Court is not bound by the decision of the Court of Appeal in Kenny v. Preen since the nature and circumstances of the case there were different from the nature and circumstances of the case on appeal. Secondly it was submitted that the learned Senior Magistrate did not err in awarding the

damages in the sum of VT299.000. It was submitted that the learned Senior Magistrate had based his findings on the evidence available before him and therefore he had correctly exercised his discretion in awarding damages.

I deal first with the issue of punitive damage. It is clear that the Respondent did not found her claim in tort. She sued the Appellant for breach of contract. And damages for breach of contract are a compensation to the plaintiff for the damage, loss or injury suffered by the plaintiff through that breach. The plaintiff is, as far as money can do it, to be placed in the same position as if the contract had been performed. If the Plaintiff cannot establish an actual loss, he is entitled only to nominal damages. The legal principles enanciated in Kenny v. Preen regarding exemplary or punitive damages are therefore accepted and applied, although the circumstances of the case were of a landlord and tenant. But the nature of the case was one of contract and breach of it.

The whole issue of exemplary damages in tort was considered by the House in Lords in England in 1964. In the famous case of Rookes v Bernard [1964] AC 1129 at 1221, Lord Devlin speaking for all the law Lords who heard the case said that not only was there no decision of the House of Lords approving an award of exemplary damages, but that such damages were an anomaly which should be as far as possible removed from the law of England.

Despite what Devlin L.J said, the House could not without a complete disregard of precedent, and of statute arrive at a determination which refused altogether to recognize certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law, and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal. At page 1226 Devlin L.J went on to describe those categories as follows:-

> "The first category is oppressive, arbitrary or unconstitutional action by the servants of the Government....
> Causes in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.....
> To these two categories which are established as part of the common law there must of course be added any category in which exemplary damages are expressly authorised by statute. (p.1227) Then at page 1228 His Lordship added that "a jury should be directed that if, but only if, the sum which they had in mind

> to award as compensation (which may of course be a sum aggrevated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then they can award some larger sum."

The second category has been held to cover also the unlawful eviction of a tenant by harassment. See Drane v. Evangelou [1978] 2 All ER.437.

It appears that Lord Devlin's restrictive view of exemplary damages has not been accepted in Canada (see Platt v. Time International of Canada Ltd (1964) 44 DLR (2d) 17 (ont.)), or in New Zealand (see Cassell & Co Ltd v. Broome [1972] 1 All ER 801 at 860), and in Australia (see Australia Consolidated Press Ltd v. Uren [1969] 1 AC 590.

It appears from precedents that Vanuatu has adopted and followed the restrictive view of Lord Devlin. In F. Harrisen v. J. P. Holloway [No.1] Civil Case No.62 of 1984, 1 VLR 106 the plaintiff sued in tort claiming damages for wrongful imprisonment. He claimed exemplary and compensatory damages. The amount claimed as aggrevated and exemplary damages was VT5,000,000. The sum of VT1,000,000 was claimed as general damages and VT36,000 were special damages. Coakley. J discusses the issue of aggrevated and exemplary damages beginning at page 112 through page 114. He cites the New Zealand case of Cassell & Co Ltd v. Broome (supra) and also Rookes v. Bernard (supra).

In his conclusion Coakley, J disallowed the aggrevated and exemplary damages of VT5,000,000. He reduced the general damages to VT180.000 and reduced the special damages to VT34,840.

The Plaintiff appealed. The proceedings is Appeal Case No.10 of 1984 Freddy Harrisen v. J. P Holloway (No.2) 1 VLR 147. The Court of Appeal at p.151 said –

> "Exemplary damages may perhaps be awarded where there is some deliberate oppression, where a tort is committed somewhat flagrantly, where warnings against repetition of such conduct have been given. Factors of that nature are not apparent in this case."

Then at p.152 the Court of Appeal said –

> "We consider that exemplary damages are not called for".

In other words, the Court of Appeal upheld Coakley, J's decision in not allowing exemplary damages. They slightly increased the general damages from VT180.000 to VT250.000.

In Palene v. Pentecost Pacific S.A, Civil Case No.213 of 1983 1VLR 94 the plaintiff sued for damages as a result of a breach of contract. Cooke C.J found the method of dismissal of the plaintiff improper and awarded him the sum of VT2,000,000 by way of exemplary damages. The defendants appealed. In Pentecost Pacific S.A v. Palene C.A. No.4A of 1984, 1VLR 134. The Court of Appeal in respect of quantum of damages said this at p.138 –

> "P.H was also awarded in the lower Court a sum of VT2,000,000 as exemplary damages, and VT500,000 for legal costs and expenses. The Court regards these two claims as unjustified: on the one hand there cannot be awarded two separate amounts of damages in respect of one single action, and on the other hand the legal costs and expenses will be covered by an award of costs against the unsuccessful party to the dispite."

The end result was simply that exemplary damages were disallowed for reason that it was an unjustified claim. Applying the principles in the cases referred to, this present case does not fall within any of the categories outlined by Devlin L.J in Rookes v. Bernard. I must therefore conclude that the Court below had erred in awarding VT50.000 to the Respondent as exemplary damages, and I so rule.

I come now to the second grounds of appeal. The Court below awarded the Respondent the sum of VT299.000 claimed by her as expenses incurred by her when she was actually operating the vehicle. This sum was agreed to by the Appellant and the Respondent on or about 9th June, 1998. Tendered into evidence as Exhibit M the Respondent produced a document the text of which is as follows:-

> **"BREACH OF AGREEMENT**
>
> Between Miss Selina Tahi and Joe Halili & Albertine H.
>
> Effective date on 15th day of June 1998.

The Agreement stated that (3,000) three thousand vatu will be paid weekly effective from the date stated above until outstanding payments of (299,000vt) Two Hundred Ninety-Nine Thousand Vatu refund is completed. At this date 09/06/98 at Luganville.

Joe Halili Vuti – Signed
Selina Tahi - Signed
Albertine H - Signed
Tom Wells - Signed."

The verbal agreement appears from the evidence to be a little more extensive than what was actually recorded in writing. It included the terms and conditions of payment of VT3,000 weekly into the Respondent's Account at Westpac Bank. Details of that Account were not provided. In her oral evidence the Appellants confirmed that that was what was agreed to . But she also said in her evidence that she did not comply with the agreement. Instead she paid Joe Halili the sum of VT100.000 because Joe Halili had approached her and demanded for the money which he claimed was his and he lended it to Albertine, the Respondent. Joe Halili confirmed receipt of VT100.000 in his evidence and maintained that the money was his and that he had used the money to pay for school fees for their children. The Respondent was at the time the wife of Joe Halili. Tom Wells reconfirmed in cross-examination that the Appellant had paid VT100.000 to Joe Halili.

A further sum of VT40.000 was paid by the Apellant to Tom Wells. Mr Wells confirmed he acted as a debt collector. He acted on the instructions of Albertine, the Respondent. In his evidence Mr Wells confirmed receipt of VT40.000 from the Appellant. He testified as to the Respondent's arrangement to pay him VT10.000 for repossession of the truck and further that he was to be paid 10% of VT299.000. The only reason Mr Wells went to demand payment from the Appellant was that the Respondent had failed to pay him for his services as agreed. In cross-examination Mr Wells admitted that he did not have a valid licence to operate as a debt collector. Both he and Mr Halili said in their evidence that the arrangement was all a family arrangement. Both these men gave evidence as witnesses for the Appellant. Mr Halili did not know that the sum of VT 3,000 had to be made direct into the Respondent's Account. He said that the arrangement was that cash payments would be made through Mr Wells. Mr Wells said in evidence that in another meeting held in August 1998 it was agreed that the amount of VT 299,000 was to be reduced to VT 100,000. All four persons were present. The meeting

was held at the Appellant's house. The reason for that reduction was that as the situation between Albertine and Joe Halili had changed, that it rendered the agreement of 9th June 1998 void.
This is not an issue which the Court should decide on. I think the issue is who was party to the purported Agreement dated 9th June 1998.

On the face of it, it appears clearly that the parties were Selina Tahi on the one hand and Joe Halili and Albertine H. on the other. All of them indicated their agreement by placing their respective signatures. Mr Tom Wells also signed. In my view he did so in his capacity as debt collector and as such he signed the Agreement as a witness.

The next issue is whether or not it was proper for the Appellant to have paid VT100,000 to Joe Halili instead of to Albertine and VT40,000 to Tom Wells instead of to Albertine?

The document dated 9th June, 1998 is clear. Joe Halili and Alertine H. were acting jointly as one party. The payment of VT100,000 to Joe Halili by the Appellant was therefore proper and the Appellant did not breach her agreement, by doing so. As regards the payment of VT40,000 to Tom Wells he had always presented himself to the Appellant as acting on behalf of the Respondent. That appears evident from a Note dated 17th September 1999. In that respect it is my view that when the Appellant had paid VT40,000 to Tom Wells, she was doing so in reduction of the sum total of VT299,000. It is of great concern that Mr Wells admitted he did not have a licence to operate as a debt collector and yet he admitted receiving VT40,000 from the Appellant for what he calls 'services' he rendered to the Respondent. He actually said that the arrangement was purely a family matter. He is the nephew of Joe Halili and Albertine. On that basis it was not proper for him to have charged for his services. But it appears that he took VT40.000 made up of VT29,900 as 10% of VT299.000 and VT10.100 for repossessing the vehicle. It appears that he did so illegally in the absence of a business licence. It is therefore encumbened on him to make good that loss to the Respondent. As far as the Appellant is concerned she had performed her part of the Agreement. There was no breach on her part.

Finally as to the VT299.000 and how it was claimed, it was submitted that it is arrived at by adding VT180.000 and VT100.000 as claimed in the statement of claims in the Court below. The total amount of those two sums is VT280.000.

In evidence the Respondent only produced receipts showing as follows:-

| | | | |
|---|---|---|---|
| (a) | Receipt 23 of 20/3/98 | - | VT2.000 – Fuel |
| (b) | Receipt 13 of 19/3/98 | - | VT1.000 – Fire extinguisher |
| (c) | Receipt 57 of 20/3/98 | - | VT41.770 – Service to vehicle |
| (d) | Receipt 21 of 20/3/98 | - | VT15.000 – Repairs to vehicle |
| (e) | Receipt 63 of 20/3/98 | - | VT 6.690 – Parts |
| (f) | Receipt 20 of 16/3/98 | - | VT16.600 – Repairs |
| (g) | Receipt 28 of 16/3/98 | - | VT25.170 – Parts |
| (h) | Receipt 365543 of 22/3/98 | - | VT 4.000 – Fees for inspection |
| (i) | Receipt 23/68 of 20/3/98 | - | VT 1.000 – Annual transport Fee |
| (j) | Receipt 19060 of 23/3/98 | - | VT18.000 – Business Licence fee |
| (k) | Receipt 2 of 31/3/98 | - | VT50.000 – First payment for vehicle. |
| (l) | Receipt 1 of 27/8/98 | - | VT50.000 – Second payment for vehicle. |
| | | **Total =** | **VT230.630** |

The Appellant did not however dispute the sum of VT299.000 as agreed. In her evidence she only testified to paying VT100.000 to Joe Halili and VT40.000 to Tom Wells. In my opinion, it was necessary for the Court below to have deducted these from the total sum of VT 299,000. The balance remaining is therefore VT 159,000. This is the only sum the Appellant now has owing to the Respondent.

For the reasons given, this appeal is allowed. The Orders of the Court below are vacated. The Court substitutes the following Orders –

(1) The Appellant be required to pay the Respondent the sum of VT159,000 being the balance of the sum of VT299,000 as agreed to between herself and the Respondent on 9th June, 1998.
This sum shall be paid by the Appellant directly into the Respondent's Bank Account at Westpac in accordance with the terms of their Agreement of 9th June, 1998 commencing on the date of this judgment and continuing each week until the whole amount is paid up.

(2) The Appellant shall pay the Respondent's costs of the action in the Magistrate's Court.

(3) There will be no order as to costs of the appeal.

**Dated at Luganville this 10th day of August, 2001.**

**BY THE COURT**

**OLIVER A. SAKSAK**
**Judge**