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

Civil Case No. 180 of 2007

BETWEEN : JEAN PAUL VIRELALA
Claimant

AND: TERRY KERR
First Defendant

AND: HON. WILLIE JIMMY TAPANGARARUA
Second Defendant

AND: AIR VANUATU (OPERATIONS) LIMITED
Third Defendant

AND: MARC NEIL JONES
Fourth Defendant

AND: TRADING POST LIMITED
Fifth Defendant

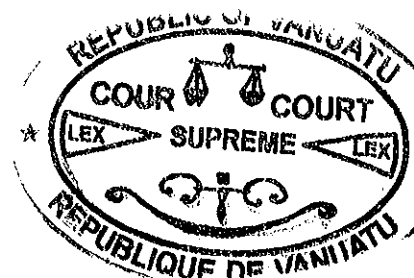
Coram: Judge Macdonald

Claimant: Mr G. Boar
1st Defendant: Mr M. Hurley
2nd Defendant: Mr J. Ngwele
3rd Defendant: Mr J. Malcolm
4th & 5th Defendants: Mr J. Ozols

Date of Hearing: 20, 21 & 22 September 2010
Date of Decision: 1st October 2010

JUDGMENT

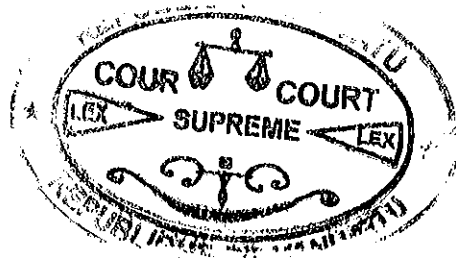
1. At the conclusion of this defamation trial I indicated to counsel that I was going to dismiss the claim. What follows is my attempt to explain why.
2. I will be as brief as I can because in light of the cross examination of the claimant the case ultimately turned on the meaning of a single sentence.



Background

3. The claimant was the Chief Executive Officer and Managing Director of the third defendant between 11 April 2003 and 11 January 2005.
4. He claims that the termination of his employment was unlawful, and as a consequence he filed a Supreme Court Claim (CC 14/05). That claim was subsequently compromised and discontinued, with the settlement reached being recorded in a Deed of Release dated 13 February 2006.
5. The claimant's successor was the first defendant who held the positions between 23 February 2005 and 23 January 2008.
6. The third defendant suffered a loss of VT494 million for the 2004 year. That was while the claimant was its Chief Executive Officer and Managing Director. For the following years of 2005, 2006 and 2007, when the first defendant held those positions, it recorded profits of VT98 million, VT156 million and VT 269 million respectively.
7. In July 2007 the third defendant's Board of Directors appointed the claimant's consultancy firm (Jean Paul Virelala Consulting Services) to assist in the operation of the company.
8. The first defendant refused to implement the appointment, even though the Chairman of the Board, Mr Maliu, directed him to do so.
9. On 15 July 2007 the first defendant arranged to be interviewed by the fourth defendant, which resulted in the following article appearing the next day in the Daily Post (Issue No. 2079):

"It is obvious we cannot work with Alfred Maliu as the new board are blatantly bringing politics into the running of the airline. Under Jean Paul Virelala the



airline lost VT494 million and was in effect insolvent. It doesn't make sense to bring him back as a consultant when things have been going so well for the airline and we are now profitable. At the very least they should take the time to go through the financial affairs of the company and discuss issues of concern with the management before going to tender if they want to bring in a consultant. I advised the board that I am not prepared to implement the three resolutions due to the fiduciary duty imposed on myself as Managing Director. I would remind the board that a fiduciary duty is a duty imposed on a Director to act solely in the best interest of the company to the exclusion of friends, family, politics, religion or self interest."

10. A further article appeared in the Daily Post (Issue No. 2082) containing comments from the second defendant about the same matter:

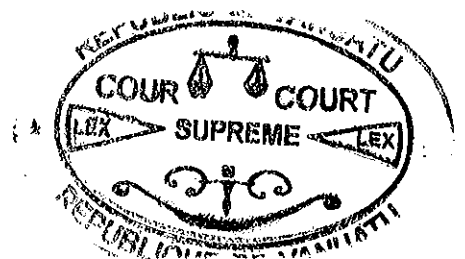
"I was away and knew nothing about these decisions to appoint Jean Paul Virelala by Mr Maliu. Whilst I have yet to speak to the Prime Minister on it as far as I am concerned as a third shareholder, I totally disagree with what Maliu and the board are doing and should let the management do its work.

If the current disturbing situation continues I will not hesitate to push for the board to be reviewed.

I gave a government cheque to Air Vanuatu for VT150 million and we are happy with the airline and are awaiting a dividend.

We do not want the same problems that happened before with the airline. I am concerned that Mr Virelala will be wanting to get back at the current management for his dismissal and it will create problems."

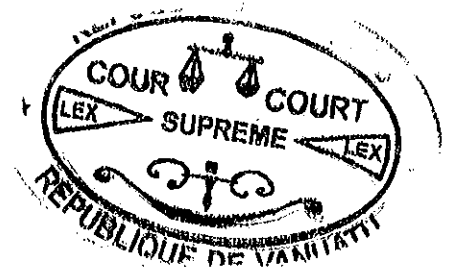
11. The claimant says that both articles are defamatory and has sued in defamation. He pleads that the defendants have falsely and maliciously written the articles to discredit and tarnish his reputation.



12. The claimant further asserts that the natural and ordinary of the words meant, and were understood to mean, that he was:
- a) directly responsible for the Air Vanuatu (Operations) Limited loss of VT494 million;
 - b) incompetent;
 - c) a thief;
 - d) a criminal;
 - e) responsible for Air Vanuatu (Operations) Limited being insolvent; and
 - f) a problem maker.
13. The claimant seeks damages in an unspecified amount, although a letter from his solicitor dated 23 July 2007, which was prior to the issue of these proceedings, mentioned a damages figure of over VT 234 million, for the alleged defamation and breaches of the Deed of Release.
14. The defences filed generally accept the primary facts but deny that the articles as published are defamatory. They also plead that the words published were true in substance and in fact, and amounted to fair comment on a matter of public interest.

Legal Principles

15. In Vanuatu there is no statute covering defamation and so the legal principles to apply are derived from the common law.
16. A defamatory statement is one that may tend to lower the plaintiff in the estimation of right thinking members of society generally: **Sim v. Stretch** [1936] 2 All ER 1237, 1240 per Lord Atkin.
17. In the present case it is a question of looking at the natural and ordinary meaning of the words in context. The test is an objective one. Under the circumstances in



which the words were published, what would the ordinary reasonable person understand by them?

18. In relation to the defence of truth Mr. Hurley, for the first defendant, has in his submissions relied on the text, 'The Law of Defamation in Australia and New Zealand' by Gillooly, (The Federation Press, 1998), which I adopt. At pp 104 -105 the learned author states:

"In order to make out the defence, the defendant must prove that the allegedly defamatory matter was in substance true. In other words, the imputations conveyed by the matter complained of must be shown to be substantially true."

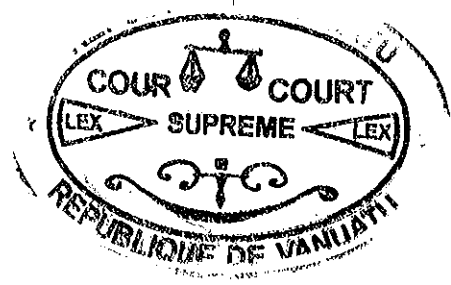
19. As to the defence of fair comment at p124 Gillooly states that there are three ingredients:

- the matter in question must be a comment;
- the comment must be on a matter of public interest; and
- the comment must be fair.

20. Further at p125 of Gillooly:

"In order to qualify as a comment for the purposes of the defence, a statement of opinion must be accompanied by a statement or at least an indication of the facts upon which the opinion is based. Publishees of the defamatory matter are thereby enabled to judge for themselves the extent to which the publisher's opinion is well founded"

21. In order to be fair a comment must, according to Gilloogy at p130, satisfy the following criteria:



- the factual matters on which the comment is based must be true or published under privilege;
- the opinion expressed must be one that a fair minded person could honestly hold on the basis of the stated or indicated facts; and
- the comments must not have been actuated or distorted by malice.

Issues

22. It is conceded that the articles were about the claimant and had been published by at least the first, second, fourth, and fifth defendants. As for the third defendant, Mr Malcolm correctly points out that there is no evidence of publishing, but he accepts the possibility of some vicarious liability arising, even though it has not been pleaded. In light of the ultimate conclusions reached I will not dwell on this. I will assume that publication by the third defendant has been established.

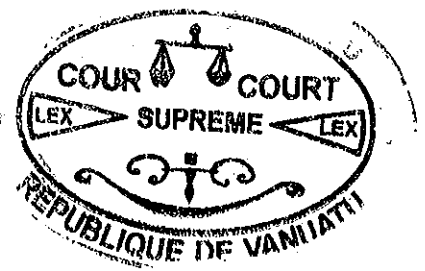
23. It means that the following issues arise in respect of each article:

- is it defamatory?
- if it is, have the defences of truth or fair comment been made out?
- if not, then what are the appropriate damages?

First article (Daily Post - Issue No 2079)

24. Of the six imputations relied upon (specified at paragraph 19 of the claim and listed above in paragraph 13), I am satisfied that in their natural and ordinary meaning the words did not mean, and nor could they be understood to mean, that the claimant was a thief, a criminal or a problem maker.

25. In cross-examination the claimant accepted that to be the case in any event.



26. That leaves the three remaining imputations relied upon, namely that the claimant was directly responsible for the airline's loss of VT494 million, he was incompetent, and he was responsible for the airline being insolvent.

27. Such imputations all arise from the one sentence:

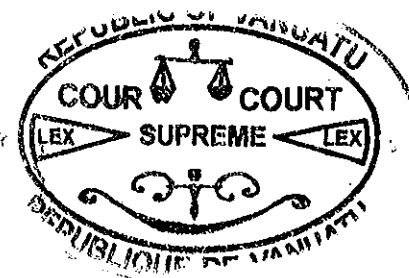
“Under Jean Paul Virelala the airline lost VT494 million and was in effect insolvent.”

28. The mention in the same sentence of the claimant being in charge of the airline when it lost VT494 million, and was in effect insolvent, could give rise to the imputation that the claimant, and he alone, was responsible for both the loss and the insolvency. And, that in turn could give rise to the imputation reflect that he was incompetent, despite the fact that most would appreciate that while the claimant played a very important role in the running of the airline, it was the Board of Directors that made decisions on behalf of the company.

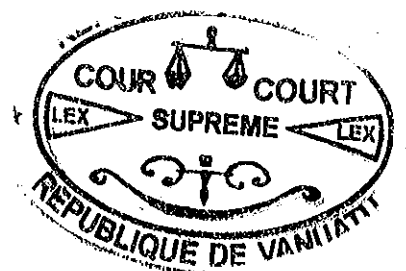
29. However, it seems to me that the words are used in the context of questioning the wisdom of the airline re-employing the claimant, albeit in a different role, given what happened when he was its Chief Executive Officer and Managing Director. Viewed in that way I do not see that the words go as far as the claimant suggests. They do not say that he is to blame for the loss or insolvency of the airline, or that he is competent.

30. In those circumstances I do not accept that the words carry the imputation relied upon by the claimant. I therefore do not consider them to be defamatory.

31. If I am wrong, however, I am in no doubt that the defences of truth and fair comment have both been made out, and the claim must fail on that basis as well.



32. The article, and in particular the single sentence under focus, is undoubtedly true. While the claimant was its Chief Executive Officer and Managing Director the third defendant did sustain a loss of VT494 million. That was in 2004. It was also technically insolvent because, as the claimant conceded, it could not at that time write out a cheque for VT494 million to meet its indebtedness. "Insolvency" simply means being unable to pay its debts.
33. The claimant appeared reluctant to accept the proposition that the company was insolvent at that time but it plainly was. Of course, that did not mean that it was unable to carry on trading. It clearly did, and, with the help of a VT150 million cash injection from the Government, it soon became profitable again.
34. I am satisfied that the plea of truth is made out and that answers the claim. The article was in substance true.
35. On the defence of fair comment I am satisfied that the article amounted to a comment on a matter of public interest. Unquestionably the financial well-being of the airline, being "the National Carrier", was and always has been a matter of public interest in Vanuatu.
36. As to whether the comment was fair, I acknowledge the claimant's position that a loss for the 2004 was something that had been budgeted for, and it was part of some five year plan. I assume that the claimant is therefore suggesting that, in the interests of fairness and balance, additional information of that kind should have been included in the article. I am putting to one side whether the loss was ever expected to be of the magnitude of VT494 million,
37. My response, however, is that the purpose of the article was surely limited to questioning the wisdom of the third defendant re-employing the claimant, or rather his consultancy firm, given the loss in 2004, when he was its Chief Executive Officer and Managing Director. It was not some in-depth analysis of the past performance of the airline.



38. Viewed in that way I consider the comment to be fair, with the factual basis for it being in substance true. The defence of fair comment has therefore also been made out.

Second Article (Daily Post - Issue No. 2082)

39. I appreciate that the claimant might be particularly sensitive about any criticism of his performance with the airline, given the termination of his employment. But, even allowing for that, I fail to see as a matter of law that this second article can bear any defamatory meaning at all.

40. Again, even if I am wrong in that conclusion, the claimant conceded that there was nothing in the article that was untrue in a factual sense. It would therefore follow that the plea of truth could not be resisted. And, the same would apply to the defence of fair comment.

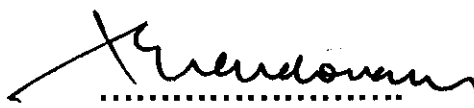
Result

41. The claims against each defendant are dismissed.

42. The defendants are entitled to costs. If counsel are unable to reach agreement on that then they may file memoranda so that costs can be fixed by the Court.

Dated at Port Vila, this 1st day of October 2010

BY THE COURT


.....
J. Macdonald
JUDGE

