

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUA
TU
(Civil Jurisdiction)

Civil Case No. 57 of 2010

BETWEEN: ENTERPRISE DINH VAN TU LTD
First Claimant

AKU DINH (also known as Dinh Van Tu) trading as Enterprise Dinh Van Tu
Second Claimant

AND: IVUKI KALTAK
First Defendant

AND: TIMOTHY KALTAK
ANDREW KALTAK
RUSSEL KALTAK TIMOTHY
Second Defendants

AND: THE ESTATE OF KALTAPU KALTAK by its Administrator,
ANDREW KALTAK
Third Defendant

AND: KNIGHTSBRIDGE INVESTMENT LIMITED
Fourth Defendant

AND: CONTI – KING LIMITED
Fifth Defendant

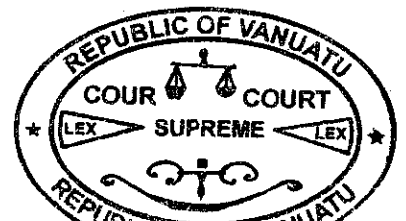
Hearing: 01 & 29 June 2012

Before: Justice RLB Spear

Appearances: Mark Hurley for the 4th & 5th Defendants (as Counterclaimants)
Daniel Yawha for the 1st and 2nd Claimants (as Counterclaim defendants)

Judgment: 16 January 2013

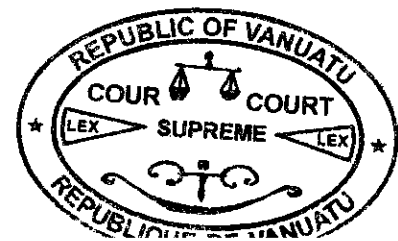
JUDGMENT ON DAMAGES ARISING FROM INJUNCTION



1. Knightsbridge (which trades as *MCI*) and Conti-King assert that they sustained loss as a result of the interim injunction obtained by Enterprise Dinh Van Tu Ltd on 12 September 2011. That order was obtained by the claimant against the 1st, 2nd and 3rd defendants and was in these terms.

This Court orders that the first, second and third defendants, their agents and servants, are now restrained from permitting any aggregate, metal or other such material to be extracted or removed from the quarry on their land know as Eruelep until further order of the this Court.

2. At the time that the injunction was issued, a joint venture of Knightsbridge and Conti-King was operating the quarry and marketing the product pursuant to a contract with the 1st and 2nd defendants; being the custom owners of the quarry. The evidence for Knightsbridge and Conti-King was from John Tonner who explained that the two companies had different shareholding although they enjoyed a close business relationship. John Tonner is a director of both companies.
3. Conti-King was the actual quarry operator and it held all necessary quarry permits. It paid all Government royalties and fees and it sold the aggregate from the quarry that it had extracted and crushed to Knightsbridge (which trades as *MCI*) at an agreed price.
4. Knightsbridge owned all the machinery used by Conti-King at the quarry. It states that it is primarily in the business of selling quality aggregate, sand and timber.
5. The injunction was obtained by Enterprise Dinh Van Tu Ltd to stop the quarry operations at the *Eruelep* quarry because of its assertion that it enjoyed the exclusive contractual right to operate the quarry and extract the aggregate.
6. The injunction was supported by an undertaking as to damages. That undertaking went through three stages:-

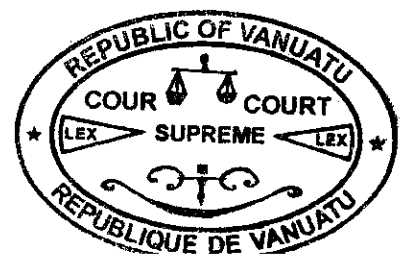


- a. It was initially given by Mr Yawha as the solicitor for Enterprise Dinh Van Tu Limited. That was not acceptable;
- b. Then, by Aku Dinh "*acting in my capacity as director of Enterprise Dinh Van Tu Limited*" on 31 August 2011. Aku Dinh is the name by which Dinh Van Tu is normally known;
- c. Finally, by Enterprise Dinh Van Tu Limited under company seal on 20 September 2011 and in these terms:-

*"Enterprise Dinh Van Tu Limited ... **HEREBY UNDERTAKES TO THE COURT** that it will "pay" all or any damages arising from restraining order in their (sic) event that the claim is not eventually successful or as determined by his Honorable Court."*

7. Reference is made to Trial Ruling No. 1 of 30 May 2012 which addressed the concern that Enterprise Dinh Van Tu Limited (the only claimant at that time) did not come into existence (i.e. it was not incorporated) until after the quarry extraction agreement of 17 September 2009 between Aku Dinh and the late Kaltapu Kaltak. The question then arose as to what particular entity should bring the claim. The following consent position was reached.
 - a. Enterprise Dinh Van Tu Limited remained but as 1st claimant.
 - b. Aku Dinh (also known as Dinh Van Tu) trading as Enterprise Dinh Van Tu was added as 2nd claimant.
 - c. The undertaking as to damages given by Enterprise Dinh Van Tu Ltd was extended by both Claimants so that it was to be accepted as if it had been given by both Enterprise Dinh Van Tu Ltd and Aku Dinh and that they had been joint applicants for the injunction.

8. Knightsbridge and Conti-King (previously but mistakenly referred to as Konti-King) were added to the proceeding after the injunction was granted as that shut down their joint operation in respect of the *Eruelep* quarry. They sought a review of the restraining order. That application was heard on 3 October 2011. At that hearing, Enterprise Dinh Van Tu Ltd and Aku Dinh indicated that they would not oppose the discharge of the injunction. By that time, the force of Mr Hurley's submissions had been appreciated. The injunction was then duly discharged.
9. A counterclaim was then brought by Knightsbridge and Conti-King against both Enterprise Dinh Van Tu Ltd and Aku Dinh in respect of loss sustained by Knightsbridge and Conti-King because of the interruption to their quarry and associated retail operations by the injunction.
10. The claim and counterclaim were set down for hearing on 30 May 2012. In Trial Ruling No. 2, it is noted that the claim against Knightsbridge and Conti-King was discontinued at the commencement of the hearing.
11. The case then continued against the 1st, 2nd and 3rd defendants but only to a point where the court was informed that a settlement had been reached. That settlement involved a judgment being entered on admission in favour of Enterprise Dinh Van Tu Ltd and Aku Dinh against the 1st and 2nd defendants jointly and severally in the sum of Vt 1,122,306 and interest. The claim against the 3rd defendant was discontinued.
12. That left the counterclaim still to be determined. That particular hearing commenced the following day on 31 May 2012. All the evidence was received that day and the case was then adjourned through to 29 June 2012 for closing addresses. Unfortunately, there was no appearance on 29 June 2012 by or on behalf of Enterprise Dinh Van Tu Ltd and/or Aku Dinh. All attempts by the Court staff to contact Mr Yawha were unsuccessful. The hearing proceeded in Mr Yawha's absence by the receipt of Mr Hurley's written submissions which were in two parts:-



a. Submissions regarding the 4th and 5th defendants' standing to pursue an inquiry as to damages;

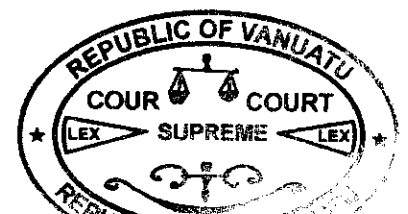
b. Final submissions regarding 4th and 5th defendants' claim for damages.

13. Mr Hurley confirmed that Mr Yahwa had been provided with an advance copy of his written submissions. They would not, however, have come as a surprise to Mr Yahwa particularly as the "*final submissions*" essentially provided a summary of the evidence that the Court received on 31 May 2012. Mr Hurley felt somewhat constrained by the absence of Mr Yahwa. He simply indicated to the Court that he relied on his written submission and that he did not propose to address them orally.

14. As it happened, Mr Yahwa filed written submissions that the court received shortly after the hearing on 29 June 2012 and under cover of a letter explaining that he was unwell and unable to attend the hearing. Mr Yahwa subsequently confirmed to the court that he relied on his written submissions and that there was no need for the court to reconvene for oral argument which had been offered.

15. Knightsbridge and Conti-King claim damages in the total sum of Vt 30,709,856 for the losses they sustained as a result of their quarry operation being disrupted by the injunction obtained by the Claimants. That loss was broken down in the counterclaim as follows:

	<i>Conti-King</i>	<i>Knightsbridge</i>
1 Pre-estimated loss incurred by Conti-King with Knightsbridge	15 000 000	
2 Loss of quarry business by Conti-King	4 061 200	
3 Loss of business by Knightsbridge		2 494 400
4 Security		912 000
5 Evacuation of plant & equipment		2 819 537
6 Additional quarry supplies		4 380 938
7 Relocation of plant & equipment		471 781
8 John Tonner's air fares		70 000
9 Loss of business goodwill		500 000
TOTAL	19 061 200	11 648 656

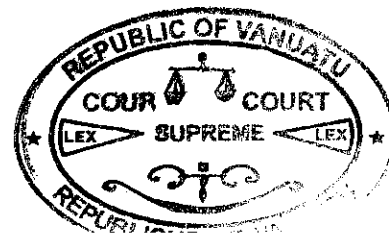


16. The claim under *b. Loss of quarry business by CKL* was amended at the hearing thus requiring the total to be adjusted. Nothing turns on that.
17. During the hearing, agreement was reached by the parties as to the amount of the loss in some respects and concession was made in other respects. That will be dealt with in due course.

Legal Principles

18. Mr Hurley provided a relatively concise summary of the legal principles that must apply in this case. While I do not repeat them in full, I will summarise the submissions which, it must be noted, were not challenged by Mr Yawha.
19. The nature of the undertaking is set out in paragraph 6 (c) above. As mentioned, it is to be considered as having been given by both Enterprise Dinh Van Tu Limited and Aku Dinh (Dinh Van Tu).
20. Knightsbridge and Conti-King were not parties to the proceeding at the time the injunction was granted but nevertheless claim that they are entitled to recovery of the loss sustained by them which arose as a result of the granting of the injunction.
21. The starting point is the well known statement by Lindley LJ in *Tucker v. New Brunswick Trading Co of London*¹,
- “an undertaking is the price of an injunction, and if a man gets an injunction he must pay the price”.*
22. The High Court of Australia dealt with a situation where an injunction may have a harmful effect upon non-parties to the proceeding. In *European Bank Limited v. Robb Evans of Robb Evans and Associates*² (interestingly, a case with a Vanuatu background),

¹ [1890] 44 ChD 249 @ 253



“... the undertaking as to damages is given to the court for enforcement by the court; it is not a contract between parties or some other cause of action upon which one party can sue the other. It is worth repeating the obvious proposition that such an undertaking is not lightly to be given”.

23. Earlier, in *Air Express v. Transport Industries (Operation) Pty Ltd*³ the High Court of Australia stated,

“in a proceeding of an equitable nature it is generally proper to adopt a view which is just and equitable, or fair and reasonable, in all the circumstances rather than to apply a rigid rule. However, the view that the damages should be those which flow directly from the injunction and which could have been foreseen when the injunction was granted is one which will be just and equitable in the circumstances of most cases and certainly in the present case”

24. The Court of Appeal of Vanuatu adopted and applied this approach in *Ebbage v. Ebage*⁴.

25. It is now well understood that a general undertaking as to damages given to the Court is not to be confined just to loss sustained by parties to the proceeding or the person restrained – see *Tucker*⁵ and *Air Express*⁶

26. The operative undertaking in this case is as follows,

“*Enterprise Dinh Van Tu Limited*”, the above named claimant **HEREBY UNDERTAKES TO THE COURT** that it will “pay” all or any damages arising from restraining order in their (sic) event that the claim is not eventually successful or as determined by this Honourable Court.”

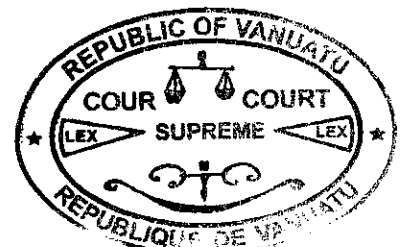
² [2010] HCA 6 @ 14

³ [1981] HCA75 @ 37

⁴ [2001] VUSA 7 at 15

⁵ (ibid) @252

⁶ (ibid) @44



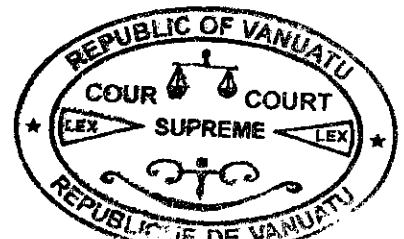
27. As mentioned, the undertaking is to be treated as having been given by the first and second claimants jointly and severally.
28. The legal principles referred to above permit the 4th and 5th defendants to recover from the claimants any loss sustained by them as a result of the injunction and which loss could have been foreseen when the injunction was granted.
29. The “claim” for loss sustained by the fourth and fifth defendants has been presented in the form of a counterclaim. That has been helpful given the various heads of damage for which recovery is now sought.
30. The claimants have raised no defence to their general liability to the 4th and 5th defendants in respect of the undertaking except as to quantum in certain respects. This decision proceeds on that understanding.
31. It should be noted for completeness that Mr Yawha presented his final submissions under cover of a letter to the Registrar dated 29 June 2012 and which included the following paragraph:

“Our Submission did not address the issue of “standing” because we concede there is an overwhelming legal precedent in support of the Defendant’s standing”

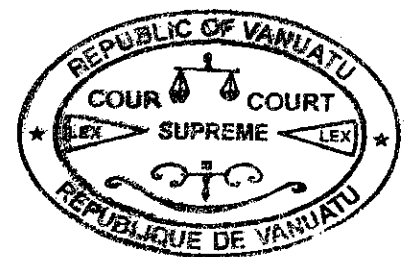
Damages 1 – Penalties incurred by Conti-King to Knightsbridge

32. The evidence from Mr Tonner is that the operational agreement between Knightsbridge and Conti-King provided for a penalty of Vt 1 million per day to a maximum of Vt 15 million. The initial agreement of 16 March 2010 contained this provision:-

“6. It is agreed (Conti-King shall give (Knightsbridge) 30 days notice of any change or restriction of access, failure of notice shall incur a penalty of one mvt per day with a maximum total penalty being 7 mvt”.



33. The operational agreement was reviewed on 5 April 2010 without material alteration (insofar as this case is concerned). It was then further amended on 22 April 2011 inter alia increasing the maximum penalty under clause 6 to Vt 15 million.
34. Mr Hurley argued that the maximum penalty of Vt 15 million is recoverable by Conti-King from the claimants as Conti-King is contractually liable to Knightsbridge for any such penalty.
35. The history to the operational agreement between Conti-King and MCI is explained by Mr Tonner in his sworn statement of 29 December 2011. There can be no doubt that this is an important component of the contractual relationship between Conti-King and Knightsbridge. Mr Hurley argues that while this is termed a "*penalty*" it is more a reasonable and agreed pre-estimate of liquidated damages in the event that access is denied or restricted.
36. It is appropriate to note now that the injunction was in force for 21 days between 12 September 2011 and 3 October 2011 which Mr Hurley argues is the period for which the pre-estimate of loss can safely be based.
37. One of the difficulties in this case relates to this particular claim. Without question, Conti-King and Knightsbridge have a close commercial relationship. While there is nothing extraordinary about this particular "*penalty*" provision in the operational agreement between them, whether Conti-King is indeed strictly liable for that "*penalty*" or liquidated damages has not been tested as would likely be the case in a more arms' length arrangement.
38. Mr Tonner explained the rationale behind the "*penalty*" provision. It is essentially a provision which pre-estimates the loss that would be sustained by Knightsbridge in the event of business interruption to its ongoing obligation to meet supply contracts and also



to take account of the investment by Knightsbridge with its heavy machinery at the quarry.

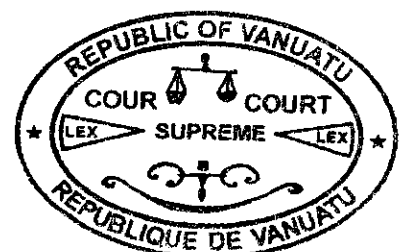
39. Mr Yawha (in his written submissions) attempts to suggest that this was akin to “*inside dealings*” given the cross-directorships between the two companies and that Mr Tonner’s evidence should be discarded in this respect as being “*likely not neutral*” and should hold “*little weight given his position as an insider in both companies*”.

40. As I have mentioned, this close relationship between the Conti-King and Knightsbridge in respect of this particular head of loss has to be treated carefully. Be that as it may, I am satisfied on the evidence that this pre-estimate of loss for business interruption was reached in a strictly commercial way recognising that while the two companies were “close”, they had different shareholding and that they were two separate legal entities. I certainly reject any suggestion that this is a trumped-up or artificially inflated figure particularly because, at the time that the operational agreement was negotiated on occasions over 2010 and 2011, there would appear to have been no purpose have such an artifice. It was clearly a provision that anticipated that there could be a breakdown in the commercial relationship between Conti-King and Knightsbridge.

41. Mr Tonner states that the actual loss sustained by Knightsbridge was Vt 17,494,400 and accordingly the maximum total penalty of Vt 15 million results in a concession on the part of Knightsbridge as against Conti-King.

42. In all these circumstances, I accept that the pre-estimated loss of Vt 15 million is properly recoverable by Conti-King from the claimants given Conti-King’s liability for that amount to Knightsbridge. Of course, this arises only because of Knightsbridge splitting its claim for loss of business between the claimants and Conti-King.

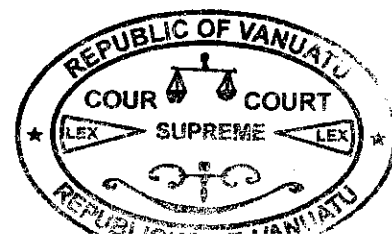
Damages 2 – Loss of quarry business by Conti-King



43. This is a claim for Vt 4,061,200 essentially representing the loss of production and thus the loss of aggregate that Conti-King could on-sell to Knightsbridge. The claim is calculated on the basis of the royalty returns made by Conti-King over the previous 5 months to the Department of Mines and Geology. Mr Dinh in his evidence was prepared to concede a loss in this respect of Vt 2,030,600 (50% of what is claimed by Mr Tonner) on the basis that Mr Tonner must have had stocks which would have been available for the supply to customers.
44. The claim under this heading is explained by Mr Tonner as the “*loss of volume which (Conti-King) would have extracted but for the restraining orders*” and which he asserts would have been in the amount of 6,248 m³ reflected in a monetary loss of Vt 4,061,200. Mr Dinh’s contends that the loss would have been little more than Vt 2 million but that appears to have been a figure plucked out of the air by him and was not substantiated. Certainly, there was no attempt made to criticise Mr Tonner’s calculation of the value of the loss which he explains was assessed by applying a rate of Vt 650 per m³.
45. I accept the claim by Conti-King under this heading of Vt 4,061,200.

Damages 3 - Loss of Business by Knightsbridge

46. This is different to the loss sustained by Conti-King and flows alongside the claim by Conti-King for Vt 15 million (Damages 1) .
47. Knightsbridge was involved primarily in the sale of processed aggregate in various forms to the market. In his evidence, Mr Tonner stated that Knightsbridge suffered loss of sales of 6,248 m³ (necessarily the same quantity as in Damages 2 above) being the amount of aggregate that he estimated that Knightsbridge would have received from Conti-King over the (approximate) two months that their quarry business was interrupted by the injunction. While the injunction only lasted for 21 days, Mr Tonner’s evidence (unchallenged) was that the time taken to re-establish the business at the quarry with the return and set-up of the plant and machinery effectively closed down this operation for approximately 2



months. Mr Tonner assessed the loss in this respect based on a rate of Vt 2,800 per m³. This brought the total loss of business for Knightsbridge to Vt 17,494,400. However, as Knightsbridge has chosen to split this claim and recover the first Vt 15 million from Conti-King, this results in the claim under this heading against the claimants at Vt 2,494,400.

48. That claim is allowed.

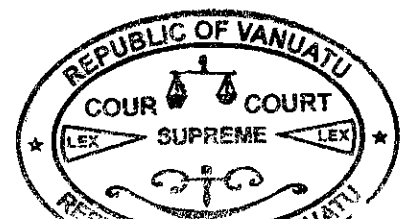
Damages 4 – Security paid by Knightsbridge

49. This is a claim by Knightsbridge for an amount of Vt 912,000 as the cost of security engaged to protect its equipment at the quarry. Mr Tonner explained that when Conti-King and Knightsbridge were effectively prohibited from entering the quarry site following the injunction on 12 September 2011, Knightsbridge had over Vt 120,000,000 worth of equipment at the quarry site. There was some disagreement to the point of conflict between the claimants and the 4th and 5th defendants at that time no doubt fuelled by the uncertainty over the contractual position relating to the use of the quarry. I accept that there were some unpleasant confrontations out at the quarry. Indeed, the assistance of the police was required to enable the security guards to gain access to the quarry and so to protect Knightsbridge's plant and machinery.

50. Knightsbridge engaged NK Security on a 24 hour basis to ensure that its plant and machinery was protected against damage and exposure.

51. Mr Dinh contends however that an amount of Vt 100,000 – Vt 200,000 would be a reasonable amount given in a normal security business in town for a month long contract.

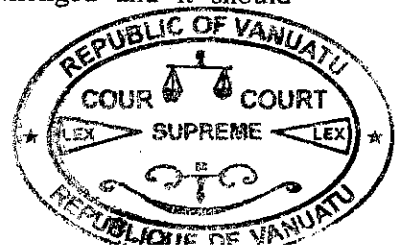
52. In the unfortunate and heated circumstances that prevailed at that time, Knightsbridge cannot be criticised for taking steps to ensure the protection of its expensive equipment and machinery. The unchallenged evidence is that Vt 912,000 was the fee charged by NK



security and that is the loss that was sustained by Knightsbridge in that respect. That claim is allowed.

Damages 5 – Evacuation of plant and equipment - Knightsbridge

53. This is a claim for Vt 2,819,537 as the cost to Knightsbridge to remove its plant and machinery from the quarry. It involved hiring a crane from Fletchers, engaging an electrical contractor to handle the power disconnection incidental to the 350 KVA generator and the use of various trucks and heavy trailers to move the equipment.
54. Mr Dinh conceded part of this claim relating to the hiring of the crane, the engagement of the electrician, the hiring of a heavy trailer and for damage to plant and set-up equipment incidental to relocation.
55. However, Mr Dinh contended that the charge of Vt 372,000 for the use of Knightsbridge's own trucks was excessive. He indicated that an amount of Vt 60,000 would be more reasonable. Mr Dinh's argument (advanced by Mr Yawha) was that an amount for fuel is all that would be required as Knightsbridge already had those trucks.
56. However, Knightsbridge is entitled to recover for the unexpected need to use its trucks for this purpose and on the basis of what they would have charged for this work if engaged to undertake this work by a third party. I allow the claim of Vt 372,000 in that respect.
57. Knightsbridge also claimed under this heading for "additional wages" of Vt 271,173 on the basis that it costs them more for their staff incidental to the relocation of the quarry business. It was argued for Mr Dinh that they were staff members of Knightsbridge and that it was not a real loss to Knightsbridge except for the "Sunday pay on 18th September" for which Mr Dinh was prepared to allow Vt 133,852.
58. As is the case with the use of Knightsbridge's trucks, this involved staff members who were deployed for work that was unexpected but necessary for the relocation of the quarry business. Mr Tonner's evidence in this respect was not challenged and it should

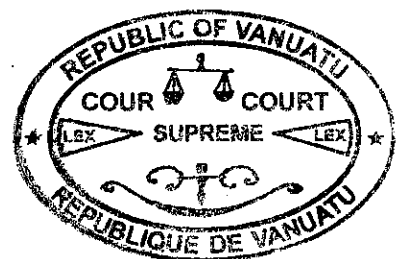


accordingly be approached as if Knightsbridge had effectively been engaged to carry out this relocation exercise by a third party. If that was not so, a company in Knightsbridge's position would be far better off engaging another company to carry out the relocation work rather than deploying its own employees and taking them away from their usual duties.

59. The final part to this head of damages relates to hiring a bulldozer from Enterprise Pirronet. It became clear during the course of the evidence that Mr Dinh did not initially understand why a bulldozer had to be used. Mr Tonner explained that the bulldozer was required during the evacuation period to move various piles of aggregate to enable Knightsbridge's heavy equipment to be removed. The charge made for this work is one recoverable by MCI.
60. The total amount claimed under this head of damage is Vt 2,819,537 and I consider that it is all recoverable from the claimants

Damages 6 Additional quarry supplies – Knightsbridge.

61. This is a claim by Knightsbridge for Vt 4,380,938 as the cost of purchasing aggregate and road base material by Knightsbridge from a competitor (Henri Russet) to enable Knightsbridge to fulfill existing customer orders. I do not understand the specific objection taken by Mr Dinh to this claim. He contends that no loss could have been sustained by Knightsbridge in that respect. That notwithstanding, he conceded 10% of the amount claimed.
62. It is clear, however, that Knightsbridge would have been required to source aggregate from other operators in this area given that its ability to obtain this material from Conti-King had been disrupted by the injunction. Mr Tonner's evidence explains that that was the actual cost incurred and it is an amount that he would not have had to pay for the material if the injunction had not disrupted the business. Be that as it may, this appears to



be something of a double counting of the loss addressed within damages headings 1 and 3 above and for which Knightsbridge is entitled to recover a total of Vt 17,494 400.

63. I do not allow this claim by Knightsbridge for Vt 4,380,938 as I consider that it has been addressed by the penalties incurred by Conti-King to Knightsbridge of Vt 15 million and the additional loss recoverable directly from the claimants of Vt 2,494,400.

Damages 7 – Relocation of plant and equipment – Knightsbridge

64. On the same basis as the cost of removing the equipment and machinery from the quarry, the expenses incidental to the reestablishing the business at the quarry are recoverable. This claim for Vt 471,781 is allowed.

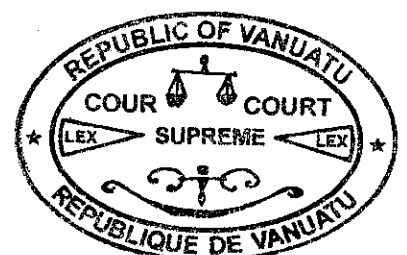
Damages 8 – John Tonner’s Air Fares - Knightsbridge

65. Mr Tonner was clearly the central person for both Conti-King and Knightsbridge in respect of this joint business operation. Mr Tonner explains that he was on the island of Ambae for work when he was required to return for the urgent hearing of the application to discharge the injunction. He was unable to travel by scheduled airline and there was no one to share a charter with him.

66. He states that he obtained a substantially reduced charter fee of Vt 70,000 for this particular flight. I accept that this is a fair and reasonable claim in all the circumstances.

Damages 9 – Loss of business goodwill

67. This is a claim for Vt 500,000 submitted as a fair and reasonable amount for the loss of “market good will” sustained by Knightsbridge. The only evidence in this respect is from Mr Tonner who simply asserts that this would be a fair and reasonable amount to reflect the loss of business goodwill that Knightsbridge sustained. There is no other evidence of a loss of good will such that Knightsbridge’s reputation and place in the Vanuatu market place as a



supplier of quarry product has been damaged. The evidence in this respect is insufficient to establish such loss. That claim is not allowed.

Finally

68. Accordingly, the amount recoverable by Conti-King and Knightsbridge is as follows:

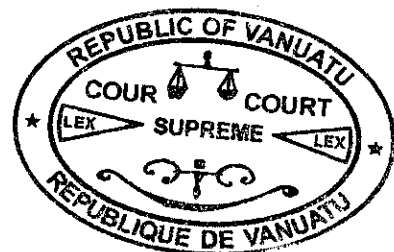
	<i>Conti-King</i>	<i>Knightsbridge</i>
1 Pre-estimated loss incurred by Conti-King with Knightsbridge	15 000 000	
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5 Evacuation of plant & equipment		2 819 537
6 Additional quarry supplies		-
7 Relocation of plant & equipment		471 781
8 John Tonner's air fares		70 000
9 Loss of business goodwill		-
	<hr/> 19 061 200	<hr/> 6 767 718

69. The first and second claimants jointly and severally are ordered to pay Conti-King the sum of Vt 19 061 200

70. The first and second claimants jointly and severally are ordered to pay Knightsbridge the sum of Vt 6 767 718

71. Both judgment sums will attract interest at the rate of 5% per annum from 4 January 2012 being the date of the counterclaim.

72. I have not heard from counsel on the question of costs. I suspect that Mr Hurley may be attracted to an application for indemnity costs. However, I consider this was an unfortunate commercial situation that arose principally because of the actions of the first and second defendants although some fault must also be attributable to the claimants who operated the quarry business for some years without a permit.



73. Two significant factors are that the claimants conceded first the position as to the inappropriateness of the injunction as soon as their lack of contractual tenure was pointed out to them. Secondly, they made a number of concessions in relation to the various heads of damage that were claimed. In those circumstances, it seems more appropriate that costs incidental to this claim for loss be on the standard basis to be agreed or taxed.

BY THE COURT

