

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

Civil Case No.239 of 2011

BETWEEN: JUDITH DUI RIO
NADIA KANEGAI

Claimants

AND: AIR VANUATU (OPERATIONS)

Defendant

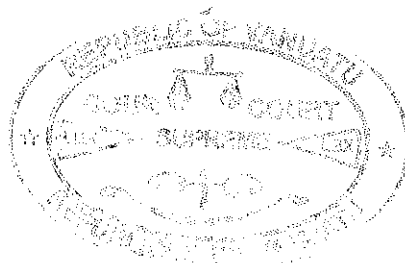
Coram: Justice D. V. Fatiaki

Counsel: Mr. S. T. Joel for the Claimants
Mr. E. Nalyal for the Defendant

Date of Judgment: 8 April 2015

JUDGMENT

1. This is an opposed application for summary judgment. The claim is brought by the widow and cousin of the late **John Mark Bani** who died in an air crash whilst piloting a plane owned and operated by the defendant company on 19 December 2008.
2. The original claim was filed on 16 December 2011 (3 days short of the limitation period) and averred at **paragraphs 2, 3 & 4** as follows:
 - "(2) *The defendants is a company registered pursuant to the Companies Act [CAP. 191] able to sue and be sued;*
 - (3) *The deceased was an employee of the Defendant as an aircraft Captain (Pilot) in its domestic air services with benefits including payment of insurance cover in respect of injuries and death as a result of accidents at work;*
 - (4) *With reference to para. 3 above the Defendant has insured the deceased through AON (Vanuatu) Limited Insurance".*
3. Additionally, the claim asserts that the death was partly caused by the negligence of the defendant company in requiring the deceased to fly an unscheduled additional flight to Lajmoli airport at short notice and without an adequate rest period. The aircraft was also overloaded.



4. By its defence filed on 4 March 2013, the defendant company disputed the claimants' "*standing to make this claim*", and unconditionally "*admits paragraphs 2, 3 and 4 of the claim*". The defendant company also sought a "*set-off*" arising from the deceased's contributory negligence.
5. The defence also denies any negligence and counter-claims that the crash was due to the negligence of the deceased pilot and the defendant company seeks a "*set-off*" as a result of the pilot's "*contributory negligence*".
6. **Rule 9.6 of the Civil Procedure Rules 49 of 2002** enables the Court to grant summary judgment if the Court is satisfied that the defendant has no real prospect of defending a claim or any part of it and there is no need for a trial. Sub-rule (3) also requires the claimant to file an application for summary judgment supported by a sworn statement that the facts in the claim are true and that there is no defence to the claim.
7. The first named claimant has filed a sworn statement in support of this application on 2 September 2014 highlighting the above admission and annexing a copy of a Grant of Administration in favour of the claimants issued on 6 June 2014. The claimant also refers to several sworn statements filed on behalf of the defendant company and deposes that: "*the defendant has (no) prospect of defending the claim*".
8. The sworn statement of **Joseph Laloyer** the CEO of the defendant company is most telling where he deposes:

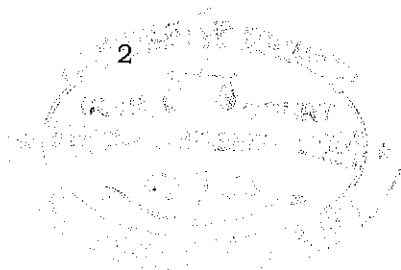
"3. *The Defendant maintains an insurance cover for its employees with Aon (Vanuatu) Limited (AON). The insured in that insurance cover is the Defendant.*

4. *That insurance cover was arranged by the Defendant some years back during the 1980s or 1990s, at the time Mr. Jean Paul Virelala was Chief Executive Officer of Air Vanuatu.*

5. *In the insurance cover, there is a sum allocated to each employee, called the capital benefit. The amount of the capital benefit depends on the position each employee holds with the Defendant.*

6. *For pilots, the capital benefit is A\$250,000.00;*

7. *When the insurance cover was started, the intention was that for pilots, in the event of death, the Defendant would utilize some of the funds to train a replacement pilot, and pay the remainder of the funds to the estate of the*



deceased pilot. I agree with what Mr. Alastair Rodger says in his statement on this point.

8. *I confirm that the Defendant was paid A\$250,000.00, being the insurance claim that the Defendant made in relation to the accident and death of the late John Bani."*
9. Significantly, no attempt was made in the sworn statement, to explain why such insurance cover which has been in existence for 20+ years was taken out on the lives of the defendant company's employees or what proportion of the insurance policy was to be paid out to a deceased employee's estate and what guidelines or policy (if any) existed within the defendant company for the training of "replacement pilots" and what proportion of the proceeds would be retained for such purpose.
10. In his submission opposing the application, defence counsel writes:

"The defendant is the insured in the insurance cover in question, not the late John Mark Bani nor any employees, signifying that any payout is made to the defendant, and we submit it is at the discretion of the defendant how much of a payment can be paid to any employee in the event of death."
11. Even accepting that the defendant company may have an "insurable interest" in the lives of its senior employees, in this case, its pilots who are undoubtedly critical to the provision of the air services part of its business, nevertheless, in the absence of the deceased's employment contract or a copy of the relevant insurance policy or company guidelines (which documents are discoverable and were within the defendant company's power to produce), the fact that the defendant company unconditionally admits: "... that the defendant was an aircraft Captain (Pilot) in its domestic air services with benefits including payment of insurance cover in respect of injuries and death as a result of accidents at work" (see: paragraph 3 of the claim) suggests, to my mind, that despite defence counsel's submissions to the contrary, the true position is that which is pleaded in the claim.
12. As was relevantly observed by Raine ACJ in Frame v. Minister of Lands Survey and Environment [1979] PNGLR 626:


"The failure to call evidence can, in some cases be regarded as being without significance ... In other cases witnesses might be available but it might be a waste of time to call them. But there are cases where the failure to call available and significant (evidence) could persuade the judge that nothing they could say could really alter the situations established "prima facie" in

the case in chief, and it seems to me that this is such a case, and that is how I look at it".

13. Needless to say the existence of such an insurance scheme could well lead to an employee not taking out private insurance in reliance on it and on the understanding that it was a "*benefit*" of his employment with the defendant company. In the present case payment of some part of the insurance proceeds to a deceased employee's estate is admitted and uncontested.
14. The absence of a readily-available company "*guideline*" for the retention and/or payment out of insurance monies received in respect of the defendant company's employee insurance scheme, as well as, any "*guideline*" with respect to the recruitment and training of "*replacement pilots*", leaves me with the distinctly unfavourable impression that none existed and that they are being introduced as an "*after-thought*" to thwart the claimants' claim and in order to allow the defendant company to retain a significant portion of the insurance proceeds that were paid out on the death of the claimant's husband to the defendant company.
15. In light of the foregoing and being satisfied that the defendant company has no real prospect of defending the claimant's claim and further that there is no need for a trial of the claim, I enter judgment in favour of the claimants as follows:
 - (1) Judgment in the sum of **VT25 million**;
 - (2) Interest at the rate of **5% per annum** on the above sum with effect from 16 December 2011 until fully paid up;
 - (3) Costs of VT250,000 summarily assessed.
16. By way of further directions I fix this case for an enforcement conference on 15 May 2015 at 11.00 a.m.

DATED at Port Vila, this 8th day of April, 2015.

BY THE COURT


D. V. FATIAKI
Judge.