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

CIVIL APPEAL CASE NO. 16/3420 COA/CIVA

BETWEEN: **STEVEN REMY**
Appellant

AND: **KYONG SIK JANG trading as JK General Machinery**
Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon Justice John von Doussa
Hon Justice John Mansfield
Hon Justice Oliver Saksak
Hon Justice Daniel Fatiaki
Hon Justice Mary Sey
Hon Justice Dudley Aru
Hon Justice Paul Geoghegan

Counsel: *Mr. James Tari for the Appellant*
Mr. Jack Kilu for the Respondent

Date of Hearing: *8th November 2016 at 2.00 pm*

Date of Judgment: *18th November 2016 at 4.00 pm*

JUDGMENT

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1. This is an appeal against a Supreme Court Decision on Quantum delivered on 4 August 2016 in Civil Case No. 63 of 2015. It followed an earlier judgment on 20 May 2016 in favour of the respondent for damages to be assessed. The Supreme Court assessed damages at VT59,705,000. The appellant contends that this assessment is grossly excessive.

2. In early 2012 the Respondent imported some heavy earthmoving machinery as part of setting up a machinery hire business in Luganville. On 1 October 2012 while the machinery was still held at the wharf in Luganville, Santo, the Appellant obtained a "*freezing order*" against the machinery which prevented the Respondent from taking delivery of it. On 13 August 2016 the machinery was returned to the Respondent by order of the Court of Appeal. The "*freezing order*"

should never have been obtained. As a result, the Respondent issued proceedings against the Appellant for damages for loss of use of the machinery.

3. Further background detailed facts of the case may be found in the Judgment of the Court of Appeal in Kyeong Sik Jang v. Santo Earth Works [2014] VUCA 16.

4. The interlocutory judgment for damages to be assessed was based both on a claim for conversion of the Respondent's property and on an undertaking as to damages given by the Appellant to obtain the "*freezing order*".

5. On either basis the principles governing the assessment would not be materially different in this case. The fundamental requirement is that the losses for which damages are claimed were caused by the seizure of the machinery and the Respondent being deprived of its use for the duration of the freezing order.

6. In Ebbage v. Ebbage [2001] VUCA 7 this Court relevantly observed:

"... authority is clear that the party seeking damages under an undertaking carries the onus of establishing both the quantum of the loss claimed, and that the loss was caused by the undertaking, not by the litigation itself or by some other cause: Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd [1981] HCA 75; (1981) 146 CLR 249 per Gibbs J at 312 – 313 and per Mason J at 325. All the facts must be investigated: Mansell v British Linen Company Bank at 163."

7. The Respondent claimed damages for loss of income (for 22 months and 9 days); lawyers' fees; travel expenses and interest of 10% per annum on any sums awarded together with indemnity costs.

8. A perusal of the claim reveals that it is confined and limited to the period between the grant of the "*freezing order*" and the return of the machinery to the respondent.

9. The trial judge in his decision on quantum awarded the respondent the following sums:

		VT
Loss of income from the excavator	-	13,350,000
Loss of income from forklift	-	16,065,000
Loss of income from truck	-	27,831,000
Legal Costs (in respect of 3 law firms)	-	1,780,000
		609,000
	-	70,000
TOTAL		59,705,000

Together with interest of 5% per annum on the sum awarded from the date of the claim 2 April 2015 until fully paid up. The respondent was also awarded costs to be taxed on a standard basis unless agreed.

10. The trial judge in awarding the above sums adopted *"a* pragmatic *approach"* using the hourly hire rates claimed by the respondent. Reference was also made to the evidence of hire rates charged by other heavy machinery operators in Port Vila and Santo. He correctly rejected the respondent's assumptions that the machinery would have been hired out every day for the whole period between seizure and recovery, preferring instead, a limited hire period for each item of machinery which would also *"... make allowance for down time resulting from break downs"* and regular maintenance which was considered very likely given that the machinery was "*second hand*".

11. In his sworn statement in support of the claim the respondent proposed hire rates of: **VT20,000** per hour for the Excavator; **VT5,000** per hour for the forklift; and **VT8,000** per hour for the Truck for the period of 22 months and 9 days based on an 8 hour working day and a 30 day calendar month. No deductions were made for weekends or public holidays, breakdowns or regular maintenance periods or running costs. He calculated his total *"Loss of income"* as follows:

▪ For the Excavator	-	VT 107,040,000
▪ For the forklift	-	VT 26,760,000
▪ For the truck	-	VT 42,816,000
		VT 176,616,000

12. The trial judge prefaced his assessment of the respondent's *"loss of income"* by saying:

"I shall therefore use (the respondent's) *calculation of the total sum available from 100% hire and reach a reasoned decision as to the likely percentage of actual hire."*

In respect of the excavator he said:

"I reason it would have been hired not for between 10 and 15 percent of time. On that basis I would say that the loss (of incomes) in relation to the Excavator would be between VT 10, 700,000 and VT 16,000,000. Taking a median point I will award damages of VT13, 350, 000 for loss of use of the Excavator for the relevant period."

As for the forklift he said:

"I would reason that the potential for hire would be between 50% to 60% of the time available. That would amount to between VT13,380,000 an VT18,450,000 giving a median figure of VT16,065,000."

With regard to the truck he said:

"The likely rate of hire would be between 60% and 70% of the time available. That would amount to between VT25,690,000 and 70% to VT29,972,000. The median amount would be VT27,831,000. That is the amount I award in relation to the flat-bed truck."

13. The trial judge concluded this assessment by saying;

"The sums set above are in respect of the loss of income which itself is the measure of damages to Mr Jang's business. In other words there will not be a separate award in respect of "damage" to the business."

14. The appellant seeks the setting aside of the entire judgment on several grounds including that "*... there was no actual evidence of loss ...*"; no evidence of any actual hire of the respondent's machinery after their release to him; no consideration of the provisions of the VIPA legislation, and awarding untaxed legal costs as damages.

15. We do not propose to deal with the grounds of appeal separately as we are of the firm view that the decision on quantum was seriously flawed and must be set aside.

16. In the present case it is not disputed that the respondent had intended to hire out the machinery to earn income and further that the machinery was the only "*income – producing*" assets of the respondent's business. Equally the respondent has not produced any evidence of unfulfilled hireage contracts or any evidence of actual hire of the machinery after they were returned to him in August 2014 and before his first abortive claim for damages was filed in April 2015 (**ie.** a period of 8 months).

17. The assessment that the trial judge was required to undertake was to assess the losses sustained by the respondent in consequence of the injunction. The loss cannot be calculated on the basis of a "*going concern*" that had actually earned income from having hired out the machinery as there was none. An alternative approach could be to award a reasonable percentage of the capital value of the machinery on the basis that the value to the respondent of that use is at least that

amount otherwise he would not have bought the machinery [***see:*** The Susquehanna [1926] AC 655].

18. Alternatively another realistic assessment of the measure of damages might be based on the value of the capital tied-up ie. a proper rate of interest on original costs less depreciation: The Susquehanna (op. cit).

19. Given the clear admission of the appellant that after the machinery was delivered to him (albeit wrongly as later determined by the Court of Appeal), *"... the three heavy machineries were then used in* (his) *business ..."* (***see***: para. 23 in the Claim and para. 18 in the Defence), we consider the more appropriate method of assessing damages would be a reasonable hire charge from 13 March 2013 when the machinery was delivered to the appellant by the Sheriff until 13 August 2014 when the machinery was returned to the respondent ***see***: Strand Electric and Engineering Co Ltd v. Brisforal Entertainment [1952] 2QB 224 per Denning LJ at 254 and especially Romer LJ at 256.

20. The trial judge adopted this approach but in reality he awarded the respondent a gross rental income. In this process of assessment he recognised that the machinery would only be hired out for a proportion of the time, but we think insufficient allowance was made for the limited prospects and opportunities that were available to hire the equipment. Moreover insufficient allowance was made against gross income for such items as maintenance, depreciation, insurance and maybe operator's wages, transportation costs and fuel depending on the terms of hire. There was no evidence led at trial on these important considerations.

21. In adopting the rates and method of calculation for the loss of income deposed by the respondent, the trial judge awarded him damages in excess of VT 54 million for "*second-hand*" machinery that on the respondent's own admission, cost just short of VT10 million to acquire in Korea. The award therefore translates into an extraordinary return of five (5) times the value of the respondent's capital investment over a period of less than 2 years. Furthermore on the respondent's own valuation in Civil Case No. 178 of 2012 "*The market price of the machinery was VT25 million*". Whatever method is adopted for the calculation of damages, an award should not constitute an unjustified windfall. On any view the award to the respondent is, in our opinion, grossly excessive, and must be set aside.

22. The judge was critical about the paucity of evidence led by the parties, and acknowledged that he was endeavouring to make a fair assessment based on the very limited information he had. During the hearing of the appeal, the appellant's counsel was invited several times by the Court to indicate a fairer alternative basis for calculating the damages for loss of profits including using the appellant's own

hire rates as disclosed in his invoices but all were met with little success and an are unhelpful submission that the respondent had the burden of establishing his loss and the amount.

23. In light of the foregoing the award by the trial judge is set aside. We have considered the possibility of making a fresh assessment in this appeal but given the serious short-comings in the evidence including the absence of any expert assistance, such an assessment would be to engage in unacceptable speculation which this Court must decline to do.

24. The appeal is accordingly allowed and the matter is returned to the Supreme Court for damages to be reconsidered and assessed afresh.

DATED at Port Vila this 18th day of November 2016.

FOR THE COURT

Hon. Vincent Lunabek
Chief Justice.

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COURT OF APPEAL
COUR D'APPEL
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