

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

CIVIL CASE NO. 245 OF 2015

BETWEEN: FR8 LOGISTICS LTD
Claimant

AND: DAN (DENNIS) EDWARD EAGAN
Defendant

Date of Hearing: August 23rd 2016

Date of Submissions: September 8th and 21st 2016

Date of Judgment: October 30th 2016

Before: Justice Mary Sey

Appearances: Ms. Christina Thyna for the Claimant

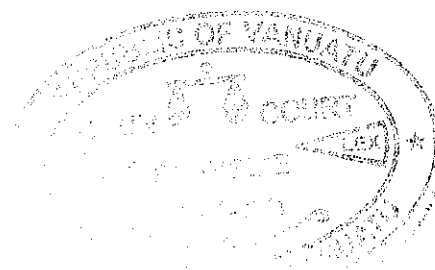
Mr. Nigel Morrison for the Defendant

JUDGMENT

1. The Claimant is a local company duly registered under the laws of Vanuatu and it specialises in international sea and air freight services to and from Vanuatu.
2. The sole director of the Claimant Company is Mr. Chris Kernot. He claims that on 29 March 2012, Mr. Eagan had requested him to obtain a shipping quotation for a boat measuring 8.5m (27') x 2.6m wide x 2.8m high - a total of 61.88m³ to be shipped from Fort Lauderdale USA to Port Vila. He says that an email was sent to Fr8 Logistics Agent in USA, Stephen at MMI Logistics, requesting routing and shipping costs.



3. On 14 April 2012, the Claimant verbally quoted Mr. Eagan the sum of USD18,490 plus document charges of USD115. Mr. Kernot says that the quotation of USD18,490 was in respect of freight charges only port to port from Miami to Port Vila and excluded all other costs of loading, securing, transport, insurance and local charges in Port Vila. He says that by the time the boat arrived in Port Vila, the Claimant had incurred extra costs of USD6,360 for freight differential and an additional VT879,573 for the following services: drayage, loading, shrink-wrapping, pick up, marine insurance, delivery order fee and additional administrative charges due to Customs Import Assessment irregularities.
4. Mr. Kernot claims that the actual freight charges for shipping therefore shifted from USD18,490 to USD24,850 which was an increase of USD6,360 because what was actually presented for shipping was far greater than what was quoted for.
5. The Claimant says that the Defendant has refused to settle his outstanding balance in the total sum of VT4,432,241 inclusive of 4% monthly compound interest per month as shown in a schedule of additional and other related charges to the Amended Supreme Court Claim.
6. In his Defence to the Amended Statement of Claim with Counterclaim, Mr. Eagan admits he requested a shipping quotation for a boat to be shipped from Fort Lauderdale USA to Port Vila, but otherwise denies paragraph 4 of the Claim which refers to the measurement as being 8.5m long and 2.6m wide.
7. Mr. Eagan denies each and every allegation in paragraph 9 of the Claim and he says that he paid the Claimant in full for the work as quoted in the amount of USD18,490. He contends that when he got the quotation he believed it was for everything right through. He says he was quoted that original quote to put the boat on the vessel in USA and bring it all the way to Port Vila.
8. Furthermore, Mr. Eagan says that there was never a conversation with Mr. Kernot about additional costs and that not one of those conversations about



height or weight of the boat had been communicated to him. He says Mr. Kernot rang him up two weeks prior to the boat coming and he asked him if he wanted insurance. He says his response was that he wanted insurance and that he thought that was in the original quote. Mr. Eagan says that he is not proficient in either reading or writing.

9. The Defendant counterclaims for general damages in the amount of VT5 million and says that he has suffered damages and loss as a result of the Claimant's unlawful delays and refusals to clear his goods.

Issues

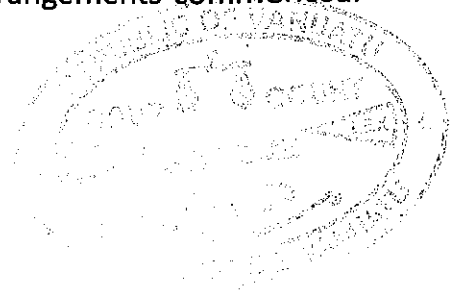
10. The issues posed by both counsel for the Court's determination are as follows:
 - (a) Was the contract the Claimant made with the Defendant for USD18,490 ever varied?
 - (b) If it was varied what were the extra changes due from any such variation?
 - (c) Whether the Defendant had been informed about the extra services required and additional costs incurred?
 - (D) Whether the Defendant had agreed to settle the additional costs?

The Evidence

11. The Claimant's evidence was essentially contained in the following documents which he confirmed as his Sworn Statements in his examination-in-chief and which were admitted in evidence as **Exhibit C1** – Sworn Statement dated 31 October 2013 with annexures "CK1" - "CK13" and **Exhibit C 2** which is his further Sworn Statement dated 25 February 2015. The Defendant relied on his Sworn Statement filed on 15 April 2015 in support of Defence to the Amended Statement of Claim with Counterclaim – **Exhibit D2**.

Determination and Decision

12. Mr. Kernot's evidence is basically that the Defendant requested a shipping quotation for a boat measuring 8.5m (27') x 2.6m wide x 2.8m high - a total of 61.88m³ to be shipped from Fort Lauderdale USA to Port Vila. He says that the boat was purchased on 28 April 2012 and shipping arrangements commenced.



He says that the boat presented for shipment was 156 inches tall (3.62m) x 456 inches long (11.58m) x 103 inches wide (2.616m) or 120.02m³ which almost doubled the original measurements supplied by the Defendant. He says that in order to minimize the shipping envelope and the costs associated with the increase, he strongly suggested to Mr. Eagan that he finds a means to reduce the size of the overall envelope to avoid logistical increases in costs which would be high, especially due to the abnormally high height of the unit meaning special requirements for stevedores to lift with chains rather than standard equipment.

13. Mr. Kernot went on to say that Mr. Eagan then arranged for his agent Joe Mundaca to work on the boat, to remove a lot of the gear on top of the boat to reduce the overall envelope, and that after this work was done the boat measured 11.58m x 2.616m x 3.1m tall or 93.909m³ – an increase of 32.029m³ or an increase in size of 51.76% over the original quotation, but far less than the 120m³ presented for shipment.
14. Mr. Kernot claims that the actual freight charges for shipping therefore shifted from **USD18,490** to **USD24,850** which was an increase of **USD6,360**.
15. He says they were then advised that the only way a 40ft Flat Rack could be supplied was to arrange to shift an empty 40ft container from Huston to Fort Lauderdale for loading. He says that he rang Mr. Eagan to give him two options i.e. to either wait until a container became available in Florida or to pay \$1000 to move an empty 40ft container from Huston to Fort Lauderdale. He says the Defendant chose the second option and consequently, a further cost of USD1000 was incurred on 21 May 2012.
16. It is common ground that the Defendant requested the Claimant to provide a shipping quotation for a boat to be shipped from Fort Lauderdale USA to Port Vila. However, the bulk of Mr. Kernot's evidence is flatly denied by Mr. Eagan in his Sworn Statement as well as during cross examination. At paragraph 3 of **Exhibit D2**, Mr. Eagan states:



"3. I agree that I asked for a quotation to package and ship my boat from Maimi, USA to Port Vila. I gave Kernot the general information to quote for what I needed. I did not provide the dimensions of the boat or anything like that. (Underlining mine). He was given the information so that he could inquire and find out and then quote accurately to me."

17. I must state straightaway that this averment from Mr. Eagan does not sound right to me. Undoubtedly, the general information would have had to include dimensions supplied pertaining to size and weight of the consignment to enable the Claimant to provide a quotation to the Defendant. I am inclined to agree with Mr. Kernot's statement at paragraph 13 of **Exhibit C2** where he states that:

"13. When a person decides that they want to purchase a boat, prior to purchasing, they have an idea of what style and size it will be e.g. Dinghy vs small motor boat, or large on a trailer or perhaps a motor launch. The shipping line or shipping agent such as ourselves (sic) does not make this decision or estimation, it is the person doing the purchasing. In this case, Dennis Eagan made the decision about what type of boat he wished to purchase, including an estimate (only) of its dimensions."

18. I believe Mr. Kernot and accept this piece of the Claimant's evidence that the Defendant requested a shipping quotation for a boat measuring 8.5m (27') x 2.6m wide x 2.8m high. Mr. Eagan had an agent in the USA with whom he had had discussions about the boat he wanted to ship from Miami to Port Vila.

19. In answer to questions put to Mr. Eagan by Ms. Thyna during cross-examination he said:

"Mr. Mundaca told me it was a good boat. The boat never changed. Chris Kernot was told what the size of the boat was. I see paragraph 9. The agent made me believe that if I took the canopy off I would get some money back. The boat never



changed size. I had never seen the boat. All I know is that it was 27 foot.

There was never a conversation with Mr. Kernot about additional costs. He rang me up 2 weeks prior to the boat coming and he asked me if I wanted insurance. I said of course I want insurance. I thought that was in the original quote. That's what I believed.

Not one of those conversations about height or weight of the boat had been communicated to me. The cost changed when the boat arrived here in Vanuatu. It was when I was putting the wheels on the trailer that he came up to me and told me that I had not paid him the extra charges."

20. For his part, Mr. Kernot vigorously contends that after FR8 had provided the initial quote the additional services were requested to be done by Mr. Eagan verbally in person due to his lack of proficiency in reading or writing. At paragraph 10 of **Exhibit C2** Mr. Kernot says:

"10. We honoured the quotation as given, that is, Port to Port, for a vessel exactly as requested on 29th March 2012. The increased costs, because the boat size changed significantly for the aspect of the wharf to wharf costs, need to be paid. The additional elements requested by Dennis Eagan, the additional costs, due to the change in nature of the quotation requested, based on dimensions supplied by Dennis Eagan, need to be honoured by him as debt due to Fr8 incurred on his behalf (these debts were not incurred by Fr8 on FR8's behalf as they were outside the scope of the quotation)."



21. It is timely to consider the written up quote that the Claimant provided for the Defendant. It is dated 16 April 2012 and it was admitted into evidence as **Exhibit D1**. It reads:

"Dan Eagen

QUOTATION

Quotation FCL 40ft Miami to Port Vila VU – Boat and Trailer

1 Wharf Road

Port Vila

Phone (678) 27744

Fax (678) 27788

Adjust the cubic measurement	40FT Flat Rack	16 April 2012
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Sea Freight Charges

			USD	USD
Ocean Freight	1	13,973.00	13,973.00	13,973.00
BAF	1	2,030.00	1,720.00	1,720.00
Panama Canal fee	1	320.00	320.00	320.00
Carrier and Port Security Service fee	1	14.00	14.00	14.00
TOTAL			\$ 16,027.00	

Local Charges Port Vila	Quantity	Amount	Sub-total	VAT 12.5%	VVU	USD
Stevedoring	1	93,348	93,348	11,669	105,017	
Toll Tax - per M3	112.35	444	49,883	Exempt	49,883	
Delivery Order Fee	1	5,500	5,500	Exempt	5,500	
Custom Clearance Commercial Goods	1	6,000	6,000	750	6,750	
Transport 40ft	1	55,000	55,000	6,875	61,875	
Sub Total				VUV	229,025	\$2,462.9

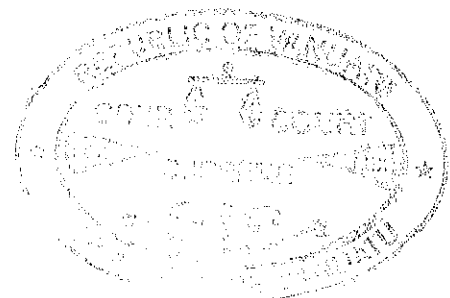


Fr8 Logistics recommends insurance; please enquire about our comprehensive insurance packages.

Best Regards

Fr8 Logistics

Vanuatu."



22. The quotation is clear.

- It is for USD18,489.90
- It is for the boat and trailer
- It is for Miami to Port Vila
- It is for 40ft flat rack
- It includes a number of specified items
- It is for 112.35 cubic meters
- It excludes insurance which is recommended by the Claimant

A note at the bottom of the document records the amount that has been paid and the balance:

“Paid \$8,489.9 USD

\$ 10,000.00 USD To be paid when vessel departs Miami.”

23. In considering the import of this quotation, I must say that I find paragraphs 8 – 12 of the Sworn Statement of Chris Kernot in support of the Claim quite significant. For ease of reference, the paragraphs are reproduced hereunder as follows:-

“8. On the 28th April, 2012 the boat is purchased, two weeks after quotation is given, and the measurements were much greater, both in length, as well as height, to the original measurements supplied by EAGAN. The boat presented for shipment at 156 inches tall (3.62m) x 456 inches long (11.58m)x 103 inches wide (2.616m) or 120.02m³- DOUBLE the original size of boat requested to be quoted upon. Annexed hereto and marked “CK4” is a true copy of the details of the boat.

9. In order to minimize the shipping envelope, and obviously, the costs associated with the increase, I strongly suggested to EAGAN that he find a means to reduce the size of the overall envelope or there would be logistical increases in costs which would be high, especially due to the abnormally high height of the unit meaning

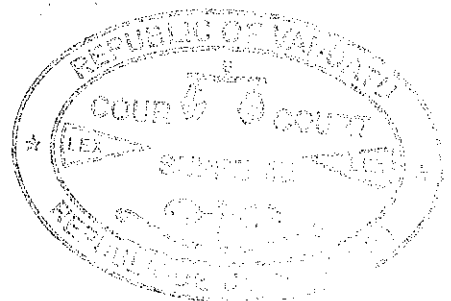


special requirements for stevedores to lift with chins rather than standard equipment.

10. *EAGAN then arranged for Joe MUNDACA to work on the boat, to remove a lot of the gear on top of the boat to reduce the overall envelope, and AFTER this work was done, the boat now measured 11.58m x 2.61m x 3.1m tall or 93.909m³ – an increase of 32.029m³ over the original quotation. Or an increase in size of 51.76%, but far less than the 120m³ the boat was presented as for shipment.*
11. *The actual freight charges for shipping, therefore shifted from USD18,490 to USD24, 850, and increase of only USD6,360 and a further cost was incurred.*
12. *On 21st May ,2012 after trying to obtain a 40ft Flat Rack, we were advised that the only way one could be supplied, was to arrange to shift a container to Fort Lauderdale for loading, and this was quoted to EAGAN at a cost of US\$1000 to position an Empty 40ft to Fort Lauderdale from Huston."*
24. These paragraphs confirm the efforts that were made by the Defendant's agent Joe Mundaca to reduce the shipping size of the "envelope" to 93.909m³. This is well within the quote which **Exhibit D1** showed to be for 112.35m cubic meters. However, what these paragraphs fail to show is how the freight differential of **USD6,360** being claimed by the Claimant was arrived at.
25. The original quote was a verbal contract made by the parties. Then an email was recorded on 14 April 2012 between Mr. Kernot and his employee Fran Malcolm as shown in Annexure **CK2** of **Exhibit C1**. The email reads:

"Subject: OFFICIAL QUOTE FOR DAN EAGEN

*Following our conversation Chris this morning re Dan Eagen
(Saturday April 14)*



You said to **QUOTE \$18,490 total USD** Miami to Port Vila Wharf to Wharf for bringing Dan's boat and trailer here.

So I have rung Dan and told him this is the quote and I will write it up on our quote form also.

But this is a record that you told me to quote him on this price and he wants to come in on Monday and pay the whole amount.

Dan is a customer we cannot muck around so he will hold you to this exact amount which you said to go ahead on.

Thanks

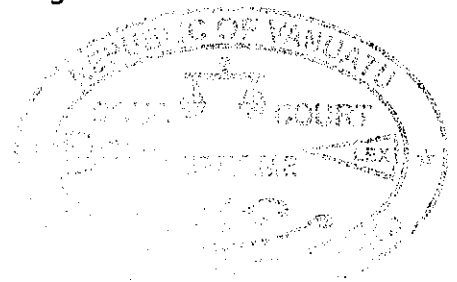
Fran"

26. Be that as it may, the Claimant contends that extra charges were communicated to the Defendant. At paragraph 6 of Mr. Kernot's Sworn Statement in support of the Claim, he states:

"6. Shipping arrangements were made on the basis of this information, the measurements supplied by EAGAN, and the quotation, Port to Port given by Fr8 Logistics Ltd to EAGAN and we were asked, in addition to arranging the freight, to organise the uplift of the boat, to pick up the container, to arrange packing, shrink-wrapping and transport to the wharf. Annexed hereto and marked "CK3" is a true copy of the fax."

27. The Claimant sought to rely on Annexure CK3 as proof that the Defendant had been advised about the extra charges. The document is an email from a Stephen Otis to the Claimant and it records that there will be extra charges for PICKUP AT POMPANO AND DELIVERY TO SOUTH RIVER DRIVE - US\$300 USD SHRINK WRAP - US\$400 USD (THIS IS THE NET COST - AS PER OUR SUPPLIERS QUOTE). Stephen Otis states:

"Spoke to Dan again. He is fine with these extra charges."



However, the Defendant denied any such agreements with Mr. Otis and he says at paragraph 6 of his Sworn Statement that:

"6. All the matters referred to here were the responsibilities of the shipping agent. I relied on the quote he had given and understood that covered all costs for shipping as I had requested. I knew nothing and was not involved in discussions about shrink wrap for instance.

Moreover, in oral evidence Mr. Egan denied any such agreements with Stephen Otis. It is noteworthy that Mr. Otis did not give evidence and his statements were objected to as being hearsay coming from the Claimant.

28. Suffice to say that I am mindful of the parties' evidence that the Defendant is not proficient in either reading or writing. Nonetheless, the Claimant should have taken the precaution of presenting invoices to the Defendant detailing all these additional charges. Regrettably, this was not done and no other quotations were made in writing.
29. Looking at all the evidence adduced before this Court, it is clear to me that the offer of USD18,490 which was confirmed in writing on 16 April 2012 as shown on **Exhibit D1** and which was accepted by payment in full by the Defendant, is the singular offer which legally binds the parties. Relevantly, the offer included the 40ft Flat Rack. There is no other evidence available to the Court of any other offer and acceptance between the parties.
30. Mr. Morrison submits that there seems to have been either no communication or miscommunication between the parties. Miscommunication as evidenced by the insurance issue. The Claimant thought there was a request for insurance; the Defendant maintained he only inquired about the existence of insurance. I must say that I am inclined to agree with counsel's submission on this point. I have looked at the detailed email correspondence at **Annexure CK7** and I find the contents quite telling. It reads as follows:



"From: Fran Malcolm <frapenz@xtra.co.nz>
Sent: Tuesday, 10 July 2012 4:02 PM
To: Terri Carter
Cc: Chris Kernot Other Van Mobile,
<bookings@fr8.vu>

Subject: Re: RE DAN EAGAN BOAT INSURANCE

Christopher you gave the quote and worked out the charges - any other job I can handle but this is all yours!!!

And re-insurance Lerrain can work that out but you need to explain to Dan the extra costs - and that e-mail was too wordy!

Fran"

Sent from iPad

On 10/07/2012, at 11:21 AM, "Terri Carter" <nz@fr8.co.nz> wrote:

"Hi Fran, back on board now... We have only invoiced him so that we could reconcile the payment that he made, there will be some adjustments to be made as there are a number of things which were not charged... loading costs, hirage/repositioning of flat rack costs, insurance etc... he never asked for insurance that I know of, but it is certainly not an argument that I want to have with him, so we have e (sic) insured it, and we have to charge it - but I do not know what the costs were, so I do not know what the charge will be (I do hope it was actually insured... Lerrain, please confirm,)"

*Best regards, Terri Carter
FR8 Logistics NZ Ltd
70 Ascot Road | Airport Oaks | Auckland | New Zealand
Ph: +649 256 2166 | Fax: +649 275 8314 | Email: nz@fr8.co.nz | Skype:
tuicarter | Mob: +649 21144770*

-----Original Message-----

From: Fran Malcolm [<mailto:frapenz@xtra.co.nz>]



Sent: Monday, 9 July 2012 :48pm.

To: Chris Kernot E Mail NZ, Chris Kernot Other Van Mobile

Cc: bookings@fr8.vu; Terri Fr8 Carter

Subject: Re DAN EAGAN BOAT INSURANCE

"Hi Christopher

Can you please let us know how we will invoice for insuring Dan Eagans Boat.

He said we said we would insure the boat for him but we have not invoiced him - do you want to sort this out when you are back as he is quite a shouty person as you know and he will prob have a tantrum about the insurance not being part of his quote that he has paid in full already.

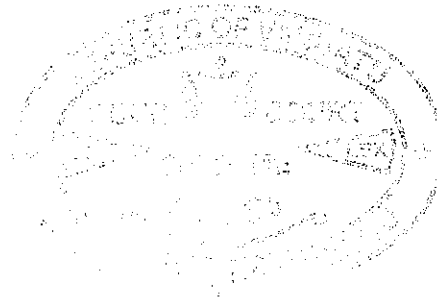
I can talk to him if you like but he will also shout at me I am thinking!!

Regards Fran"

31. This email simply highlights the dilemma and confusion surrounding the issues of **extra costs** and **insurance** in this case. Ms. Malcolm says: *"And re insurance lerrain can work that out but you need to explain to Dan the extra costs"*

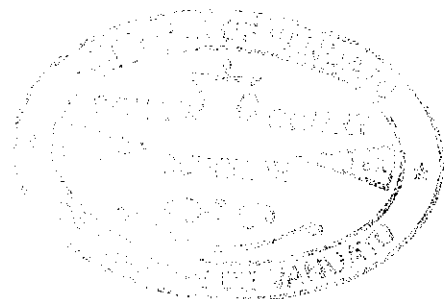
It is noted that:

- Nowhere is there any explanation of extra costs to the Defendant.
- Ms. Malcolm was not called to give evidence.
- The discussions re insurance took place at or about the time the shipment had arrived in New Zealand on transit to Port Vila.
- The Defendant said that by then, due to the Claimant's poor performance, he became concerned about whether the boat was insured. He understood it should be, but was concerned the Claimant may have "self-insured" to save costs. He did not request insurance then be taken out.



32. This, undoubtedly, cannot amount to Offer and Acceptance and a binding and enforceable contract which is the basic law of contract. There must be an offer by one party and acceptance by the other party. Also, there should be an intention to create a legally binding agreement and the parties must evince proper understanding and consent of what is involved. Acceptance must be unequivocal and communicated to the offeror: the law will not deem a person to have accepted an offer merely because they have not expressly rejected it.
33. When the boat arrived in Port Vila, the Claimant sought to not release the boat until claimed extra charges were paid. The Defendant denied any legitimate extra charges and managed to gain release and possession of his boat.
34. There is a schedule of additional charges in the Amended Supreme Court Claim. These charges are all enhanced by 4% monthly compound interest (i.e. 48% per annum). Ms. Thyna submits that the Claimant had informed the Defendant at each stage prior to carrying out the extra services required for the shipment of the boat and that the extra services were provided at the Claimant's expenses. I find that this is not borne out by the evidence. None of these additional charges are evidenced by offer and acceptance and not one of them is supported by invoice. I am equally satisfied that there was never any offer and agreement relating to extra charges giving rise to variation of the initial contract. I therefore reject all the additional charges.
35. Counsel further submits that the Defendant fraudulently removed the boat and refused to settle the Claimant's extra costs. It is trite law that he who asserts must prove and it is well established that fraud must be distinctly alleged and as distinctly proved. In my judgment, the Claimant has failed to do so.
36. In the circumstances, the Claim is hereby dismissed.

The Defendant is awarded standard costs to be taxed by the Master if not agreed.

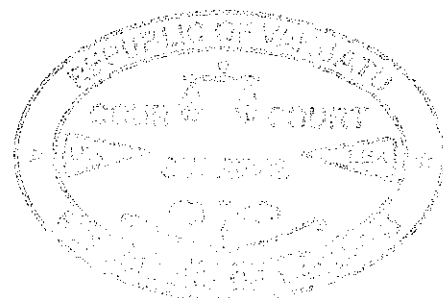


Is the Defendant entitled to judgment on his counterclaim?

37. The Defendant counterclaims for delayed delivery of his boat which he says cost him income and he seeks judgment on the Counterclaim for general damages in the amount of VT5 million. In his Sworn Statement dated 28 July 2015, the Defendant states that between 1 July and 13 August, he would have made six day trips at VT500,000 net earnings per trip. Furthermore, the Defendant says what happened was that he had to lay off his 7 Ni-Vanuatu staff he could not pay and he had to close his business.
38. On the question of damages, I must say that, even though there was no cross examination of the Defendant on that piece of evidence, I am left in a particularly unsatisfactory position as to its proof. Pecuniary damages need to be specifically pleaded and specifically proven. As Lord Goddard C.J stated in ***Bonham-Carter v Hyde Park Hotel Ltd, (1948) 64 T.L.R 177*** :

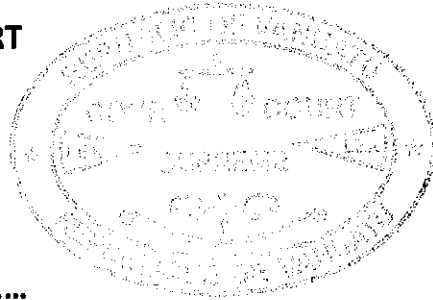
"Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages, it is not enough to write down the particulars and, so to speak, throw them at the head of the Court saying this is what I have lost I ask you to give me these damages. They have to prove it."

39. In my considered view, I find that it is not enough for Mr. Eagan to just write down the particulars of what his net earnings per trip would have realised. It is also not enough for him to merely attach photographs and trip reviews to his Sworn Statement as he has done. It is for him to prove his damages. Mr. Eagan has failed to do so and, therefore, no award will be made for damages.
40. The Counterclaim is hereby dismissed. The parties are to bear their own costs.



DATED at Port Vila this 30th day of October, 2016

BY THE COURT



.....
M. M. SEY

Judge