

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

Civil Case No. 235 of 2004

BETWEEN:

**KAKULA ISLAND RESORTS LIMITED**  
First Claimant

AND:

**DOUGLAS BAILEY**  
Second Claimant

AND:

**RUSSEL NARI**  
First Defendant

AND:

**THE GOVERNMENT OF THE REPUBLIC OF VANUATU**

Coram: Justice P.I. Treston

Counsel: Mr. Roper for Claimants  
Mr. Aru & Mr. Steven for Defendants

Dates of Hearing: 7, 8 & 9 March 2006  
Date of Judgment: 13 April 2006

**JUDGMENT AS TO QUANTUM**

**CLAIM**

In a Supreme Court claim filed on 21 December 2004, the two Claimants Kakula Island Resorts Limited and Douglas Bailey claimed against the two Defendants Russel Nari and the Government of the Republic of Vanuatu for damages under various heads.

The First Claimant ("Kakula") is a business involved in developing, constructing, marketing and administrating luxury tourist resorts and accommodation. The Second Claimant ("Mr. Bailey") is a resident of Vanuatu and is the General Manager of Kakula. Mr. Bailey is a Resort Developer and Administrator and an operator and owner of companies and businesses devoted to tourism and development.

The First Defendant ("Mr. Nari") is a Vanuatu citizen and at all relevant times was the Deputy Director of the Environment Unit of the Second Defendant ("the Government").

In early 2000 Kakula purchased a lease over was then known as Rabbit Island, a small island off the coast of North Efate, with a view to developing the same as a premier tourist destination. In March 2001 Kakula submitted a development application to the Shefa Provincial Council, which council approved the development in about May 2001. In August 2004, the Environment Unit directed Kakula to file an environment impact assessment under the Environment Management and Conservation Act No. 12 of 2002. Kakula complied and in September 2004, the unit required preparation of full scale environment impact assessment. On 20 October 2004, Mr. Nari visited the development without the consent of Kakula and on 26 October 2004, the Environment Unit ordered Kakula to cease work on the development and the Defendants have acknowledged that that was ultra vires the power of the unit and the Government.

The claims by Kakula and Mr. Bailey are for damages for trespass, negligence, injurious falsehood, defamation and breach of confidence and general damages and exemplary damages are sought against the First and Second Defendants.

Neither Defendant filed a defence and on 14 March 2005 judgment as to liability was entered by consent for the Claimants against the Defendants. It is the question of the quantum of the liability which has been the subject of the present hearing.

Despite orders being made on three occasions by this Court that the Defendants must file and serve sworn statements they elected not to do so and the hearing dates for 7, 8 and 9 March 2006 were allocated at a conference on 1 December 2005 when all the parties were represented by counsel. A note was endorsed on the order setting the hearing dates that the parties were required to pay the trial fees within 7 days of the date of the order or they would be subject to a 50% increase. Despite that, the Defendants failed to pay the hearing fees and had not paid when the Solicitor General, Mr. Aru, and Mr. Steven appeared for the defence at 9am on the first allocated hearing date on 7 March 2006. I reminded counsel for the Defendants of the provisions of Rule 4.12 (3) (f) (i) of the Civil Procedure Rules No. 49 of 2002 that if a party fails to pay his or her trial fee by 14 days before the trial date the judge could order that the party is not to participate in the trial. Counsel for the Claimants generously did not seek such an order and the Defendants' trial fee was paid on the first day of the hearing although the penalty was not paid until the following day.

Mr. Aru at first sought an adjournment of the trial to discuss settlement. That application was opposed by the Claimants. I declined the application because the matter had been allocated a fixture for over three months and the Defendants had not taken any meaningful steps in the proceeding and the Claimants were ready to go ahead.

Various sworn statement had been filed on behalf of the Claimants as to quantum, and they sought to rely on the sworn statements of Ricky Donovan Vanvleet of 12 July 2005, Mary Louise Starkey of 24 August 2005 and that of Mr. Bailey of 4 August 2005. The Defendants had not given notice to cross-examine any of those witnesses at least 14 days before the trial in accordance with Rule 11.7 (4) of the Rules and Mr. Aru on behalf of the Defendants

confirmed at the hearing not only that no such notice had been given but also that no cross-examination of the witnesses was required.

The hearing itself was divided into 3 days. On 7 March 2006, the Claimants produced the sworn statements to which I have referred and, with the consent of the defence, Mr. Bailey gave additional short evidence as to the likely completion date of the development and he was cross-examined in that regard only by Mr. Steven for the Defendants. On 8 March 2006, as had been agreed by the parties at the trial preparation conference, the judge, counsel and the parties travelled to the development to take a view. On 9 March 2006 submissions were made by counsel for the Claimants and the Defendants.

The basis of the claim for damages was that, by the admitted actions of the Defendants, the development had effectively been delayed from its proposed opening date of 10 July 2005 until at least 1 April 2006.

The additional evidence of Mr. Bailey and the view of the site confirmed that in fact the development would not be ready for operation and occupation until much later than 1 April 2006, but the Claimants in the circumstances were prepared to limit their claim for damages to the 9 months that I have referred to namely between 1 July 2005 and 1 April 2006.

Although damages had not been specifically quantified in the claim itself, it became clear from the sworn statements filed on behalf of the Claimants that damages were based on prospective loss of income for the period to which I have referred and to extra operational costs due to the delay occasioned by the admitted actions of the Defendants and to unnecessary costs of a full environmental impact statement and to the costs for the improper stop work notice and to exemplary damages also in the context of the admitted actions of the Defendants.

By way of comment as to the progression of the hearing, the Court notes that Mr. Aru, the Solicitor General for the Government, entered an appearance with Mr. Steven on day 1 of the hearing. He also attended the view on day 2 but did not appear on day 3 when submissions were made on behalf of the Defendants by Mr. Steven who is a rather junior legal officer employed by the State Law Office. Mr. Steven advised the Court that the Solicitor General was unable to attend Court for submissions because he was involved in interviewing a prospective legal officer for the State Law Office.

## **EVIDENCE**

The thrust of the evidence of Mr. Vanvleet, who is a Director and shareholder of Kakula, and effectively the owner of the company, was that he has other interests in Vanuatu in various tourism companies and for the operation of those companies and the development of Kakula he used a mix of his personal funds and those of investors who were willing to channel their funds into Vanuatu in the expectation of eventually converting their investments into an equity position in one of more of the Vanuatu ventures. The newspaper articles referred to in the claim and the comments made by Mr. Nari resulted in large numbers of investors withdrawing their support and investment funds from the development. Mr. Vanvleet's statement referred in detail as to what had happened with the investors and included a number

of potentially hearsay statements to which the defence objected. I shall deal with that later. However, it was clear that the withdrawal of significant funds as a result of what the Defendants had done created serious problems and as a result of this situation the development was unable to be properly funded and material procurement fell well behind schedule, as detailed in the sworn statement, and Mr. Vanvleet was forced to look for funds from other more unconventional sources to continue the project and to pay out investors who had indicated that they wanted to leave the group. It was these financial difficulties which Mr. Vanvleet said was caused by the admitted actions of the Defendants which forced him to divert much of his own funds into the development and the shortfall in funding caused the schedule of completion of the development to fall behind to the extent of the period of nine months to which I have already referred.

Ms. Starkey qualified herself as a person who could give expert advice as to what occupancy rates and lease rates Kakula could expect to achieve. This evidence was unchallenged. She said that the type of exclusive resort that was proposed would expect conservatively an occupancy rate of at least 75% in the first year and at least 98% in subsequent years. She said that users of the resort would expect to pay US\$38,000 per night or US\$250,000 per week to book luxury private island accommodation such as Kakula was to provide.

Mr. Bailey, who Mr. Vanvleet said had a unique background in engineering, environmental science, business development and management, along with diverse abilities and general knowledge in running the other associated Vanuatu ventures said that the resort was aimed to provide exclusive and luxury accommodation to a niche market of the world's wealthiest holidaymakers.

The extra and unnecessary environment impact assessment had cost VT200,000.

The cease construction notice of 20 October 2004 had resulted in a loss of VT3,962,274.

The delays in the construction schedule had resulted in losses which he calculated at VT138,306,384 for the nine month period from 1 July 2005 until 1 April 2006 and, based on Ms. Starkey's assessment as to what occupancy and lease rates could be achieved, a net income loss was VT602,874,686 for the period.

As I have said all that evidence was effectively unchallenged by the defence who did not even seek to cross-examine the various witnesses. I also repeat that no sworn statements in response were filed by the defence.

## **SUBMISSIONS**

The Claimants submitted that the possible hearsay evidence contained in the sworn statement of Mr. Vanvleet was admissible in that it was more probative than prejudicial and the reason the evidence was put before the Court was only as to quantum and although Mr. Vanvleet's recollection of the evidence could have been tested in cross-examination the Defendant elected not to do so and in any event there was other evidence which would cover the objected to hearsay evidence. Mr. Steven had earlier indicated that the defence objected to the admissibility of the hearsay evidence contained in that sworn statement.

In relation to quantum the Claimants submitted that the Court must rely upon the loss of profits based on Ms. Starkey's expertise and unchallenged statement. It was Mr. Bailey who had calculated the rates of profits based on the evidence of Ms. Starkey and the Court ought to accept that. The Claimants submitted that Mr. Bailey was well qualified to carry out the calculations which he had made particularly in relation to the building of the resort but also in relation to the loss of profit aspects.

The Claimants conceded that, because of the effluxion of time, any delay after 1 April 2006 could not necessarily be attributed to the actions of the Defendants and in particular Mr. Nari's comments and that is why Kakula had limited its claim to the period ending 1 April 2006.

Mr. Roper then analyzed the evidence of Mr. Bailey in setting out the figures which I have referred to above.

The Defendants through their counsel argued that, although they had elected not to cross-examine witnesses, in considering the appropriate quantum the Court should consider three issues: -

- i. The particulars of the loss arising out of each cause of action, and
- ii. The admissibility of the evidence, and
- iii. Whether the Claimants had mitigated their own loss.

The evidence and calculations of Mr. Bailey were objected to by the defence on the basis that he had only said in his sworn statement that he was the General Manager of the resort and there was insufficient evidence to qualify him as a person able to make the calculations.

The exhibit "DBL14" was objected to on the basis that it seemed to contain items other than operational costs. Mr. Steven argued that the exhibit "DBL11" was mere speculation and should be disregarded and in summary it was submitted that Mr. Bailey had not established any expertise to make the calculations and to produce the documents and the Court should not take any notice of the annexures.

In additional submissions the defence conceded that judgment had been entered by consent in favour of the Claimants but that no liability had been admitted. It was submitted that the Claimants had failed to establish loss by trespass and that there was no duty of care owed in negligence and, as the particulars of loss had not been set out in the claim for injurious falsehood, that should fail. It was further argued that as far as defamation was concerned the maximum that could be awarded in such a case was VT5,000,000.

The defence further objected to the hearsay aspects of Mr. Vanvleet's evidence and submitted that if that evidence was excluded that must have a bearing on the identity of the investors and the amounts of monies Mr. Vanvleet had to repay those investors.

It was submitted that the amount of the claim was unrealistic. It was further submitted that Mr. Bailey's evidence about newspaper articles ought to be disregarded because the Court should not take judicial notice of such newspaper articles. There were also parts of Mr.

Bailey's evidence that were objected as to hearsay.

It was submitted that the Government should not be used to fill in the gap to complete the project and that, if the judgment were allowed, the people of Vanuatu would be deprived of services and the Government may go bankrupt and it was submitted that the Claimants had failed to mitigate their own loss and that the Government was willing and eager to support the project and that any award of exemplary damages should be made against the Government only.

In closing Mr. Steven accepted that there should be an exemplary damages award against Mr. Nari personally vis à vis the remarks made at the meeting of chiefs in Efate.

In response Mr. Roper for the Claimants indicated under which heads the particular awards of damages should lie and in relation to exemplary damages he referred to a text and certain cases which could assist the Court in relation to such an award.

## **LAW**

The Claimants have the onus of proving their quantum of loss on the balance of probabilities.

In general terms, hearsay evidence is inadmissible as to the truth of the statement reported. The matter was succinctly put in *Subramaniam v Public Prosecutor* [1956] 1 WLR 956 at 969 (PC) where this was said:-

***"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible where the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible where it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."***

In other words the rule against hearsay can be stated as this: an assertion other than one made by a witness while testifying in the proceeding is inadmissible as evidence of any fact asserted. That statement was approved by the House of Lords in *R v Sharpe* [1988] 1 All ER 65 at 68 per Lord Havers of Courts and, as was said in Cross on Evidence, Fourth Australian edition, "the absence of an opportunity to cross-examine the maker of the statement is however, the best all-embracing reason that can be given for the rule". (See page 805)

Of course the mere fact that the statement was made on oath does not render the statement as evidence of the truth of its contents: *Haines v Guthrie* [1884] 13 QBD 818.

It is clear that there can be damages for defamation and exemplary damages in this jurisdiction (See *Moli v Heston* [2001] VUCA 3; Civil Appeal Case 11 of 2000 (27 April 2001)).

Exemplary damages although a penalty or punishment can be awarded for the oppressive or arbitrary invasion of others' rights by a person who answers the description of a servant of a Government and such damages are given only in cases of conscious wrongdoing and

contumelious disregard of another's rights (See Uren v John Fairfax & Sons Pty Ltd [1966] 117 CLR 118).

In Fogg v McKnight [1968] NZLR 330 in New Zealand the Court held that exemplary awards need not be confined to a narrow class of cases involving oppressive, arbitrary or unconstitutional action by Government servants or a profit to the offender in excess of proper compensation to the injured party but may extend to cover cases of malice, vindictiveness, arrogance and contumelious disregard of the injured party's rights.

The 17th edition of McGregor on Damages referred to the case of Rookes v Barnard [1972] A. C. 1027 and in relation to awards confirmed that an apology by a Defendant in a witness box might make a difference in his favour and that the means of the parties was a factor and said that: -

"While the assessment of compensation can never be affected by the amount awarded by way of exemplary damages, the converse is not true. The size of an exemplary award may indeed be influenced by the size of the compensatory one, even to the extent of being eliminated."

## **FINDINGS**

I accept, as I must in the circumstances, the unchallenged evidence of Mr. Vanvleet, Ms. Starkey and Mr. Bailey. Apart from no challenge to the Claimants' evidence, except in submissions, there is no evidence to the contrary. Clearly Kakula has suffered significant loss as a result of the admitted actions of Mr. Nari and the Government. It is clear that Mr. Nari was acting for and on behalf of the Government in most of the circumstances, save insofar as it has not been established by evidence that he was so acting when he made his remarks to the meeting of Efate Chiefs on 27 October 2004 as was set out in paragraph 24 of the claim as follows: -

- "(i) *Mr. Bailey is a person who doesn't respect the laws of Vanuatu;*
- i. Mr. Bailey is not a good investor. He breaks Vanuatu's Environmental Laws;*
- 2. Mr. Bailey is politically manipulative. He is the type of person who uses financial power to influence political decision making;*
- 2. Kakula Island Resort has gone ahead with the Development without proper approvals;*
- 1. Kakula has gone ahead with the Development in breach of the Environmental Management and Conservation Act No. 12 of 2002;*
- 1. Mr. Bailey and Kakula have breached lawful orders issued by the Environment Unit; and*
- 1. Mr. Bailey and Kakula have behaved criminally."*

That was admitted in the judgment by consent, and is clearly injurious falsehood and defamation. Mr. Nari must be personally responsible for that.

As to the objection to the potential hearsay portions of Mr. Vanvleet's evidence I consider that the evidence in accordance with the principles outline above, is admissible, not as to the truth of the statements, but as to the fact that they were made. That must be so in the context of this case where the deponent was not even cross-examined. There is in addition ample evidence, even apart from that, that the admitted actions of the Defendants caused a large number of investors to withdraw their funds causing difficulties and loss to the Claimants particularly Kakula. Thus the loss occasioned to Kakula involving the substantial delay in the completion of its project because of the withdrawal of investment funds is quite clear on the evidence. There is, in summary, an undeniable body of evidence which properly establishes that funds were withdrawn causing delay in the project beyond the control of the Claimants and totally the responsibility of the named Defendants as recognized by them in the consent judgment of 14 March 2005.

The quantum of the claim was made well known to the Defendants as far back as July and August 2005 in the sworn statements of the three witnesses for the Claimants. Despite that, the Defendants elected to take no steps in the action by either filing a defence or by filing sworn statements as they were ordered to do and they have adopted a remarkable indifference in failing to take steps to answer such a significant claim. As I have said, their indifference extended even to the failure to pay the hearing fee until the very date of the hearing and payment of the penalty on the day after. Mr. Nari never even attended Court at any stage.

As to the other submissions made by the defence I am satisfied that Mr. Bailey was qualified to make the calculations that he did and that his workings are not mere speculation.

Furthermore there were consensual admissions of all of the allegations in the claim and the publication in the newspaper is proper evidence in such a case particularly where it was not denied.

The consequences to the Government and the people of Vanuatu of a significant award of damages is not properly a matter for the Court which bases its decision on a proper application of the relevant law.

I do not accept that in all the circumstances the Claimants were in any position to mitigate their losses.

It is in my view that the Claimants must succeed on their unchallenged evidence and I consider that the defence have not made any impact upon the veracity and acceptability of that evidence in their submissions. I am satisfied that the Claimants have proved their quantum on the balance of probabilities.

## **CONCLUSION**

The quantified damages against the Government in favour of Kakula are as follows:-

Unnecessary costs of Environmental impact assessment (Negligence)	VT200,000
Loss associated with cessation of works for wrongful stopping of works (Trespass and negligence)	VT3,962,274
Additional operational costs in the delay of 9 months (Injurious falsehood and defamation)	VT138,306,384
Loss of profits for 9 months (injurious falsehood and defamation)	VT602,847,686
<b>TOTAL:</b>	<b>VT745,316,344</b> =====

Clearly the Government is also responsible for exemplary damages to Kakula, as it has conceded, for the loss that I have referred to above, but the size of the compensatory award against the Government is such that, in my view, any further award by way of exemplary damages would be inappropriate (see above).

As far as Mr. Nari is concerned there is no evidence which establishes that at the meeting of Chiefs, to which I have referred to above, he was acting on behalf of the Government and accordingly it is my view that he must be personally responsible for what he has admitted was injurious falsehood and defamation to Kakula and Mr. Bailey. Following on from the amount of quantum in the *Moli case* above, I am of the view that the award against Mr. Nari in this regard must be VT3,000,000. Clearly there is also a need for exemplary damages against Mr. Nari in relation to those circumstances of his injurious falsehood and defamation. Those exemplary damages must be in excess of what the Court of Appeal considered appropriate in the *Moli case* because Mr. Nari has consistently failed to apologize despite his admission of liability and has even failed to attend Court at any stage. At the very least in the *Moli case* the Defendant after several months made an apology. Here Mr. Nari has made no apology and it is my view that the additional exemplary damages in this case must be a further VT4,000,000 and the total quantification of damages in favour of Kakula and Mr. Bailey against Mr. Nari is the sum of VT7,000,000 and that amount should be shared equally by the two Claimants.

I also award costs to the Claimants against the Defendants and I will hear from the parties as to the basis on which those costs should be awarded on a date which I shall fix on the delivery of this judgment.

## **JUDGMENT**

Accordingly I enter judgment for Kakula against the Government in the total sum of VT745,316,344 and I give judgment for Kakula and Mr. Bailey against Mr. Nari in the sum of

VT7,000,000.

Because of the amounts, I consider that an enforcement conference is necessary and I shall also give a date for that on the delivery of this judgment.

**Dated AT PORT VILA on 13 April 2006**

**BY THE COURT**

**P. I. TRESTON**

**Judge**