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

CIVIL APPEAL NO. 18 OF 2011

BETWEEN: **VANUATU COPRA AND COCOA EXPORTERS (VCCE) LIMITED**
Appellant

AND: **VANUATU COCONUT PRODUCT LIMITED (VCPL)**
First Respondent

AND: **REPUBLIC OF VANUATU**
Second Respondent

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice Bruce Robertson
Hon. Justice J von Doussa
Hon. Justice Daniel Fatiaki
Hon. Justice Robert Spear

Counsel: Mr James Tari for the Appellant
Mr Frederick Gilu for the First and Second Respondents

Hearing: 23 November 2011
Decision: 25 November 2011

JUDGMENT

---

[1] This is an appeal against part only of a judgment of the Supreme Court dated 12th August 2011 which ruled that *"The claimant has claimed for loss of profit and general damages. The Court is of the view the Claimant is not entitled to these.*

Instead, the Court will allow interests on the outstanding sum of Vt 8.356.900 at 5 percent per annum from September 2009 to the date of filing of proceeding which is April 2010."

[2] In the Supreme Court, the appellant, as claimant, claimed that the first and second respondents, in breach of contract, had failed to pay copra subsidies totaling Vt 8.356 900 and sought judgment for that amount. The statement of claim further pleaded:-

> *"As a result of the defendants' actions, and failing to pay the Claimant's invoices, the Claimant has suffered general business loss and profit.*
>
> *Particulars*
>
> *a) Loss of Profit;*
>
> *b) General Damages to the running of the business to be assessed."*

[3] The appellant pleaded that it is the largest and one of the main exporters of copra and cocoa in Vanuatu; that the first and second respondents were responsible for the payment of a copra subsidy throughout Vanuatu; and that the first and second respondents had contracted with the appellant to pay it the sum claimed.

[4] The respondents denied that they were liable to pay the copra subsidy to the appellant either in contract or at all.

[5] When the trial came on for hearing the respondents submitted that the Court should rule on liability first before addressing the quantum of the claim for damages. The Court agreed to this course. Witnesses were then called by both sides concerning the contractual basis of the claim alleged by the appellant. Sworn statements which had been filed were admitted into evidence. The appellant's sworn statements dealt in part with the claim for loss of profits and general damages.

[6] In a reserved judgment the Supreme Court held that the respondents were contractually liable to pay copra subsidy of Vt 8.356.900, and entered judgment accordingly. However, the Supreme Court went further, and made the ruling now under challenge, which dismissed the claim for loss of profits and general damages but allowed 5% interest on the judgment sum from September 2009 up to the filing of the proceedings.

[7] The period of time for which interest was awarded is a mystery to us. The appellant's unpaid invoices covered a period from 9th November to 1st December 2009. We cannot understand the basis for an award for interest from September 2009. Further, if the appellant suffered general damages as a result of being kept out of its money, that loss would have continued up until the date of payment of the judgment.

[8] The appellant contends that the dismissal of the claim for loss of profits and general damage, and the award of interest, are matters that should not have been addressed by the Supreme Court in its judgment in light of the earlier ruling that the trial was to be on the issue of liability only. In the context of the pleadings and given

that the dispute between the parties was whether or not the respondents had any contractual liability to pay the copra subsidy, the appellants contend that the ruling meant that the Court would deal only with the question of whether or not a contract existed, and not address the loss of profit and general damages claims at all at that stage.

[9] The respondents contend that it was open to the Supreme Court to make the ruling dismissing the claims for loss of profits and general damage because there was evidence in the appellant's sworn statements which gave particulars of the proposed claim. Those particulars justified the Court in holding that, as a matter of law, the claims were too remote from the breach of the contract constituted by the failure to pay the invoiced copra subsidy, and on that ground the appellant had failed to establish liability to pay any loss of profits or general damages.

[10] The particulars of the claims for loss of profits and general damages disclosed by the appellant's sworn statements allege two heads of loss: first, a loss of $3.500 per day being a charge incurred by the appellant as a daily excess fee for overdrawing its cheque account with its banker, and secondly a loss of profits claim based on the number of tonnes of copra that could have been purchased for Vt 8.356.900, and then resold on the international market at a higher price, the loss being a difference between the purchase price and the sale price. The claims projected these heads of loss from the date of the appellant's invoices to at least the date of trial.

[11] The two heads of loss are of a kind that are likely to be held to be too remote from a failure to pay a liquidated debt. However, there is nothing in the papers which suggests that the nature of the heads of loss or the question of remoteness was canvassed at the trial. Moreover, the award of interest made by the Judge in lieu of loss of profits and general damage is in itself in the nature of a claim for damages consequent upon the non-payment of the copra subsidy. The choice of the rate of interest is a matter of quantum. In all the circumstances, we accept the appellant's submission that the ruling that liability be tried as a preliminary issue was reasonably understood by counsel to confine the matter for determination to whether the respondents were under a contractual liability to pay the copra subsidy. The question of whether consequential damages flowed from the failure to pay the subsidy, should a contract be found to exist, would await a further hearing.

[12] As the trial proceeded on the footing that the claim for loss of profits and general damages stood adjourned for further consideration, the appeal against the ruling dismissing those claims must be allowed, and the matter will have to be returned to the Supreme Court to consider them. It will be for the Supreme Court at the further hearing to determine whether the two separate heads of loss identified in the appellant's statement are too remote, and if not, what loss was suffered.

[13] The basic rule governing the law of remoteness of damage in contract was stated by Alderson B in Hadley v. Baxendale [1854] 156 ER 145 at 151: *"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie, according to the usual course of things, from such breach of contract itself, OR such as may*

reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

[14] The word *"OR"* has been emphasized to indicate that there are two branches or limbs to the rule in Hadley v. Baxendale. Under the first limb damages awarded are broadly described as *"general"* damages, and those awarded under the second limb as *"special"* damages. The general damages are those which the law presumes to follow *"naturally"* from the breach, whereas special damages are of an exceptional nature and are only recoverable where the defendant had prior knowledge of a likelihood that the loss would be suffered.

[15] The development of the rule in Hadley v. Baxendale, and a modern statement of the rule may be found in Chitty on Contracts, 29th edition, vol 1 at paragraph 26-044 and following. As we have observed, the two heads of damage asserted in the appellant's sworn statements are losses of a kind that are unlikely to be considered as arising naturally or in the ordinary cause of things from a failure to pay a liquidated debt, and will not be recoverable unless at the time when the contract was made the defendants were made fully aware that the claimant intended to outlay the copra subsidy receipts in the particular ways now alleged by the Appellant.

[16] Claims for damages for consequential loss flowing from a failure to pay a liquidated amount are usually resolved by treating the consequential loss as equivalent to the opportunity cost of the amount of the debt. That opportunity cost will be assessed in the circumstances of the particular case. For example, where the plaintiff is a commercial enterprise the value of the money is likely to be the cost

which the plaintiff will incur in borrowing a like amount from a banking institution. In Dods v. Copper Creek Vineyards Ltd [1987] 1 NZLR 530 the plaintiff was held entitled to recover under the second limb of Hadley v. Baxendale special damages equal to the interest incurred as a result of late payment of a debt. The Court was satisfied by the evidence in that case that it would have been in the contemplation of both parties, at the time the contract was made, that such a loss would be the probable result of the failure to pay the debt.

[17] In Hungerfords v. Walker [1989] 171 CLR 125: 84 ALR 119 the High Court of Australia upheld an award to the plaintiffs of damages equal to the interest on money they had paid out in consequence of a breach of contract under the first limb of the rule in Hadley v. Baxendale. The Court did so on the ground that the cost of obtaining that money by a commercial enterprise was a loss *"according to the usual course of things"* following the defendant's breach of contract. In that case, the award was based on the actual interest costs which the plaintiff had incurred, and the award was based on compound interest rates.

[18] In the present case, the application of these decisions could result in the appellant obtaining an award of general damages if it incurred interest costs on money borrowed to make up for the failure of the respondents to pay the copra subsidy on time. It will be a matter for evidence to show the extent of interest costs which the appellant incurred, and whether, to the extent that the so called *"excess fees"* are claimed, whether the excess fees were the result of non-payment of the subsidy, or whether excess fees were a long standing feature of the appellant's business due to the way in which it arranged its monetary affairs. The three pages

of a bank statement dated 4th October 2010 annexed to one of the appellant's sworn statements are insufficient to throw any useful light on that question.

[19] We would urge the parties to consider the authorities to which we have referred, and to confer with a view to reaching agreement to avoid the need for a further trial.

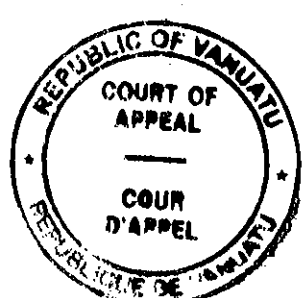
[20] Finally, we cannot understand why the respondents applied to split the trial, or why the split was ordered. Attempts to save time and costs by splitting trials all too often prove not to be a short cut to finality, but a very long route. This case is a good example. Here the appellant had filed all the evidence it wished to adduce on both liability and quantum and there seems no reason why the trial on all issues could not go ahead. As the important issue of remoteness is so closely tied up with the nature and extent of the damages claimed it was desirable that all issues be tried at the one time. As there seems no good reason for the respondent's application to split the trial we consider that the respondents must bear the costs of this appeal.

[21] The formal orders of the Court are:

1) Appeal allowed.

2) Set aside the order that the respondents pay interest on Vt 8,356,900 at 5 per cent per annum from September 2009 to April 2010.

3) Matter remitted to the Supreme Court for determination by another judge of the appellant's claim pleaded in paragraph 13 of the statement of claim filed on 20th April 2010.



4) Respondents to pay the appellant's costs of this appeal be agreed or taxed.

DATED at Port Vila, this 25th day of November 2011

BY THE COURT

Hon. Chief Justice V. LUNABEK

Hon Justice B. ROBERTSON

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

Hon. Justice J v DOUSSA

Hon. Justice D. FATIAKI

Hon. Justice R. SPEAR