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

Civil Appeal Case No.05 of 2013

BETWEEN: **ENTREPRISE DINH VAN TU LIMITED**
Appellant

AND: **AKU DINH trading as ENTREPRISE DINH VAN TU**
Second Appellant

AND: **IVUKI KALTAK**
First Respondent

AND: **TIMOTHY KALTAK, ANDREW KALTAK, RUSSEL KALTAK**
Second Respondents

AND: **THE ESTATE OF KALTAPU KALTAK by its administrator ANDREW KALTAK**
Third Respondent

AND: **KNIGHTSBRIDGE INVESTMENT LIMITED**
Fourth Respondent

AND: **CONTI-KING LIMITED**
Fifth Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver A. Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice Mary Sey

Counsel: *Mr. D. Yawha for the Appellants*
First and Second Respondents – no appearance
Third Respondent – no appearance
Mr. M. J. Hurley for the Fourth and Fifth Respondents

Date of Hearing: *19 April 2013*

Date of Decision: *26 April 2013*

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

JUDGMENT

1. This is an appeal against an assessment of damages arising out of an undertaking given by the appellants in support of an interim injunction granted by the Supreme Court on 12 September 2011 in the following terms:

> "*This Court orders that the first, second and third defendants their agents and servants are now restrained from permitting any*

aggregate, metal or other such material to be extracted or removed from the quarry on their land known as Eruelep until further order of the Court".

2. At the time the injunction was issued the fourth respondent (Knightsbridge) and the fifth respondent (Conti-King) pursuant to a joint venture were operating a quarry on land known as Eruelep on Erakor Peninsular. Conti-King was the actual quarry operator and it held all necessary quarry licences. It paid all government royalties and fees and it sold the aggregate from the quarries it extracted and crushed to Knightsbridge at an agreed price. Knightsbridge owned some of the machinery used by Conti-King at the quarry. Its primary business was the selling of quarry aggregate sand and timber. Knightsbridge and Conti-King had a common director, John Tonner, although the companies had different shareholdings. The relationship between the two companies is discussed in more detail later.

3. The most immediate and direct effect of the injunction was to cause all quarrying works conducted by Knightsbridge and Conti-King to cease. This effectively closed down their operations for 21 days between 12 September 2011 when the injunction was granted and 3rd October 2011 when the injunction was discharged.

4. The granting of the injunction was made upon an undertaking as to damages. In its final form the undertaking is: "*Entreprise Dinh Van Tu Limited and Aku Dinh hereby undertake to the Court that they will pay all or any damages arising from the restraining order in the event that the claim is not eventually successful or as determined by the this Honourable Court*".

5. The appellants were the claimants in the Supreme Court. As against Knightsbridge and Conti-King they were not successful. On 30th November 2011 Knightsbridge and Conti-King applied for an inquiry and assessment to be made of the loss and damages they suffered to their respective business operations as a result of the injunction. The Court directed that their claim for loss and damage be made by way of counterclaim. This was done. In its final form the total claim, broken down between Knightsbridge and Conti-King was as follows:

		Conti-King	**Knightsbridge**
1	Pre-estimated loss incurred by Conti-King with Knightsbridge	15 000 000	
2	Loss of quarry business by Conti-King	4 061 200	
3	Loss of business by Knightsbridge		2 494 400
4	Security		912 000
5	Evacuation of plant & equipment		2 819 537
6	Additional quarry supplies		4 380 938
7	Relocation of plant & equipment		471 781
8	John Tonner's air fares		70 000
9	Loss of business goodwill		500 000
	TOTAL	VT19 061 200	VT11 648 656

6. At the trial of the counterclaim both written and oral evidence was received from John Tonner on behalf of both Knightsbridge and Conti-King, and from Aku Dinh on behalf of the appellant. In the result, the trial judge disallowed items 6 and 9 in the above schedule but allowed all the other heads of claim in full. Items 1 and 2 were awarded to Conti-King, and the remaining to Knightsbrige.

7. The appellants now appeal against the quantum of the awards. In essence the appellants challenge both the way in which the trial judge approached the assessment of the losses, and the particular amounts awarded under several heads of loss.

8. Before dealing specifically with the items claimed, we make the following general observations.

9. The principles that must guide a court assessing compensation for losses suffered in consequence of an undertaking to the Court are not in dispute. The trial judge referred to Air Express v. Transport Industries (Operations) Pty. Ltd. [1981] HCA 75 at [37] and the decision of this Court in Ebbage v. Ebbage [2001] VUCA 7 at 15. We add a reference to the helpful summary of the relevant principles by Neill LJ in Cheltenham & Gloucester Building Society v. Ricketts [1993] WLR 1545 at pp1551/1552. The trial judge concluded that the legal principles permitted Knightsbridge and Conti-King to recover from the claimants any loss sustained by them as a result of the injunction and which loss could have been foreseen when the injunction was granted.

10. Considerable time at trial was spent considering the contractual relationship between Knightsbridge and Conti-King. In an operational agreement between the two companies Conti-King had agreed to give Knightsbridge 30 days notice of any change or restriction to access to the quarry operations, and in the event of failure to give notice Conti-King incurred a "*penalty*" of VT1 million per day with a maximum total penalty of VT15 million. Although this payment was described in the agreement as a "*penalty*" Mr. Tonner gave evidence that it was in reality a fair pre-estimate of the damage which Knightsbridge would suffer in the event that it was not given due notice of an interruption to access. The trial Judge accepted this evidence and held that as Conti-King had not given 30 days notice (because the injunction occurred suddenly) it was liable to pay VT15 million to Knightsbridge.

11. This contractual liability was found to be a loss suffered by Conti-King in consequences of the injunction, hence the award in Conti-King's favour under item 1 in the schedule of claim. In respect of the business or trading losses of Knightsbridge caused by its inability to supply its customers, the trial Judge held that its total trading loss was VT17,494,000. As VT15 million would be recovered from Conti-King under the penalty clause, only VT2,494,400 was awarded under item 3 of the claim to Knightsbridge.

12. As the trading losses of Knightsbridge were held to exceed the penalty indemnity the aggregate of the awards made to the two companies by the trial judge did not depend on the penalty clause. However for reasons given below we consider the evidence did not establish that the trading losses of Knightsbridge were so high. As we consider the losses were considerably less than VT15 million it therefore becomes necessary to examine whether the

existence of the penalty clause which governs the internal relationship of Knightsbridge and Conti-King is a factor which can influence the assessment of the compensation to be awarded against the appellants.

13. In our opinion there is no basis whatsoever in the evidence to support a finding that the existence of the penalty clause or indeed any particulars of the contractor relationship between Knightsbridge and Conti-King were known to the appellant. There is no basis in the evidence for a finding that the appellant could have foreseen that Conti-King would incur a liability under a penalty clause in the event that the injunction prevented it giving 30 days notice of cessation of operation to Knightsbridge.

14. The appellant should have foreseen that by obtaining an injunction which prevented the quarrying operations the quarry operators (who ever they were) would suffer a loss of turnover and resulting loss of profits. It would also have been foreseeable that the quarry operators would be required to take steps to protect and remove equipment, and later to reinstate it if the injunction was set aside. It follows that the exercise which the Court was required to undertake was to assess the losses including loss of profits suffered by the quarry operators in consequence of the injunction. The fact the quarry operator were a joint venture between two companies would not affect the overall assessment of the aggregate losses. Detail of the contractual arrangements between the companies comprising the joint venture could be relevant to determining how the aggregate losses should be split between the two companies once the assessment was made, but the contractual arrangements were not relevant to the assessment of the aggregate losses which the appellants were required to pay under their undertaking.

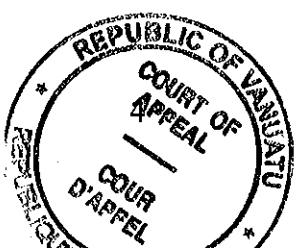
15. To ascertain the trading losses of the quarry operators (being the joint venture parties) it is necessary to consider together items 1, 2, 3 and 6 in the schedule of losses. Item 2 concerns the primary operations of the quarry business which involved the extraction of aggregate from the quarry face. That component of the operation, being a separate operation within the joint venture conducted by Conti-King, lends itself to separate consideration, and an assessment of one component in the total of the quarry operators' losses. Knightsbridge's operations are also capable of separate examination to assess another component of the quarry operators' overall loss. The trading losses of Knightsbridge, are combined within items 1, 3 and 6 of the schedule of losses.

16. There are 4 grounds of appeal which challenge;

    (1) the award of VT15 million to Conti-King on the ground that the trial judge erred in the reliance he placed on the "*penalty*" provision in the agreement between Conti-King and Knightsbridge.

    (2) the assessment under item 2 in the schedule, namely the loss of quarrying business by Conti-king.

    (3) the assessment of the loss of business claimed by Knightsbridge in item 3 of the schedule.



(4) the award under item 4 of VT912,000 for security services.

17. Grounds 1 and 3 involve a consideration of items 1, 3 and 6 of the schedule of losses Item 6 (additional quarry supplies) is not specifically mentioned in the grounds of appeal. However we think it is implicitly raised by ground 3 which is an overall challenge to the assessment for the loss of business of Knightsbridge.

18. The injunction was in force for 21 days between 12 September 2011 and 3rd October 2011. During this time, to comply with the injunction, Knightsbridge was required to remove heavy quarrying equipment from the quarry site, ensure its protection through the employment of security guards, and when the injunction was lifted to return the plant and equipment to the quarry. The evidence suggests that the disruption of the quarry business extended a further few days beyond 3rd October 2011 to enable the return of the plant and equipment, and then another few days to enable the resumed operations to return to full production. Mr. Dinh, himself a quarry operator, considered the operations should have been back to normal within 2 weeks of the injunction being lifted. This would make the period of disruption about 35 days. That estimate is consistent with the length of time for which a bulldozer was hired to assist in re-establishing the quarry operations. It is also consistent with the October extraction figures for Conti-King.

19. Mr. Tonner however said that the business of the joint venture was affected for approximately 2 months by the injunction, and the claims of both Conti-King and Knightsbridge were formulated on the footing that their operations were closed down for 2 months. We are not persuaded that the evidence supports the estimated 2 months which the trial judge accepted. On the contrary we think that if loss over a period of 1.25 months is allowed that would be a fair estimate, taking into account that during the later part of that period quarrying operations had recommenced, though not at full speed.

20. The challenge in grounds 1 and 3 of the Notice of Appeal to the award for the loss of business of Knightsbridge includes, but is not limited to, the time span over which the loss was assessed. Another major challenge is that Knightsbridge did not properly focus on its loss of profit as the basis for its claim, and failed to produce accounting records which would have enabled the claimed loss to have been checked against past and future production, and against monthly operating costs and profits. We agree with the appellants' counsel that the absence of these records was a serious short-coming in the evidence before the trial judge. Moreover, in loss of business claims of this kind a claimant would normally be expected to have the losses worked out by a qualified accounting expert. If in the re-assessment of the loss which we undertake, this Court is thought to have applied a broad brush that is too wide, this is the consequence of the poor state of the evidence that was placed before the trial judge by the quarry operators.

21. Mr. Tonner in his sworn statement supporting the claim said:

Therefore, MCI (Knightsbridge) suffered losses of 6,248 m³ due to the restraining orders calculated at the rate of VT2, 800 per m³. This

amount of VT2, 800 per m³ is the average final cost price to (Knightsbridge) of processed material ready for sale (the sale price is VT3, 600 per m³). Therefore VT2, 800 @ 6,248 m³ equals losses of VT17, 494,400 loss sum received from Conti-King (CKL) VT15 million.
Less: The sum received from CKL (Conti-King) VT15,000,000
Net loss sales claimed: VT2, 494,400.

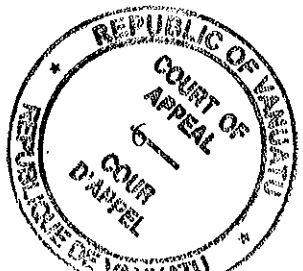
22. The figure of 6,248m³ is based on 2 months interruption. We consider the calculation should start from loss of sales for 1.25 months. A monthly figure of 3,124m³ has been extracted by Knightsbridge from average quarry extraction figures which Conti-King used as the basis for its payments of mining royalties. Although the monthly estimate was challenged by the appellants, we think the evidence supports that figure and we are not persuaded that some different figure should be adopted.

23. We are unable to understand why the business loss of Knightsbridge should be assessed on the final cost price of acquiring the processed material, as stated by Mr. Tonner. The assessment should involve an estimate of loss of profits. We think the figure that should have been used is the difference between the sale price of VT3, 600 and the cost price of VT2, 800, namely VT800/m³.

24. That margin would seem to be the profit component. On this basis the loss of profits, before other adjustments that are necessary, is VT800 x 3,124m³ x 1.25 months = VT3,124,000

25. Although the quarrying operations had stopped, Knightsbridge would have continued to incur overhead costs such as insurance, depreciation on equipment, administrative expenses within the office, finance charges and so on. There is no evidence to assist at all in assessing what percentage of the unit cost of VT2,800/m³ is assigned to expenses of this kind and this Court must use its own judgment based on past experience in commercial cases to make the assessment. We proceed on the footing that 25% of the unit cost reflects overhead which would continue even though the mining operations were temporarily shut down. We therefore allow as part of Knightsbridge losses a further VT700 x 3,124m³ x 1.25 months = VT2, 733,500.

26. We consider a further adjustment is necessary to arrive at the overall business losses. It was necessary for Knightsbridge to buy in materials from another source to enable it to meet some of the outstanding orders from customers who were pressing it for supply. The material purchased was of a lesser quality, and required more processing at additional costs. The evidence shows that 1,127m³ of road base was acquired as raw material that was then subjected to further processing. As this volume of material was supplied to customers during the period of downtime, we consider that the profits or loss (as the case may be) incurred by Knightsbridge in buying and processing this material must be offset against the provisional loss of profits based on the loss of turnover over 1.25 months.



27. In the absence of precise evidence about the sale price of these substitute materials we shall assume they were sold at VT3,600/m³, giving gross sales receipts of VT3, 600 x 1,127 m³ = VT4,057,200. From this must be deducted the costs of purchasing and processing the substitute materials which Mr. Tonner said totalled VT4,380,938. The components of this figure were challenged by the appellants. Mr. Dinh said the charges were grossly overpriced but his alternative estimates appear to be too conservative. We are not persuaded that we should depart from Mr. Tonner's firgures. Therefore the sales of substitute materials to its customers resulted in a net loss to Knightsbridge of VT223,738. We consider it was forseeable that the quarry operators would seek to preserve customer relationships by finding supplies from another source.

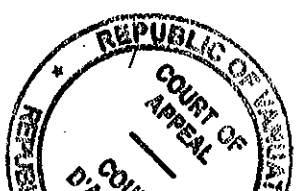
28. We therefore assess that the losses of Knightsbridge attributable to loss of business as:

(a)	Loss of profits on lost sales	3,124,000
(b)	Continuing over heads	2,733,500
(c)	Net loss on acquisition and sale of substitute material	223,738
	TOTAL	VT6,081,238

29. For these reasons we consider that the appeal in so far as it relates to items 1, 3 and 6 should be allowed; the sums awarded by the trial judge should be set aside, and in lieu for those items VT6,081,238 should be awarded to Knightsbridge against the appellants.

30. The appeal in relation to item 2 deals with the quarry business of Conti-King. The evidence establishes that the aggregate extracted by Conti-King was on-sold to Knightsbridge at a gross price of VT650/m³. As with Knightsbridge, the loss of Conti-King must be based not on the loss of gross sales but on the loss of net profit resulting from those sales. The appeal against the award under item 2 must therefore succeed. This Court must re-assess this head of loss. No evidence was placed before the trial judge about the costs incurred by Conti-King in its operations. Mr. Dinh said the proper margin on that type of quarry operation should be between 10 and 20%, and suggested 15% as a compromise. The profit margin apparently received by Knightsbridge in its operations (the difference between VT3,600 and VT2,800/m³) exceeds 20 percent, but the evidence overall does not justify a higher figure than 20%. We therefore assess the Conti-King loss on the assumption that its profit margin was 20 % of the gross sale price namely VT130/m³. We have already indicated that we do not think the evidence supports the finding that the loss production extended over a longer period than 1.25 months. We therefore assess the business loss of Conti-King as VT130 x 3,124m³ x 1.25 months = VT507,650.

31. As with Knightsbridge, we think it is reasonable to allow an amount for continuing overhead expenses which Conti-King would have incurred even though its actual quarry operations had ceased. In the absence of further evidence we allow 25% of the notional costs of production (being VT650 – VT130/m³). We therefore allow an additional amount for overhead expenses being VT520 x 25% x 3142 m³ x 1.25 months = VT507,650.



32. We therefore assess the total claim of Conti-King as follows:

Loss of quarry business profit	507,650
Continuing over leads	507,650
TOTAL	1,015,300

33. As between Knightsbridge and Conti-King their internal arrangements including the operation of the penalty clause is a matter for them. There is no cross-claim between them in these proceedings which would invoke the jurisdiction of the Court to consider on that question.

34. The remaining ground of appeal concerns item 4 in the schedule of losses, namely VT912,000 for security costs. Mr. Dinh gave evidence that this was a gross over estimate and submitted that the amount claimed was not satisfactorily established by production of an invoice from an independent security firm for these charges. The trial Judge considered that the claim had been adequately established. We are not persuaded by the appellants' arguments that the amount allowed by the trial judge should be reviewed. We think it was justified on the evidence. That ground of appeal therefore fails.

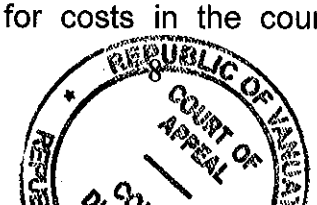
35. Items 5, , 7 and 8 of the schedule of losses which the judge allowed in full are not the subject of an appeal. Those items stand.

36. The trial judge disallowed Knightsbridge's claim in item 9 for loss of business goodwill on the basis that the only evidence in this respect was from Mr. Tonner who simply asserted that the claim for VT500, 000 was fair and reasonable to reflect the loss of business goodwill. The trial judge considered that evidence to be insufficient to support the claim. However the written submissions of the parties, and the judge's notes, indicate that the parties had agreed that VT150, 000 was to be allowed on this item. It seems that this concession was overlooked by the trial judge. In our opinion the agreed amount should be included in the award.

37. For these reasons we consider that the appeal must be allowed, and the following award substituted:

	Conti-King	**Knightsbridge**
Loss of quarry by Conti-King	1,015,300	
Loss of business by Knightsbridge		6,081,238
Security		912, 000
Evacuation of plant and equipment		2,819, 537
Relocation of plant and equipment		471, 781
John Tonner's air fares		70, 000
Loss of business goodwill		150, 000
TOTAL	VT1,015,300	VT10,504,556

38. Although the appeal has succeeded in respect of the items challenged, the appellants remain liable under this judgment to pay a substantial amount under the undertaking given in support of the injunction. In these circumstances we do not think that the order for costs in the court below should be disturbed.



However the appellant must pay the costs of Conti-King and Knightsbridge in this Court on the basis that they receive one set of costs at the standard rate.

39. The formal orders of the Court are:

(a) Appeal allowed;

(b) Awards of compensation in the Court below set aside;

(c) Judgment be entered in favour of Conti-King against the appellants jointly and severally for VT1,015,300;

(d) Judgment be entered in favour of Knightsbridge against the appellants jointly and severally for VT10,504.556;

(e) Both judgment sums to carry interest at the rate of 5% per annum form 4 January 2012 being the date of the counterclaim;

(f) Conti-King and Knightsbridge to pay the appellants' costs of the appeal on the standard basis.

DATED at Port Vila, this 26th day of April, 2013.

FOR THE COURT

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

Vincent LUNABEK
Hon. Chief Justice.