IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU

CIVIL CASE No 42 OF 1994

BETWEEN: DANIEL MOUTON Plaintiff

AND

SELB PACIFIC LIMITED Defendant

Coram: The Chief Justice
For the Plaintiff: Mr Juris Ozols
For the Defendant: Mr Christian Roger de Robillard; instructed by Messrs Geoffrey Gee & Co

Selb Pacific Ltd, the defendant in this case, is an old established Vanuatu construction company and probably the biggest one in Vanuatu. It was established well before independence. Indeed its present Managing Director and one of its major shareholder, Mr André François, came to Vanuatu in 1971 from France, at a time when he was working for a company called SEGEFOM, who were engaged at that time in a joint venture with SELB building the French hospital in Port Vila, now known as the Pompidou Centre. After working here for three years, Mr François was approached by the then managing director of SELB, a Mr Denisa and was offered a contract with SELB. He has remained in Vanuatu ever since and took up Ni-Vanuatu citizenship in 1991. He later became a shareholder to the amount of 40% in SELB and became its managing director when Mr Denisa retired. Mr Denisa himself remains a shareholder to the amount of 60% but is no longer involved in the running of the Company.

The plaintiff in this case, Mr Daniel Mouton, was recruited in France by Mr François. He had graduated from the same school as Mr François together with Mr François' nephew, Luc François, who recommended Mr Mouton to his uncle. At the time, Mr Mouton was working as a 'Conducteur de Travaux' for a very large French building firm known as Bouygues. Upon being offered a job with SELB in Vanuatu, Mr Mouton signed a contract in France with SELB dated 8 June 1987 and left Bouygues to come to work in Vanuatu. He arrived here on the 13 August 1987. He was employed by SELB as a 'Conducteur de Travaux' that was what he had trained for and was qualified and

experienced to do. Mr Mouton claimed that he had qualified at a special school in France for 'Conducteurs de Travaux', indeed the very best and he told the Court what was expected of a 'Conducteur de Travaux':

> "'A Conducteur de Travaux' is the project's manager. He is in charge of every aspect of the project, he is in charge of the financial aspect of the project and deals with the clients, he assures the site meetings with the clients, the architect and the subcontractors. This position is above the site foreman. A 'Conducteur de Travaux' can be in charge of several sites at the same time, whereas the foreman remains on one site. As a 'Conducteur de Travaux' my duty was to follow the progress of different works. I was quoting for different works. I was responsible for preparing quotations. I would sign tenders. I was in charge of all the works on the Islands and some of the work on Efaté. I was visiting the different sites once a week or twice per month. I was the projects' manager, the 'Conducteur de Travaux' I had to organise the ordering of the material, assuring the site meetings with the clients, and the architects and I issued the progress notices. I was responsible for the accounts of each project. In 1992, the middle of 1992, I quoted for the stadium. When the project came up seriously I was the only person who had any knowledge about this project. I was involved in the quotation work and even signed the contract in December 1992. The general management of the project was assumed by myself. I was also in charge of some of the administration work in the company. I was presenting financial statements requested by the Bank. They were financial statements requested by the Bank and I was in charge of preparing those documents. It is a common part of the duties of a 'Conducteur de Travaux' to present these accounts to the manager. I was in charge of the Santo road project. I made two visits to the project per months."

The long and short of it is that the 'Conducteur de Travaux' is the project's manager, with sole control of the project, with the duty to ensure that the project is built according to plan, within the time allocated, within the financial constraint of the project. He is also the person responsible for arranging any insurance for the project, calling in the equipment and material. In other words he has the complete management and responsibility for the proper running of one or more particular projects. In his employment he was answerable to and reported to Mr André François. Mr Mouton's contract was for a period of 2 years certain, expiring on the 31 July 1989. It was a contract written in French and which purported to be subject to the Joint Regulation Number 11 of 1969. That Joint Regulation that used to regulate the conditions of employment of workers in Vanuatu prior to 30 May 1983 has long ceased to have effect, for it was superseded by the Employment Act of 1983, which came into force on 30 May 1983: see Cap 160. Employment in Vanuatu since that date has been governed by that new Act. The contract purports to be made "in accordance with the provisions of section 5 of Joint Regulation 11 of 1969 on employment in the Republic of Vanuatu". Paragraph 11 of the contract states that the contract "... may not be terminated unilaterally by any one party prior to the date of expiry, except as provided under paragraph 3 [of the contract, namely for a serious offence] or in circumstances of 'force majeur' or Act of God or in the event of gross misconduct as provided in section 9 of the above Joint Regulation". An accurate translation of paragraph 14 of the contract states: "Any circumstances not provided for under this contract shall be dealt with in accordance with the provisions of Joint

Regulation No 11 of 1969 on employment in the Republic of Vanuatu". As stated above, that Joint Regulation no longer has the force of law and has not had the force of law since the 30 May 1983 and did not "govern" employment in Vanuatu at the time the first contract was made. Since the date of that first contract the parties entered into two further contracts in almost identical terms, the second on 1 August 1989 and the third on 31 May 1991.

It is an old established principle of common law that an employer may dismiss an employee without notice on the grounds of the latter's gross misconduct, so that such a dismissal would not be wrongful: See Callo v Brouncker (1831) 4 C&P 518. In modern times this is explained in contractual terms, as the acceptance by the employer of the repudiation of a contract by the employee: See Boston Deep sea Fishing and Ice Company v Ansell (1888) 39 ChD 339, CA. The question that now often arises in contractual terms, is whether the misconduct was sufficiently grave to amount to a repudiation by the employee of the terms of his contract of employment. This is of course a question of fact in any particular case. Previous case law is of limited precedent value as attitudes to certain misconduct may change over time. Wrongful dismissal has come to mean simply a dismissal in breach of the relevant provisions in the contract of employment relating to the expiration of the term for which the employee is engaged. If an employee is dismissed without sufficient cause to permit his employer to dismiss him, in circumstances where he is engaged for a fixed period or for a period that can only be terminated by notice, either before the expiry of the fixed period or without the required notice, the dismissal would be wrongful and would entitle the employee to sue for damages.

In the modern age, the terms and conditions of employment are often fixed by the parties themselves and these are incorporated in a contract of employment which may define or limit the terms under which an employer may dismiss his employee. A dismissal in breach of those terms would be a wrongful dismissal on that ground, entitling the employee to sue for damages.

In Vanuatu there also exists an Employment Act that sets out the general principles relating to contracts of employment. The first matter that must be born in mind is that the Act sets out a minimum standard for employees. It does not affect any law, custom, award or agreement which ensures more favourable conditions: See section 6. The second principle is that a contract for a fixed term exceeding 6 months must be in writing incorporating certain minimum particulars, including the names of the parties, the nature of the employment, the amount and the mode of payment of remuneration, and where appropriate, any other terms and conditions of employment including housing, rations, transport and repatriation. So that the law foresees that the conditions to be stipulated in a contract of employment are in no way exhaustive and that the parties can make their own bargain. Here it merely repeats the rule at common law: See section 9.

Clearly from reading the whole of the contract of employment in this case, it is plain that the parties intended that there should be certain conditions attached to that contract. A reading of the contract shows that the parties followed the conditions set out in section 9

of the Employment Act and went further. There is a legal maxim says: "nemo censitur ignorare legem", in other words, no one is meant to ignore the law. In the absence of evidence to the contrary, is the court to presume that the bargain made between the parties, not once, but on three separate occasions, was made in ignorance of the law, that is, in ignorance of the Employment Act CAP 160? The court can only give effect to the intentions of the parties. Looking at these three separate contracts, clearly the parties intended that conditions expressed in the Joint Regulation 11 of 1969 should, wherever possible, become expressed terms of these contracts. This is obvious from paragraph 11 and 14 to which I have already made reference above.

The parties have agreed in paragraph 11 of the contract of the 31 May 1991(the relevant contract here) that the contract may not be terminated unilaterally except in the ..... "event of gross misconduct as provided in section 9 of Joint Regulation 11 of 1969". We must, therefore, look at the terms of section 9 of the Joint Regulation, to see what the parties agreed to:-

> 9. (2) The following shall be considered as serious offences for the purpose of this Section and of Section 16-
> (a) misconduct;
> (b) wilful disobedience;
> (c) assault;
> (d) habitual (or substantial) neglect of duty;
> (e) repeated unjustified absence from work without leave;
> (f) drunkenness of a kind liable to have a serious effect upon work:
>
> Provided that the foregoing definition shall not be exclusive and provided further that the [Court] shall, in case of litigation, decide what constitutes a serious offence within the meaning of this Section.
>
> (3) Any unjustified breach of contract by one of the parties shall entitle the other party to claim damages.

One advantage that this Section brings to the employee, over and above Section 50 of the Employment Act, is that it sets out some of the major grounds upon which his contract of employment may be determined. In practice all those grounds could be grounds under section 50 of CAP 160, but here the employee is forewarned and knows partly what to look out for. There are no reasons why the parties could not have entered into such an agreement, nor is this in any way contrary to the body or spirit of the Employment Act. On the facts, I hold that this was plainly the intention of the parties and that the contents of section 9 of the Joint Regulation do form part of the express terms of the contract of employment between SELB and Mouton.

There is one other term to the present contract of employment that has given rise to submissions in this Court, that is the "tacite reconduction" clause of the contract.

Paragraph 1 of the first contract entered into by the parties purports to be a contract starting on the 1 August 1987 and ending on the 31 July 1989. It also contains this stipulation: "Le présent contrat sera renouvelé par **tacite reconduction** à l'expiration de cette période sauf si l'une des parties le dénonce 3 mois avant son expiration, par lettre recommandée."

On the 1 August 1989, Mr Mouton signed another contract in almost identical terms with SELB. Neither parties it seems, sought to rely on the "tacite reconduction" clause of the original contract. That new contract which expired on the 31 July 1991 also contained the same "tacite reconduction" clause. Again the Parties entered into a new contract for the third time, it seems that again they chose not to rely on the "tacite reconduction" clause of the second contract. This third new contract, which gave a substantial increase in salary to Mr Mouton, was in identical terms to the previous two. It too contained the 'tacit reconduction' clause. This last contract was to be renewed by 'tacite reconduction" unless three months prior to its termination, that is, three months prior to the 31 July 1993, notice had been given in writing by registered mail to the other party, that the contract was to end. In 1993 a new contract was not signed by the parties. The relationship between Mr Mouton and Mr François appear to have considerably cooled down in 1993. That was a year when they were extremely busy with a number of projects, including the construction of a new landmark in Vanuatu, the Korman Stadium, which had to be finished by the beginning of December 1993 as Vanuatu was hosting the Pacific mini games.

Having heard the evidence of both Mr Mouton and Mr François, I am certain that the fact that both men were busy on a number of projects during 1993, had nothing to do with the failure of SELB to sign a new contract with Mouton. It seems that both men were having second thoughts about their continued relationship, and that Mr François as the Director of SELB was not going to be rushed into signing a new contract with Mr Mouton. This seems to have considerably angered Mr Mouton, so much so that it provoked him into writing a very strongly worded letter to Mr François dated 27 October 1993, exhibit 11, which he personally delivered to Mr François. The first six paragraphs of that letter set out in scathing terms Mr Mouton's discontent at not having had his contract renewed. It states: "Je te rappelle, mais je pense que tu ne l'ignores pas, que je ne suis lié à la SELBE dans la présente situation que par le terme de 'tacite reconduction' de mon présent contrat. C'est vague et très léger". This can best be translated thus: "May I remind you, although I am sure that you are fully aware of it, that I am only linked to SELB in the present situation, by the term 'tacit reconduction' of my present contract. It is vague and rather loose."

The rest of the letter of 27 October 1993, appears to be a vitriolic and personal attack against Mr François by Mr Mouton, reciting what Mr Mouton perceives to be the gross mismanagement, on a human approach level of SELB, by Mr François. As it turned out, most of what was said in this letter was unsubstantiated in Court. If Mr François was indeed the slave driver he is made out to be in that letter, it is remarkable that his staff remained with him for as long as they have, and that none have left him. Clearly this letter

seems to have put an end to any 'entente cordial' and trust that may have existed between the two men. Mr François took it, as both men told the Court in their evidence, as a gross insult and a personal blow. Mr François told the Court that he had not got over it to this day and that he saw the greater part of the letter as unjustified. Now the Employment Act CAP 160 provides, as I said before, a minimum standard by which employees are protected. One of the acts that cannot be deemed to constitute misconduct by an employee is the making in good faith of a complaint by an employee. One of the questions raised as misconduct going to the root of the trust existing between the parties, is the letter dated 27 October 1993 addressed to Mr François by Mr Mouton. It is a question of fact for the Court to determine whether this was a complaint made in good faith by Mr Mouton or not. Having heard Mr Mouton and Mr François on the matter, I am quite certain that this letter would never have been written if Mr François had signed a new contract with Mr Mouton. On the evidence that I have heard, I am also further satisfied that it was not a complaint made in good faith. It is a vindictive, violent and personal attack on the Managing Director of SELB, motivated by the sole reason that he had not signed Mr Mouton's new contract. It went to the root of the trust that existed between the parties and destroyed what working relationship existed between Mr François and Mr Mouton. That is how Mr François regarded it and he was right. It was in my view, a sufficient ground of serious misconduct by Mr Mouton to justify his summary dismissal. Having received this letter, Mr François considered it over the week-end of the 27 October. He later met Mr Mouton and told him that he regarded it as a blow below the belt, but did not dismiss him. He sat on that letter for over 4 months before taking any action over it.

Section 50 (1) states:

> "*An employer shall be deemed to have waived his right to dismiss an employee for serious misconduct if such action has not been taken within a reasonable time after he has become aware of the serious misconduct*".

In my view, a delay of 4 months or more is not a reasonable period of delay. Therefore SELB could not have relied on that letter to dismiss Mr Mouton, albeit that it is in my view a sufficiently serious misconduct to have dismissed him.

Mr Mouton left Vanuatu for a two month holiday on 29 December 1993. The company had been left in what Mr François claimed to be a sorry mess by Mr Mouton. There were a number of complaints made to SELB by a number of clients, levelled at Mr Mouton personally. These concerned the management or rather the purported mismanagement by Mr Mouton, of a number of projects under his charge, these included, the Caillard Kadour Ellouk access road contract, the Mitride contract, the Langlois contract, the Yamaishi contract, the Santo Boat Shed project and the Santo Road project, to name just a few. We shall never know if it was the letter of 27 October 1993 alone or these complaints, that prompted Mr François to take legal advice from a lawyer, but upon Mr Mouton's return from holiday, indeed the very next day, Mr François told Mr Mouton that he was sacked. According to Mr Mouton no explanations were given at all save that Mr François told him

"Je ne peux plus te faire confiance". When Mr Mouton asked why, Mr François apparently replied: "C'est comme ça, j'ai pris ma décision, c'est terminé je ne reviendrai pas dessus". This can best be translated as follows: "I can no longer trust you". "It is like this, I have taken my decision, it is over and I will not go back on my decision". Mr François' evidence about the matter was not very different. He told the court that when Mr Mouton entered the office on 4 March 1994, he told him that as from now he had no trust in him, that he could no longer work with him and that after taking advice he was sacking him. "On the 4 March one of the first things I told Mr Mouton was that the letter he had sent me on October 27 had a lot to do with it. I also told him about the motive of the refurbishment of his office without first obtaining my consent. I also spoke to him vaguely about the situations of the various projects that had come to light during his absence. I also gave him other reasons but I cannot now recall them".

As a result of that dismissal, Mr Mouton sues SELB Pacific Ltd for breach of contract and wrongful dismissal and claims damages. SELB on the other hand, claims that the plaintiff had been properly dismissed for serious misconduct and counterclaims that the plaintiff's performance of his duty fell so far short of that which would have been expected of a professional man of his standing and experience, that it amounted to gross negligence and a breach of his contract of employment, for which SELB claims to have suffered considerable financial loss and damage to its reputation as a reputable building firm.

Monsieur Mouton relies on the "tacite reconduction" clause of his contract, claiming that this means that his employment contract is automatically renewed for a period, it is submitted on his behalf, of two years and that he is therefore entitled to damages for breach of contract at common law and to further damages under section 56 (4) of the Employment Act. SELB on the other hand, counterclaims inter alia that the words "tacite reconduction" has a very special meaning in French employment law, which they claim applied in Vanuatu prior to independence and still applies to date. Under that law, they say, unless the contract is renewed prior to its termination, the effect of the 'tacite reconduction' clause is to convert the contract into a contract for an unspecified period of time, which is determinable by three months' notice under section 49 (3) (a) of the Employment Act. They further claim that in any event, the plaintiff's contract was rightly terminated by them for serious misconduct and that the plaintiff is therefore not entitled to any damages or compensation under the Act or under the common law for breach of contract. Mr Ozols for the plaintiff counters this by submitting that French law does not apply to Vanuatu, that it has never been applied since independence and submits that in any event such a construction would be unfavourable to his client and contrary to section 6 of the Employment Act which states "Nothing in this Act shall affect the operation of any law, custom, award or agreement which ensures more favourable conditions..... " to his client. This begs the question of what exactly is meant in Vanuatu law by the term 'tacite reconduction'. Mr Mouton's third contract had come to an end by efflux of time on the 31 July 1993. Any claim that he may now have can only arise as a result of the effect of the 'tacite reconduction' clause of his contract.

Section 48 of the Employment Act states:

"*Subject to the provisions of this part a contract of employment shall terminate on the last day of the period agreed in the contract or on the completion of the piece of work specified therein*".

PARAGRAPH 1 of the contract states:

> "This contract shall be for a term of twenty four (24) months, corresponding to the term of residency of Mr Daniel Mouton in Vanuatu. It shall take effect from August 1st, 1991 and shall cease on July 31st, 1993. The present contract may be renewed by 'tacite reconduction' upon the expiry of the said term, unless one or the other of the parties hereto terminates the agreement by giving notice by registered letter three months prior to such date of expiry".

Section 15 of the Act states:

> "*The maximum duration of employment that may be stipulated or implied in any contract shall in no case exceed 3 years*".

Does the effect of the reconduction clause of this contract mean an extension of the original contract for an additional period of 2 years? If that is the case then the implied duration of the contract would be over the three years permissible by the law and would be ultra vires and therefore void; or has it a separate and distinct meaning that may bring it in line with the effect of section 15. The next question that arises is, what meaning is to be attached to the term 'tacite reconduction' regarding the period of the renewal of the contract? This is a Vanuatu contract, written in French, made between a Vanuatu company managed by a French (at the time of the original contract) general manager and a Frenchman.

The questions to be answered are twofold: 1) have those words a very special meaning in French law, and 2) does that law apply here in Vanuatu. It is submitted on behalf of the defendant that those words in French contracts of employment have a very special meaning, which is well established and are founded on the customary laws of France. It is further submitted that this interpretation forming part of the jurisprudence of France long before the independence of Vanuatu, would have had the force of law in Vanuatu prior to independence and it is further submitted that the Constitution of Vanuatu has specifically preserved, in the absence of other laws promulgated by Parliament, or where Parliament has not specifically revoked those laws, the application to Vanuatu of both French and English laws in the general sense, that is, statutes of specific or general applications as well as common or civil laws, that applied here prior to independence.

For these propositions the Court was referred to the Constitution Article 95. Article 95 (1) specifically preserves all Joint Regulations and subsidiary legislation made thereunder, in force immediately before the day of independence, subject to such adaptations as may be necessary to bring them into conformity with the Constitution. This has no application to the present case.

95 (2) "*Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom*".

It has been quite common since independence, in the absence of other laws applicable to Vanuatu, in the terms of Article 95 (2), to apply in these Courts either common law principles, precedents or Statutes laws of England. It would never occur to anyone practicing law in Vanuatu to submit that this was other than in conformity with the Supreme law of Vanuatu. Yet it is submitted on behalf of the plaintiff that, since French laws have not been applied by these Courts in Vanuatu (largely as a result of the ignorance of those that were practicing it or would have been called upon to apply it here), they no longer apply and should not be applied in the present case. To accede to this submission would be tantamount to saying that time can prescribe the Constitution, and that these Courts can ignore the Supreme law of the land and set itself up above Parliament. It cannot be done. In the instant case, there is a lacuna in the Vanuatu law. This Court has to fill it from laws applicable to Vanuatu. The Court has not been referred to any English authorities on the subject. Indeed the words to be interpreted are French words. It would not be right to translate them into English and then to give to that translation an interpretation that it would not have had in French or in French law. In that context French law is the law of Vanuatu, just as there are instances when English law is the law of Vanuatu. Clearly there are precedents in the context of the French laws on employment contracts, that are identical to the present facts and where the words 'tacite reconduction' were adjudged to have a particular meaning. In this context I was referred to the case of Société François Roussel v Machtelinck (495) Cass. civ. 23 octobre 1974. Machtelinck had been employed by the Appellant since November 1953. In 1960 he entered into a new contract of employment with the Appellant, for a term certain of 5 years. The contract was renewable by means of 'tacite reconduction' unless the contract was determined by letter sent by registered mail, one year prior to the date of expiry of the contract. The Court held that "since the contract did not contain a clause limiting the number of times that the contract could be renewed by means of 'tacite reconduction', it was therefore in its very nature a contract for an unspecified period. That the period stated in the contract itself was not alone sufficient to determine the duration of the contract". In other words, the contract must be looked at as a whole, if in its very nature it is a contract for an unspecified period, then the effect of the words 'tacite reconduction' simpliciter, means that the contract is one for an unspecified period and not one renewable for the period mentioned in the contract itself.

On this subject, the Court was also referred to Professor Bernard Teyssié's thesis on employment contracts of limited durations. He states at paragraph 374, under the heading 'Clause de tacite reconduction': "L'absence de précision de la clause entraîne la qualification de contrat à durée indéterminée. Ainsi, lorsque le contrat contient une clause prévoyant qu'à l'issue de la période initiale, il se continue par tacite reconduction, il a

toujours été qualifié par la jurisprudence de contrat à durée indéterminée". The translation is this: 'Referring to clauses of tacit reconduction in a contract': "The absence of precision in the clause has the effect of turning the contract into a contract for an unspecified period. Therefore, when a contract contains a clause that states that at the end of the initial period of the contract, it will renew by tacit reconduction, it has always been held in jurisprudence to be a contract for an unspecified period". He refers for that proposition to a case ref (243) Cass. civ. 4 nov. 1931. The Court also heard expert evidence on the matter from Maître Lombardo, a French lawyer from Nouméa. He was emphatic on the point, and referred to the same authorities referred to above. If the authorities the Court is referred to are correct, and since French law in this respect is the law of Vanuatu, expert evidence is not required, however grateful one may be for the assistance of a French lawyer in the field. The case law that the Court has been referred to above nevertheless, all remain persuasive authorities. We are only bound by the decisions of our Court of Appeal. This Court is highly conscious of the fact that Vanuatu jurisprudence is in its infancy and that we have to develop our own jurisprudence. In doing so, there is no harm in being persuaded by long established legal principles, founded on the bedrock of wisdom and tested on the steel of time. Another matter that must not be forgotten is that the Employment Act CAP 160 has, as its ancestor, Joint Regulation 11 of 1969. Perusal of the latter piece of legislation shows that in many respects, and with few exceptions, though important ones, the Employment Act was copied from it. Many of the sections of the Joint Regulation were copied into the Employment Act. The present section 15 is an exact copy of the former section 10. It is as well to remember that Joint Regulations were laws made for Vanuatu jointly by the French Resident Commissioner and the British Resident Commissioner. They were joint laws made for the New Hebrides in which concepts of the common law were married to concepts of French jurisprudence. If the contract were renewed by tacit reconduction for a further period of 2 years, it would mean that this would be a contract for an implied term of more than 3 years and as such the term would be void and the contract would expire on the 31 July 1993. On the other hand, if it converts to a contract for an unspecified period, the contract can be terminated by notice of usually three months. In this way section 15 is not affected in anyway. To terminate the present contract in normal circumstances, if the plaintiff has not repudiated the contract by committing some serious misconduct, would require notice of not less than 3 months under section 49. French laws would also apply to cases of intestacies of the estate of French nationals or 'optants', in contracts, donations inter vivos or to last surviving spouses, trusts, adoptions, guardianship of minors etc, where French nationals or 'optants' are involved, there being no Vanuatu laws covering those subjects, the Courts of Vanuatu would be bound to apply the French laws that existed prior to independence.

Now, having heard the whole of the evidence in this case, I am quite satisfied; indeed beyond a reasonable doubt, which is to a standard far higher than that which is required in the present case, that Mr Mouton's short-comings with regard to the Mitride house, the Ellouk access road project, the Santo boat shed project and the Santo Road project, for which he had sole responsibility, fell so far short of what would have been normally expected of a reasonably competent and experienced 'conducteur de travaux', as to amount to 'serious misconduct' for the purposes of section 50(1) of the Employment Act

CAP 160, and I so rule. As to the other contracts for which he was responsible, collectively, they may well have amounted to the same, although one need not be concerned with those at this stage. This means that he is in breach of expressed terms contained in his contract referred to in JR section 9 (2) (a) and (d). Although I do not propose to recite the evidence regarding these matters here in detail, I do nevertheless propose to recount the salient facts of each of these contracts in turn.

MITRIDE HOUSE

The construction of the Mitride house was the sole responsibility of Mr Mouton. The construction work on that house started after the Pacific mini games in mid December 1993, at a time when the pressure of work on the Korman Stadium was over. On this matter I heard the evidence of Mrs Mitride, Mr François and Mr Mouton. Mrs Mitride claimed that her house had been built contrary to the plans, facing inland towards neighbouring houses, instead of facing the sea, which was what the plan required. She told the Court that as a result of this, her neighbour's house had a view directly inside her sitting room and that they could not see the sea from their sitting room and overlooked instead neighbouring houses. The Court visited Mrs Mitride's house. Clearly, the present positioning of the house is as described by Mrs Mitride in her evidence. Mr Mouton, both in chief and in cross-examination, accepted that Mrs Mitride was correct in saying that the house had been built in a different position to that anticipated on the plan, but he claimed that Mr Mitride had been informed of the variation to the plan and had consented to the shifting of the position of the house. Mr François told the Court in his evidence that he had received complaints from Mr Mitride regarding the positioning of the house and as a result of which he came to an agreement to compensate the Mitride for the error. He provided the Mitrides with a wooden ceiling instead of a concrete one, and that they also had part of their land tarmacked at SELB's expense. This he claimed cost SELB an extra 333,779 vatu. On this point, I simply do not believe Mr Mouton's evidence that he had the consent of Mr Mitride to shift the house from its original planned position. I can think of nothing more infuriating than living in a house from which you expected to have a beautiful sea view and which ends up with a view over neighbouring houses. If Mr Mouton had been doing his work properly, he would have made sure that the house had been positioned according to plan. He simply could not have been present when the foundations had been layed or was so negligent that he totally failed to put the matter right when he noticed it, if he did. I have no doubt that if he had exercised the degree of care and expertise that could have been expected of him, this error would not have occurred. It also seems to me that the compensation that was paid to the Mitride and which was accepted by them, was trivial compared to what they might reasonably have expected to get in the circumstances. Mr François was quite right in mitigating the damages in the way that he did and as promptly as he did, thus saving SELB from having to pay what could have been substantial damages to the Mitrides.

THE ELLOUK ACCESS ROAD

The Ellouk access road project for Caillard Kadour, involved the subdivision of a piece of land at a place called Ellouk into 9 lots, which involved the construction of access drives to each of the plots. This was to be done under the direct supervision and management of Mr Mouton. Now, it is a well known engineering concept, and Mr Mouton told the Court so in his evidence, that such roads should not have a gradient of more than 1 in 4 or 25°.

On this matter, the Court heard the evidence of Messrs Mouton, François and Loïc Bernier, the latter being an employee of Caillard Kadour estate agency. It is common ground that this was a botched job. Access to plot number 5 was built in such a way that most cars attempting to gain access to the plot could not do so either at all or without scraping their under carriage on the ground. Although in his evidence in chief, Mr Mouton sought to blame the fault on the original design of the access, in cross-examination he had to accept that it amounted to carelessness, but then he tried to cast the blame on the site foreman. He said "It was not carelessness on my part that caused the problem. It was someone else's carelessness as well as my own." A site foreman is not an engineer, and it is no part of his duty to determine what is or is not acceptable as an engineering concept, but it is clearly the responsibility of the 'Conducteur de Travaux' and his alone. Again, I have no doubt that if Mr Mouton had inspected the site at the time when he should have done, the error would never have occurred. This is again an occasion when Mr Mouton's work fell far below the standard that one could have expected of him. Mr François tells us that the cost of putting right this blunder came to 1,338,900 vatu. This figure was accepted by Mr Mouton as being a correct estimate of the cost of the remedial work that had to be carried out. Once more, Mr François' prompt action saved SELB from considerable embarrassment and additional financial loss.

THE SANTO BOAT SHED PROJECT

The Santo boat shed project involved the construction of a boat shed at the end of the docks on Santo. This again was a project for which Mr Mouton was solely responsible. The problems there were that the purlins had been ordered 50 cms too short as well as the failure on the part of Mr Mouton to order braces. Those were eventually ordered by Mr François, but this resulted in delays to the constructions that ended up costing SELB 470,267 vatu in delay penalties and an additional freight cost of NZ$ 450, which would not have been incurred if Mr Mouton had ordered them at the same time as the purlins. Regarding this contract I heard the evidence of Mr Mouton and Mr François. In his evidence Mr Mouton accepted that in spite of being asked by letter dated 20 October 1993, whether he would not in fact need longer purlins than those he had ordered, he persisted in purchasing them at a length of 4.80 metre instead of the required 5.40 metres. He claimed in his evidence that he had done so in order to save money on the transportation, as containers could not take the required length. He nevertheless accepted that they had been ordered by him too short and that this would have occasioned further work by SELB. He ended up by saying that he did not know how the error occurred. Again this was another occasion where Mr Mouton's performance fell far below that which could have been expected of him. The settlement by Mr François of the penalty was no more than could have been expected in the circumstances and the prompt action of Mr François in settling the matter, once again saved not only the Company's reputation, but also additional further cost.

THE SANTO ROAD PROJECT

The Santo road project for which Mr Mouton had complete conduct and management was, if possible, the worse example of all when it comes to gross negligence. It amounted in my opinion to the worse possible example of dereliction of duty. This project involved the construction by SELB of 28 kilometres of road on the Island of Santo. This was a project financed by the European Union. The supervision of the work on their behalf was to be handled by a company called Kenhill Kramer. SELB were to construct the road and Mr Mouton was to be the project's manager with absolute authority. Regarding this project, the Court heard the evidence of Mr Mouton, Mr François and Mr Moodie. It seems that the tender for this project was put in towards the end of 1991. All the calculations had been done by Mr François, who used what we heard was a secret formula in order to do the calculations, before he went on holiday to Europe. At some stage, the tender had to be changed as there was a limit as to the amount of money that the European Union were prepared to put in this road building project. The calculation figures were altered. Mr François tells us that he has no recollection of ever giving the authority to vary the figures. Clearly the variations were made in the hand writing of Mr Mouton initially. Subsequently this was typed out and the letter accompanying the new calculations was signed by Mr François. Clearly when one looks at document exhibit 88 the letter dated 5 December 1991 which is accompanied by two other documents, BQ 3 and BQ 4, which set out a considerable reduction to the tender price, was in fact signed by Mr François. Mr François says in his evidence that he has no recollection at all about these documents. He accepts that the letter dated 5 December 1991 was signed by him, he points out merely that the forms BQ 3 and BQ 4 do not bear his signature. Nevertheless they are referred to in the letter of 5 December and the reduced figures themselves are shown in that letter. Mr François says that the only way that this could have occurred is for Mr Mouton to have altered the figures without his consent and since he had absolute trust in Mr Mouton, he would have signed the letter without looking at it. That may be so, but I cannot speculate as to how it came about. I note that this occurred at a time when the tender was being reopened because the original tender price offered by SELB, was well above the budget set out for it by the European Union. Of course, if the prices had not been reviewed, then SELB may well not have obtained the contract. Mr François was aware that the contract price that he had obtained was about 120 million vatu. So it is unlikely that he was not aware that figures had been altered to match the contract. I accept that he was not aware of exactly how this was arrived at and that he trusted Mr Mouton absolutely and that he may therefore have signed a letter agreeing to the reductions without having looked at it closely. At the same time I also note that there was at that stage no bad blood between the parties at all and it is unlikely that Mr Mouton would have set out deliberately to mislead Mr François about it. If any loss was caused to SELB as a result of this reduction, one could certainly not lay it at the feet of Mr Mouton, nor does he appear to have acted negligently with regard to that particular matter. Mr Mouton had the sole charge of this project and was appointed by Mr François to be in sole charge of this project and both men knew and understood that to be the case. Mr Mouton had the necessary training, experience and skills to be in charge of such a project or at the very least he had set himself up as someone who did. A number of things went seriously

wrong with the project. Mr Mouton puts it down to his being overworked. Yet he never at anytime complained to anybody that this was the case. Indeed he was always looking out for more work for SELB under his supervision. He also put it down to the fact that Mr François wanted him to concentrate on the Stadium project, thus giving him less time to concentrate on other projects. Even so, both parties say that Mr Mouton was on the Stadium site about 30 minutes per day, except for Wednesdays, when Mr Mouton spent half the day on site. Mr François told the Court that this was the first time that he had had the opportunity of observing how much time Mr Mouton was spending on any site. In his opinion this was far too little and he complained often about this to Mr Mouton who paid no notice. Mr Mouton claimed that he had other projects to manage and said that the time he spent on site was sufficient in all the circumstances. The one common thread that comes out of all of the evidence that I have heard in this case from all the witnesses, was that Mr Mouton was very scarcely on any site and very difficult to contact. It seems that he was never anywhere long enough for clients to meet and talk to him. This was certainly the experience of Mr Bernier over the Ellouk project and of Mr Langlois over the building of his house. Mr Langlois told the Court how on two occasions he had to go and camp outside Mr Mouton's office, threatening not to leave until he saw Mr Mouton, before he in fact saw him. Mr Moodie of Kenhill Kramer had similar experiences when he needed to see Mr Mouton, who was very difficult to contact.

One has no idea what Mr Mouton was doing in 1993, but he could not have been devoting the amount of time he claims to his projects or any where near the amount that he could have been legitimately expected to devote to his work. I simply do not accept Mr Mouton's evidence on the matter. The Santo Road project went badly wrong exactly because of Mr Mouton's failure to devote adequate time to its supervision. His standard of work there too, fell grossly below that which could have been expected of a person of his experience and skill. Having heard the evidence of Messrs Mouton, François and Moodie on the matter, I am quite satisfied that Mr Mouton was grossly negligent in that i) he failed to supervise either adequately or at all the building work of the road in Santo. Clearly the failure to compact the road sufficiently quickly after the cutting was made and the failure to build adequate drains fast enough after the road had been made, contributed to the damage done by the rains on Santo; ii) it was the duty of Mr Mouton to ensure that the project carried the appropriate insurance to cover SELB for eventual damage caused by the weather. The insurance expired in September 1993 and was not renewed by him, as a result of which SELB had to bear the full cost of the repair work to the road. Mr Moodie, who is a highly qualified civil engineer employed by Kenhill Kramer to supervise their side of the contract and who, for the purpose of this case, can be described as an independent witness, told the court that the responsibility for the damage to the road could be divided in his opinion in this way: 40% due to the rain and 60% due to poor or bad or untimely workmanship. The 60% bad workmanship portion that caused the loss to SELB was clearly as a direct result of Mr Mouton's negligence. The 40% that might have been recovered from the insurance by SELB was, nevertheless, lost again as a result of Mr Mouton's negligence in failing to take the necessary steps to make sure that the insurance was renewed. The other major matter which Mr Mouton failed to do was to put in a variation notice in time regarding additional work that had been done by SELB. This

almost cost SELB to lose the amount that they would have been due for the work. Mr Moodie had asked Mr Mouton to account for it, but he completely ignored the request. This according to Mr Moodie was a very serious breach of duty by Mr Mouton. Mr Moodie told the Court that this type of failure would almost certainly, in the case of his own company, have cost him his employment, so seriously is this type of breach considered to be in the building trade. I need not go into the whole of that evidence, the reasons why such a serious act of negligence is considered grounds for immediate dismissal are obvious. In the building trade, firms work on a tight cash flow budget. SELB was no exception and Mr Mouton who was in charge of SELB's budget reports to the bank, was fully aware of the tightrope on which SELB was operating at that time. His failure almost caused the company to go under. Mr Moodie is a highly experienced man in this field, and I agree with his view of the matter entirely. The other serious failure by Mr Mouton, which in my view would have entitled the company to dismiss him for serious misconduct, would be the fact that he completely failed to send in a variation notice and an invoice for the construction of a bridge. This failure was only noticed by Mr François in 1994. Nothing had been mentioned by Mr Mouton to anyone about its construction. The claim came in so late that Mr Moodie recommended that his clients do not pay for it. Again this caused a great deal of problems to SELB and involved Mr François in a considerable amount of further work and discussions before he obtained payment for it. Payments for this and the previous matter that I mentioned were considerably delayed and this in turn considerably aggravated the company's cash flow problems. In the case of the first matter it reached the stage where the Bank was putting a stop on the company's cheques. That these matters were all sorted out in the end, was due purely to the efforts of Mr François. It is right to describe the conduct of Mr Mouton over the Santo road project as a complete disaster. It amounted to the grossest possible negligence.

At common law, SELB would have been entitled to dismiss Mr Mouton without further ado. Even if he had been dismissed without the knowledge of this, the subsequent discovery of his failures would have fully justified the original dismissal at common law: See Harmer v Cornelius 5 C.B. (N.S.)238 and Boston Deep Sea Fishing and Ice Company v Ansell [1888] Chancery Division Vol 39.

It is also a well known and accepted principal of common law that repudiation by one party alone does not terminate the contract, it requires acceptance by the other: See Banque Indosuez Vanuatu Ltd v Ferrieux Civil Case No 1 of 1990 and Gunton v London Borough of Richmond upon Thames [1980] 3 All E.R. 567. In this case the behaviour of Mr Mouton would certainly have been enough to amount to a breach of his contract of employment. The dismissal by Mr François of Mr Mouton would have been justified and would simply have amounted to an acceptance by SELB of the repudiation by Mr Mouton of his contract of employment. Any action at common law for breach of contract by Mr Mouton in these circumstances fails completely. Far from SELB having breached his contract, it is Mouton himself who, through his serious misconduct and gross negligence, has breached the terms of his employment contract (set out in section 9 of the Joint Regulations (a) and (d)) with SELB. Mr François' dismissal of Mr Mouton on the 4

March 1994, amounted merely to an acceptance by SELB of Mr Mouton's repudiation of his own contract of employment.

Here it is not the common law alone that applies, but also the Employment Act CAP 160.

Section 50 states:

> "*In the case of serious misconduct by an employee it shall be lawful for the employer to dismiss the employee without notice and without compensation in lieu of notice*".

This is subject to section 50(3) which states:

> "*Dismissal for serious misconduct may take place only in cases where the employer cannot in good faith be expected to take any other course*".

And this is also further limited by section 50(4) which states:

> "*No employer shall dismiss an employee on the ground of serious misconduct unless he has given the employee an adequate opportunity to answer any charges made against him and any dismissal in contravention of this subsection shall be deemed to be an* ***unjustifiable dismissal***".

Therefore the consequence of this Act is to give a protection to the employee that he would not have had under the common law. Even though he might be in breach of contract, and even though his contract of employment may be at an end, his employment itself is not. It is open to the employer "*to take some other course*" in the words of section 50 (3), rather than dismiss him. It also gives the employee an additional ground to receive some form of compensation that he would not have been entitled to at common law. I said above that if Mr Mouton sued SELB for damages for breach of contract, that action would be bound to fail in the circumstances of this case. On the other hand if he brought an action under section 50 of the Act, as he has done here as well, different principles would apply. The Court would have to consider the evidence to see whether 1) there had been serious misconduct by Mr Mouton justifying dismissal without notice and compensation; 2) whether the employer had given the employee an adequate opportunity to answer the charges made against him; and finally the Court would have to consider 3) whether in all the circumstances the employer could not in good faith have been expected to take any other course. Only then could the employer dismiss without notice and compensation.

As to the first point, I have no doubt, Mr Mouton's conduct would have amounted to sufficiently serious misconduct as to justify his dismissal without compensation. I must then ask myself, did Mr François give Mr Mouton **an adequate** opportunity to answer the charges made against him before dismissing him. The evidence here discloses the opposite. I have no doubt, and I accept the evidence of Mr François, that he did on the 4

March 1994 tell Mr Mouton that he was dismissing him and that he did tell him the gist of why he was doing so and that it was for serious misconduct on his part, but that is not sufficient. I must ask myself whether Mr François did in fact give Mr Mouton **an adequate opportunity** to answer the charges levelled against him before dismissal. The evidence clearly discloses that he did not do so. Mr François told the Court that when Mr Mouton entered the offices of SELB on 4 March 1994, the doors to Mr Mouton's office were locked. He had a short conversation with Mr Mouton in which he told him that he was dismissed and very briefly told him the reasons why and that he would not go back on that decision. This accords substantially with Mr Mouton's recollection, although there are some differences. I need not go further and consider whether a reasonable employer in the circumstances might have decided to take any other course, for example, to reduce his salary or withdraw some particular benefit, instead of terminating his employment. It is my view that in all the circumstances of this case Mr François did not give Mr Mouton the **adequate opportunity** required under section 50(4), to answer the charges levelled against him before terminating his employment. Since quite plainly Mr Mouton's serious misconduct was a repudiation of his contract, his dismissal by Mr François was merely an acceptance of that repudiation by SELB, which terminated that contract in common law: see Heyman v Darwins Ltd [1942] AC 356 at p 361 and Gunton v Richmond L.B.C. supra. Under the common law that would have been an end to the matter, but here under section 50(4) such a lack of an opportunity to answer the charges is deemed to be an **unjustified dismissal.** Not a wrongful dismissal but an unjustified dismissal.

The next question that must be answered is: what is an employee entitled to claim if his dismissal is unjustified under section 50 of the Act? Section 53(1) sets out what the employee would be entitled to, in the event where:

> "*.... an employer illtreats an employee or commits some other serious breach of the terms and conditions of the contract of employment, the employee may terminate the employment forthwith and shall be entitled to his full remuneration for the appropriate period of notice in accordance with section 49 without prejudice to any claim he may have for damages for breach of contract*".

This is in effect a restatement of the common law position but giving the employee additional grounds under which he may be entitled to terminate his contract and claim damages. What section 53 does not tell us is what would be the entitlement of an employee who is unjustifiably dismissed under section 50(4), but not as a result of any "ill treatment or in breach of his contract of employment" by the employer. In other words, that section does not tell us what award the Court may make where it finds that the termination of the employment of an employee was **unjustified** under the Act, albeit that it was the employee who was in breach of contract. Plainly the employee would not be entitled to any damages for breach of contract or for remuneration for the appropriate period, under section 49.

The Employment Act states:

54(1) "*Subject to section 55 where an employee has been in continuous employment for a period of not less than twelve months, with an employer on a contract of employment entered into before or, on or after the date of commencement of this Act, and -*

(a) *the employer terminates his employment;*

the employer shall pay severance allowance to the employee."

The Act foresees that the employee shall be entitled to severance allowance where his employment is terminated by his employer. This section does not tell us in what circumstances severance is not due; but section 55 does.

55(2) states: "*An employee shall not be entitled to severance allowance if he is dismissed for serious misconduct* ***as provided in section 50***".

Put in simple terms, any employee who is dismissed by his employer is entitled to severance pay, except if he is dismissed for serious misconduct as provided in section 50. If he is not, then he is entitled to severance pay, albeit that he is in breach of the terms and conditions of his contract of employment. The contract of employment is at an end, but not the employment itself, unless the employee is dismissed pursuant to section 50. Mr Mouton, I have already found, was not dismissed **as provided by section 50** since he was not given **an adequate opportunity** to answer the charges under section 50(4). Therefore is Mr Mouton entitled to any severance allowance, and if so to what amount?

Mr Mouton was recruited in France by SELB in 1987. Indeed his contract was signed in France prior to his arriving in Vanuatu on 13 August 1987. At the time he was recruited he was ordinarily resident in France. He arrived here in 1987 and since then, his contract of employment was renewed twice, in 1989 and again in 1991. Does that in any way affect the position of Mr Mouton?

Section 54 (1) states

"*Subject to section 55 where an employee has been in continuous employment for a period of not less than twelve months, with an employer on a contract of employment entered into before or, on or after the date of commencement of this Act, and*

(a) the employer terminates his employment;

The employer shall pay severance allowance to the employee...."

Section 55 (1) states

"*severance allowance shall not be payable to an employee who has been recruited outside Vanuatu and is not ordinarily resident in Vanuatu*".

On the facts, clearly Mr Mouton was recruited outside Vanuatu but of course at the time that the severance allowance became due he was ordinarily resident in Vanuatu. The fact that he now does reside in Vanuatu and that it is as a consequence of his employment, does not disqualify him from benefiting from the entitlement of severance allowance. To exclude him from the benefit of severance allowance the words "*and is not ordinarily resident in Vanuatu*" would have had to have been excluded. What amount of severance allowance is Mr Mouton entitled to in the circumstances? In the case of Banque Indosuez Vanuatu Ltd v Ferrieux Vanuatu CA No 1 of 1990 at p 13 the Court of Appeal stated:

> "We have had considerable difficulty with section 56 (4). In this context, we take "shall" to mean "must". So that where a Court finds that a dismissal was "unjustified" it is obliged to make an award under this head, subject to a maximum figure. But the Act gives no guidance as to how that award is to be assessed, whether it is intended to be punitive or merely compensatory, what considerations are to be taken into account, or whether it is additional to or to be set off against any award of damages at common law. We must try to extract those guidelines from general principles and from the rest of the Act ..... The intention of Part XI, which deals with severance allowances appears to be no more than to ensure that at the end of his employment an employee will receive, in one way or another, a minimum sum calculated according to his length of service. We say "in one way or another" because under section 57 the employer may deduct from severance allowance certain other payments made by him for the benefit of the employee..... In our view section 56 (4) does not give the Court power to award a sum akin to aggravated or punitive damages, or for loss of career prospects. It merely enables the Court to compensate an employee for any special damages that he has suffered by reason of an unjustified dismissal, if the basic severance allowance is insufficient for that purpose. The law presumes that a person should not be compensated twice for the same wrong so that any award under this statutory head must be set off against any award of damages at common law. The Chief justice appears to have awarded damages under this head by reason of the manner of the dismissal. In our view that is not permissible and only the basic severance allowance should be paid"

The Court then proceeds to consider what can be taken into account as part of the "salary" in the calculation of severance allowance under section 56 (2) and after considering sections 16 (2), 16 (8) and 17 their Lordships say:

> "The term should be given the same meaning throughout the Act. In many places "remuneration" clearly means 'payment in money". Accordingly we hold that "remuneration" for the purpose of section 56 (2) means salary only."

In other words, this has two consequences concerning Mr Mouton's claim under section 50: i) in calculating the severance allowance due to Mr Mouton, any salary that he has received in the first three months after his dismissal must be accounted for and must be deducted from the amount of his severance allowance and ii) only the salary that he was receiving can be taken into consideration when assessing severance and not the other benefits to which he might have been entitled to as a consequence of his contract of employment. In the words of the Court of Appeal in the case of Ferrieux:-

"section 56 (4) does not give the court power to award a sum akin to aggravated or punitive damages, or for loss of career prospects. It merely enables the Court to compensate an employee for any special damages that he has suffered by reason of an unjustified dismissal."

To this extent only, the plaintiff succeeds in his claim against SELB. In this case, for reasons that will be made clear later on in this judgment, the exact amount of severance allowance owing to Mr Mouton cannot be ascertained by this court on the present evidence that it has. All that can be said is that whatever this sum may be at the end of the day, it cannot be greater than 2,304,167 vatu. This present sum was arrived at by using the method of calculation in section 56. Mr Mouton having been in continuous employment with SELB between 1 August 1987 until 4 March 1994, namely 6 years and seven months. Therefore 350,000 x 6 = 2,100,000 + (350,000 -:- 12 x 7 = 204,167)= 2,304,167 vatu.

COUNTERCLAIM

The defendant counterclaims for damages for breach of contract as a result of the plaintiff's negligence. Regarding three of these matters, I consider the claim too vague and remote to hold that the loss that occurred to SELB was as a result of Mr Mouton's conduct. It appears that in many instances the exigencies of the clients might have been a substantial contributing factor. These are with regards to The Stevens' House, the Langlois' House and the Yamaishi's house. As for the landing strip on the Santo Road project, however unwise an investment, Mr Fançois knew about it. For that as well I do not propose to award any damages. The same applies to the refurbishment of the SELB offices. When Mr François found out about it, he did nothing to stop it, on the contrary, he ordered refurbishment of the rest of the office. Regarding the Clos d'Ellouk, the Mitride House, the Santo Boat Shed and the Santo road, I have absolutely no doubt whatsoever that it was as a result of the plaintiff's negligence that SELB suffered these losses. In each of these projects, for which he had sole control and management, he acted so far below the standards required of a 'Conducteur de Travaux' as to amount to gross negligence. The damage that was likely to be suffered by SELB would have been obvious to anyone. Mr Mouton failed in his duty of care to his employers to ensure that the work with which he was entrusted was adequately and properly carried out. I note that in paragraph 9 (3) of the Joint Regulation of 1969, which I have already said formed an integral part of terms and conditions of employment, preserves specifically the right of the parties to sue for breach of contract. This is merely a declaration of a contracting party's common law rights. The damages suffered by SELB were foreseeable and in no instance has SELB failed to mitigate its loss where it was able to, as indeed they did in the Mitride case. In the other projects that I have mentioned, it would have been impossible for SELB to do anything to mitigate their loss. All the claims here are for liquidated damages. It was claimed on behalf of the plaintiff that there is no precedent known to him, where an employer has claimed for damages for breach of contract as against the employee. Although it is true that such examples are rare, as usually the employer would use his

power of dismissal and retain payment of salary, thus incurring no damages, nevertheless precedents do exist. The classic case is Lister v Romford Ice Co (1957) A.C. 555. Further on the evidence that I have heard, I hold that there has been no contributory negligence on the part of SELB or of any of its other employees, which would or could absolve Mr Mouton of his liability towards SELB. The amount of liquidated damages that I find proved are as follows:

d)	The Clos d'Ellouk		= 1,338,900
e)	Mitride House		= 333,779
f)	Santo Boat Shed		= 341,855
g)	The Santo Road		= 3,939,300
		Total	= 5,953,834 vatu

On this sum interest will be added at the rate of 10% since the date of the original pleadings.

There is an outlandish claim made for loss of reputation by SELB in the sum of 100,000,000 vatu. Having heard the evidence in this case, it is quite clear that, if anything, the reputation of SELB has been enhanced as a result of Mr François' behaviour. This was in no way due to Mr Mouton, but clearly it has not been established at all, that SELB has lost any of its reputation or good will. I do not therefore propose to award anything under this head.

The matter does not end there because, as a result of his breach of contract, the defendant now claims an injunction order restraining the plaintiff from exercising his profession in Vanuatu for a period of 2 years and a further injunction restraining the defendant from using or disclosing any confidential information he has gained as a result of working for SELB. Clause 3 (3) of the contract of employment states: "In the event that the agreement is determined by Mr Daniel Mouton, or by reason of gross misconduct on his part, he shall strictly refrain from pursuing any activity related to his profession in the Republic of Vanuatu for a period of two years from the termination of the contract".

I am referred for assistance by counsel for the plaintiff to the case of General Bill Posting Company Limited v Atkinson [1909] A.C. 118. The test there being: "That the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract", the fact there were that the appellants had dismissed the respondent in deliberate disregard of the terms of his contract of employment and were thereafter seeking to rely on a restraint of trade clause in the contract. The present is the converse situation. It is the plaintiff who has breached the contract. The bargain between the parties entered freely between them foresaw that the plaintiff would not exercise his profession in Vanuatu in the event of a breach of contract on his part. I have to consider whether that is a reasonable restraint of trade. The plaintiff is a French national who has been working in Vanuatu for the last 8 years. He is a skilled 'Conducteur de Travaux" who has worked for the largest building firm in France in his time. He says that he now wishes to settle in Vanuatu. It would be difficult for him to do so if he could not exercise

his profession here. On the other hand he entered freely into the bargain and understood very well the engagement that he was making towards SELB. The second element that I propose to look at at the same time is the element "trade secret". The defendant also ask the Court for an order preventing the plaintiff from disclosing to third parties what they call "the confidential" information that he may have obtained while working for SELB. I accept the general proposition, put forward on behalf of the plaintiff that a former employee is entitled to make use of all the skill and knowledge that an employee of his kind would have acquired in the course of his former employment. What is in effect protected is a "trade secret". The leading authority on the point in England is Faccenda Chicken Ltd v Fowler and others (1986) 1 All E.R. 617. The ratio being that the duty of fidelity owed by an employee to a former employer was not as great as the duty implied in the employee's contract of employment and owed during the subsistence of the employment, when use or disclosure of confidential information, even though it did not amount to a trade secret, would be a breach of the duty of good faith. Accordingly, confidential information concerning an employer's business acquired by an employee in the course of his service could be used by the employee after his employment had ceased unless the information was classed as a trade secret or was so confidential that it required the same protection as a trade secret. In that case Neill LJ set out four points that would assist to determine whether information was a trade secret or its equivalent at p 626 he stated:

> "In order to determine whether any particular item of information falls within the implied term so as to prevent its use or disclosure by an employee after his employment has ceased, it is necessary to consider all the circumstances of the case. We are satisfied that the following matters are among those to which attention must be paid. (a) The nature of the employment. Thus employment in a capacity where 'confidential' material is habitually handle may impose a high obligation of confidentiality because the employee can be expected to realise its sensitive nature to a greater extent than if he were employed in a capacity where such material reaches him only occasionally or incidentally. (b) The nature of the information itself. In our judgement the information will only be protected if it can properly be classed as a trade secret or as material which, while not properly to be described as a trade secret, is in all the circumstances of such a highly confidential nature as to require the same protection as a trade secret eo nomine. (c) Whether the employer impressed on the employee the confidentiality of the information. Thus, though an employer cannot prevent the use or disclosure *merely* by telling the employee that certain information is confidential, the attitude of the employer towards the information provides evidence which may assist in determining whether or not the information can properly be regarded as a trade secret. (d) Whether the relevant information can be easily isolated from other information which the employee is free to use or disclose".

In his evidence Mr Mouton has accepted that he had, particularly during the latter part of his employment a wide scope of autonomy. He was in charge of whole projects on his own and was responsible for preparing quotations and contracts totally independently of Mr François. At one stage in cross-examination he said: "*If I suddenly stopped working it would cause difficulties for SELB. Not only because of the projects but also because I had a lot of confidential information regarding SELB at that stage*". Later he said: "*All the data about all the rates were on the SELB computer and also on my personal*

computer. That was extremely confidential information to SELB and would be of great value to SELB's competitors in tendering against SELB. These rates comprised rates for almost every aspect of a construction company's rates. Similarly, I had all the data for the Santo road project, and Mr François had is own method of calculation for road works". Again later in cross-examination he said: *"I now see a bundle of documents with 9 pages marked with an X on the front page. I personally attended at George Vasaris during discovery in this case and I obtained a copy of that document at the time. These documents relate to careful workings out of costing calculations. That document sets out the unitary cost of each type of work as undertaken by Mr François. This document in my possession would allow me to quote for projects similar to Mr François. These documents are confidential to SELB. I do not now have a copy of such a document".* Mr François in his evidence described the same document thus: *"If this document I hold in my hand should fall in the hands of a competitor, then it would be the soul of the business that would be affected. Anyone who would have my prices could remove 5% profit and beat me on a tender. This private formula is never disclosed to anyone ever".* The only other person who, as a result of his close cooperation with Mr François, had the knowledge of this "secret formula" was Mr Mouton. As a result of his work, Mr Mouton would have had access to and would have been required to use at regular intervals the "secret formula' of SELB. Indeed he made no secret of the fact that he had seen it and that at one stage he had it on his own computer. Can I also ignore the evidence that as soon as he left SELB he did a project for Messrs Russet and won in a project contest as against SELB where the difference in prices was very small and yet leaving a sufficient margin of profit!

In the case of Herbert Morris Ltd v Saxelby (1916) 1 A.C. 688 at 709 Lord Parker CJ referring to covenants against competition made between employer and employee said:

> "It is quite different in the case of an employer taking such a covenant from his employee or apprentice. The goodwill of his business is, under the condition in which we live, necessarily subject to the competition of all persons (including the servant or apprentice) who choose to engage in a similar trade. The employer in such a case is not endeavouring to protect what he has, but to gain a special advantage which he could not otherwise secure. I cannot find any case in which a covenant against competition by a servant or apprentice has, *as such*, ever been upheld by the Court. Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of and influence over the customers of his employers, *or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilize information confidentially obtained*".

I also note that the covenant in this particular case applies to the whole of Vanuatu. I have also to consider if therefore it is reasonable in those circumstances. Vanuatu is of course, a very small country. It has in fact only two centres of industry and commerce. We have a population of 150,000 inhabitants. There is not the room as in other larger

countries, for competition, should it be deemed to be disloyal or in breach of a trade secret to operate beyond a certain limit or boundary. Here everyone knows SELB and a great many Mr Mouton as well. The effect is therefore that unlike those larger countries, one could not delimit an area of Vanuatu where Mr Mouton's work would not directly affect SELB's. I also bear in mind the evidence given by Mr Mouton regarding the type of work that he has been doing since he has left SELB, as well as the quantity of work that he has been doing. I found his evidence on this not merely unconvincing, but untruthful. He has clearly busied himself in the same trade and profession as SELB's and in open competition with SELB. I find, on a balance of probabilities, that he has also been using the very special secret formula known to Mr François and acquired by him to enter into competition with SELB, the Bouffa road project is an example. If I were to apply the test enunciated by Neill LJ, in the Faccenda Chicken Ltd v Fowler case ante, (a) the nature of the employment, (b) the nature of the information itself, (c) whether the employer impressed on the employee the confidentiality of the information, and (d) whether the relevant information can be easily isolated, I would be bound to answer each in favour of SELB. I accept from all that I have heard in this case, that the particular figures used by SELB to calculate their project when answering a tender, is such that in my judgement it is to use the words of Neill LJ "information that can properly be classed as material which, while not properly to be described as a trade secret, is in all the circumstances of such a highly confidential nature as to require the same protection as a trade secret eo nomine". It is the "soul" of the company, as Mr François told the Court. Mr Mouton was well aware of it and of the damage that he could inflict on the company if he were to put such information as he has into use to compete with the company. He was the only other person in the company to whom that information would be imparted on a regular basis, indeed each time that he had to quote for tenders. That information is well known to Mr Mouton after six years working for SELB and in my judgment is not of a nature as to be easily isolated from other information which the employee is free to use. A covenant not to operate his trade in Vanuatu for a period of two years is, in all the circumstances, not unreasonable. Mr Mouton is a skilled man, who could easily go back to Europe and exercise his trade there or alternatively, he is of course, entirely free to operate some other business in Vanuatu.

Therefore in the whole of the circumstances of this case, and for the reasons that I have stated above, I propose to acceed to the prayer for an injunction restraining Mr Mouton from exercising any activity in connection with his trade as a 'Conducteur de Travaux' in Vanuatu for the next two years from this order, and further from divulging to any third party the "secret formula" of SELB.

I mentioned earlier on in this judgement that I found it difficult to assess Mr Mouton's exact entitlement under the severance claim. This is simply because I do not believe his evidence regarding the amount of work that he did between March and May 1994, nor do I accept his evidence that he did not work and did not earn during that period. He will have to produce all his accounts for that period in order for an investigation to be made to assess the true sum that is owing to him. That sum when established, will also bear interest at the rate of 10% as from the date of the original pleadings in this case, and will be set off against the sum that he owes to SELB.

Delivered at Port Vila this 13th day of April 1995

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX REPUBLIQUE DE VANUATU

E.J.