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

Civil
Case No. 15/63 SC/CIVL

BETWEEN: KEYONG SIK JANG (T/A J K General Machinery)
Claimant

AND: STEVEN REMY (T/A Santo Earth Works)
Defendant

Hearing: ***9th August 2017***
Before: ***Justice Chetwynd***
Counsel: ***Mr Kilu for the Claimant***
Mr Tari for the Defendant

JUDGMENT ON QUANTUM

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1. On 4th August 2016 I handed down a judgment on quantum in this case. It followed a decision on liability earlier in the year. The decision on quantum was appealed and on 18th November 2016 [1] the Court of Appeal allowed the appeal and remitted the case to the Supreme Court.

2. Directions were given for a fresh hearing on quantum which was fixed for today 9th August. Before the hearing started counsel approached me in Chambers and requested that the matter be dealt with on written submissions and by reference to a court bundle prepared by the Claimant (and agreed by the Defendant) and the appeal book which was before the Court of Appeal in November last year.

3. For the sake of completeness the basic facts of the case need to be recited. They are quite simple. In 2012 the Claimant ("Mr Jang") bought some plant hire equipment in Korea and shipped it to Vanuatu, to Luganville to be precise. Before Mr Jang could make use of it the Defendant ("Mr Remy") became involved. He issued proceedings against another company. He obtained judgment against that company and issued enforcement proceedings. He had also made an application pursuant to Rule 7.8 of the Civil Procedure Rules for what used to be known as a Mareva Order which is an order whereby property is seized and effectively frozen until the judgment debt is dealt with. The plant hire equipment imported by Mr Jang was seized under that order. On 25th July 2014 the Court of Appeal allowed an appeal [2] by Mr Jang which effectively set aside the enforcement warrant and ordered Mr Remy to return the equipment which had been wrongfully seized. In the 2014 decision the Court noted the freezing order was made on 1st October 2012. In the 2016 Court of Appeal decision the date the equipment was returned to Mr Jang is variously stated as 13th August 2016 (paragraph 2), August 2014 (paragraph 16) and 13th August 2014 (paragraph 19).

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[1] *Remy v Kyong Sik Jang* [2016] VUCA 47; Civil Appeal Case 3420 of 2016 (18 November 2016)
[2] *Kyeong Sik Jang v Santo Earthworks*[2014] VUCA 16; Civil Appeal 12 of 2014 (25 July 2014)

There is no apparent dispute the equipment was returned to Mr Jang on 13th August 2014.

4. The present case arose from Mr Jang's claim against Mr Remy's firm, Santo Earth Works. It was founded on the undertaking given by Mr Remy prior to the freezing order being granted and for a claim for damages for loss of use.

5. Following a hearing the decision of 4th August 2016 was given after I attempted to assess damages on the only figures presented in the case by Mr Jang. The Court of Appeal said the decision was seriously flawed.

6. The Court of Appeal also said:

> *"...we consider the more appropriate method of assessing damages would be a reasonable hire charge from 13 March 2013 when the machinery was delivered to the appellant by the Sheriff until 13 August 2014 when the machinery was returned to the respondent."*

The Court then referred to the English case of *Strand Electric and Engineering Co Ltd v. Brisford Entertainment* [1952] 2QB 224. The Court referred to Lord Denning's comments at page 254 and *"especially"* Romer L.J.'s comments at page 256.

7. There are several comments by Lord Denning in that case which are pertinent. He said at page 254 in the second paragraph:

> *"If a wrongdoer has made use of goods for his own purposes then he must pay a reasonable hire for them, even though the owner has suffered no loss."*

Later at the foot of page 254 he says:

> *"The claim for a hiring loss is therefore not based on loss to the plaintiff, but on fact that the defendant has used the goods for his own purposes."*

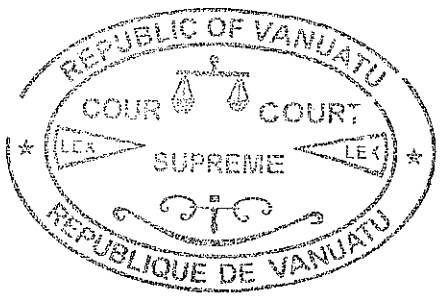
At the top of page 255 he adds:

> *"It is an action against him because he has had the benefit of the goods. It resembles, therefore, an action for restitution rather than an action of tort. But it is unnecessary to place it into any formal category. The plaintiffs are entitled to a hiring charge for the period of detention, and that is all that matters."*

8. Romer L.J.'s comments at page 256 include the following;

> *"...the defendants...sought to contend that they could not be said to have used the equipment because they did not actively operate the switchboards. This, in my opinion, is immaterial."*

Later Romer L.J. says:



"... the question is whether Mr Caplan is right in his proposition that if the use of an article has a recognized hiring value then such value constitutes the measure of damages recoverable by the owner from a defendant who, by wrongful detention, has the use of that article."

He answers that question by saying;

"...I am of opinion that on principle Mr Caplan's proposition is sound"

More importantly he says towards the end of the second paragraph on page 256;

"*What loss has the plaintiff suffered by reason of the defendant's wrongful act ? In determining the answer to this inquiry the question of quantifying the profit or benefit the defendant has derived from his wrongful act does not arise; for there is no necessary relation between the plaintiffs' loss and the defendants' gain."*

At page 257 (third paragraph) Romer L.J. concludes;

"The full hiring charge for the switchboards over the period of unlawful detention has been found to be just over GBP 400, and it follows from what I have said that in the absence of other considerations that is the sum which, in my judgment, should be awarded as damages to the plaintiffs."

9. It does appear to be plain from all these comments that the period over which the loss occurs and upon which damages are to be assessed is the period of detention by both the Sheriff and later by the Mr Remy. The Mareva order or freezing order was made at Mr Remy's request. He had *"use"* of the equipment until the Court of Appeal allowed Mr Jang's appeal in July 2014 and the Sheriff returned the plant hire equipment to Mr Jang in August of that year.

10. When, in 2016, the Court of Appeal remitted the case to the Supreme Court it said:

"We have considered the possibility of making a fresh assessment in this appeal but given the serious short-comings in the evidence including the absence of any expert assistance, such an assessment would be to engage in unacceptable speculation which this Court must decline to do."

Unfortunately the situation is unchanged. There is more "evidence" by way of sworn statements from Mr Jang and Mr Remy but no independent expert evidence.

11. In submissions Mr Remy concentrates on the comments made by the Court about the "value" of the plant hire equipment. The Court did say;

" In adopting the rates and method of calculation for the loss of income deposed by the respondent, the trial judge awarded him damages in excess of VT 54 million for "second-hand" machinery that on the respondent's own admission, cost just short of VT10 million to acquire in Korea. The award therefore translates into an extraordinary return of five (5) times the value of the respondent's capital investment over a period of less than 2 years. Furthermore on the respondent's own valuation in Civil Case No. 178 of 2012 "The market

price of the machinery was VT25 million". Whatever method is adopted for the calculation of damages, an award should not constitute an unjustified windfall.

With respect to the Court of Appeal, other costs of acquisition were overlooked by them. There was evidence before the Court in the appeal book with sworn statements exhibiting documents showing shipping costs of US$ 78,900, refurbishment costs of US$ 22,650 and duties and other payments on entry to Vanuatu of VT 1,508,475 together with storage charges in the region of VT 3,166,948. There is no formal evidence of the dollar vatu exchange rates for 2012 but my own research of specialist currency exchange websites seem to indicate a rate of VT 94 or VT 95 for 1 US$. That would mean that the US$ costs and import costs would amount to at least another 10,000,000 to 15,000,000 Vatu. Those costs would in all probability be part of the *capital investment* referred to in the 2016 Court of Appeal judgment.

12. Mr Jang makes submissions along those lines and points out that the valuation of VT 25 million was one produced by Mr Remy in Civil case 178 of 2012. In the circumstances it could be accepted that the capital investment made by Mr Jang was between VT 20 million and VT 25 million. However, as before the Court of Appeal there are short-comings in the evidence before me now and no expert assistance on the value or Mr Jang's capital investment.

13. For that reason I am unable to take advantage of the Court of Appeal's suggested approach to assessing damages;

"An alternative approach could be to award a reasonable percentage of the capital value of the machinery on the basis that the value to the respondent of that use is at least that amount otherwise he would not have bought the machinery..."

Or;

"Alternatively another realistic assessment of the measure of damages might be based on the value of the capital tied-up ie. a proper rate of interest on original costs less depreciation..."

14. I propose to fall back on the possibility of establishing "*a reasonable hire charge*" using evidence from both the claimant and the defendant. I will start with the excavator. Mr Remy's evidence is that such equipment would likely as not only be hired out once a year. Mr Jang produces an invoice which shows that Mr Remy entered into a wet hire agreement with the Public Works Department in respect of the excavator imported by Mr Jang. This was during the time the excavator was in Mr Remy's possession. It shows that the Public Works Department hired the excavator for 240 hours at an hourly rate of VT20,250. The invoice from Mr Remy, or rather his firm Santo Earthworks, dated 28th May 2014 has a total hire charge of VT 4,860,000. Accepting that example and accepting one hire per year that would mean Mr Jang's loss in respect of the excavator would be VT 9,720,000.

15. So far as the truck is concerned undisputed evidence from Mr Jang shows that during July 2014 Mr Remy used the truck on 8 occasions during that month. There is no evidence from Mr Remy that the month of July 2014 was anything other than average. There is also evidence that Mr Jang hire the truck to one of Mr Remy's witnesses, Mr

Peter Terry. Mr Terry paid VT25,000 for each use shortly after it was returned to Mr Jang[3] . If therefore we accept that the average use of the truck was 8 occasions per month and each hire was for VT25,000 there is a monthly hire income of VT 220.000 giving a lost income over the time the vehicle was seized of VT4,400,000.

16. Turning to the fork lift truck, there is very little information or evidence to assist with the lost income of that particular piece of equipment. Mr Remy's evidence is that it would have a hire rate similar to that of the truck. He does indicate at one point that the truck and the fork lift were often used together. Accepting that evidence and Mr Jang's rate of hire VT there would be 8 times a month when the fork lift was hired at VT 5,000 per hour. The only gap in the evidence is the number of hours. In my opinion it would not be unreasonable to expect the fork lift to be occupied for 3 or 4 hours during the loading and unloading. On the lower usage that would equate to 24 hours every month giving rise to lost income of VT 2,640,000.

14 The total lost income would amount to VT 9,720,000 plus VT 4,400,000 plus VT 2,640,000 or VT 16,760,000. Mr Jang has given evidence about the costs involved but the figures he gives relate to more extensive periods of hire. An answer can be found in the recent Court of Appeal case *EZ Company v Republic of Vanuatu* [4]. In that case where the Court was also dealing with the plant hire equipment it said;

> *"We agree with the trial judge that a significant deduction must be made from the gross fee of VT10,000 per day to account for fuel, other operating expenses and maintenance. However we do not think that the net loss of profits were fairly compensated by simply deducting the total hire costs paid to a third party for a tipper truck. The third party's hire charges would include a profit component on the value of the equipment hired. The charges would probably also reflect the fact that this type of machinery would be hired at a premium over cost to reflect the fact that hired machines are often sitting idle waiting for the next hirer. We consider a more reasonable deduction from the gross hourly rate would be the sum of VT5,500 per hour, giving a net profit for the hours loss of VT4,500 per hour. The damages for the 44 days' work suspended would therefore be VT5,544,000."*

In other words 40% of the gross income could reasonably be assumed to be profit. On that basis the loss to Mr Jang would be VT 6,704,000.

17. I remind the claimant that he has to prove his case on the balance of probabilities. He was told of this in the Supreme Court before the last decision was made, he was reminded of his obligations by the Court of Appeal and he was again reminded of what was required during conferences and direction appointments prior to this decision. Whilst I appreciate that it is sometimes very difficult to produce hard facts and figures, particularly in a case like this where a fledgling business tries to calculate what ***might*** have happened, the claimant could have sought the professional assistance of, for example, an accountant. Expert evidence could have been provided about amortisation, reasonable rates of return and profit margins but there has once

[3] See the sworn statement of Mr Jang filed on 26th June 2017.
[4] *Ez Company Ltd v Republic of Vanuatu* [2017] VUCA 19; Civil Appeal Case 1500 of 2017 (21 July 2017)

more been a distinct lack of assistance in that regard. The claimant could have provided witness evidence from an established plant hire equipment operator. That happened to a very limited degree with evidence about hire rates but a business man who was well established in this kind of operation could have provided much clearer assistance to the Court. Otherwise the Court has to work with what it is given.

18. So far as interest is concerned, Mr Jang is entitled to interest on the sum set out above. As is made clear in the *EZ Company* case mentioned previously, interest in cases involving a commercial business such as we have here is treated differently;

> *"This claim is for damages caused by a breach of contract which interfered with the ongoing commercial business of the appellants. The business was heavily dependent upon capital equipment employed in it. It was readily forseeable that the appellants would suffer further losses at commercial interest rates if anticipated income was withheld. In such cases it is appropriate to award interest at a commercial rate [see: Hungerford v. Walker [1989] HCA 8; (1989) 171 CLR 125].* "

In the *EZ Company* case there was evidence before the Court that the company had to pay interest on its loans of 17%. That was the rate awarded. I do not think that rate is appropriate here but a commercial rate is. I am of the view that 12% would be appropriate.

19. As was also set out in the *EZ Company* interest is treated differently in a case involving commercial businesses;

> *"Moreover, in a commercial context such as this, interest should run from the date when the loss is suffered as it is part of the damages suffered, not from the date when proceedings were issued."*

In line with what was said in *EZ Company,* in this case interest will be paid at 12 % from a date midway through the period of seizure, namely from 1st July 2013 on the amount of VT 6,704,000 until that sum is paid.

20. Finally Mr Jang also claims his legal expenses not covered by other actions. These were expended in an attempt to recover his property and are legitimate costs incurred in that regard. He can recover the fees paid to Mr Sugden of VT 1,780,000, Indigene lawyers of VT 609,000 and Mr Yahwa of VT 70,000 totalling VT2,459,000. Interest on that sum will be 12% from the date of issue of proceedings until paid.

21. Mr Jang is also entitled to his costs of this action (including those prior to the decision on liability) and those costs will be taxed on a standard basis if not agreed.

DATED at Port Vila this 10th August 2017

BY THE COURT

DAVID CHETWYND

Judge

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