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

Civil
Case No. 16/1937 SC/CIVL

BETWEEN: WALTER HAPSAI HAPHAPAT AHELMHALAHLAH
Claimant

AND: REPUBLIC OF VANUATU
First Defendant

AND: FELIX STEPHEN DORRICK
Second Defendant

AND: JOHN OBED ALILEE
Third Defendant

AND: VINCENT LUNABEK
Fourth Defendant

Coram:	***Justice Jeremy Doogue***
Counsel:	***Felix Laumae for the Claimant***
	Frederick Gilu and Lenon Huri for the Defendants
Date of Hearing:	*6th – 8th and 13th March 2018*
Date of Judgment:	*16th March 2018*

JUDGMENT

[1] In overview the background of the case is as follows. The claimant was appointed as a magistrate in 2010 with his area of jurisdiction being Tanna Island.

[2] One of the causes of action which the plaintiff brings is in defamation. The central event relevant to this cause of action is that on 30 April 2013 the 2nd defendant, the Chief Magistrate, wrote a letter to the 4th defendant, the Chief Justice, and which he made an allegation, amongst other things, that the claimant had been "*harassing some of the college d'Isangel female students*". The claimant alleges that these allegations were false and that in consequence of the 2nd defendant sending the letter, and copying out to other persons including other magistrates, great harm was done to his reputation for which he seeks damages.

[3] The 2nd cause of action is concerned with the circumstances of the claimant's termination of office as a magistrate. In 2012 the claimant was involved in an incident in another part of Vanuatu, Malekula, which resulted in him appearing in the Supreme Court on criminal charges. He pleaded guilty to 1 of the charges and was in due course discharged without conviction in regard to it.

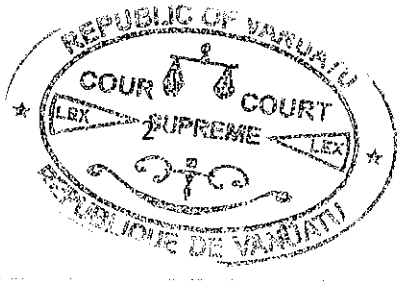
[4] Subsequently he tendered his resignation as a magistrate in writing on 6 May 2013. In November 2013 payments of his salary were discontinued.

[5] The applicant now claims that his resignation was brought about as a result of improper pressure which was brought to bear upon him by the Chief Justice of Vanuatu, the 4th defendant. It will be necessary to enquire into the circumstances of the meeting which took place between the applicant and the 4th defendant at the latter's private residence on 3 May 2013. One of the two main parts of this case concerns whether, despite his apparent resignation, the claimant should now be entitled to damages against the Republic of Vanuatu, which is the 1st defendant, and the other defendants. The claimant puts forward put causes based upon breach of contract and negligence. It also appears from the papers which the claimant has drafted and filed that he is seeking relief arising from what he considers was the breaches of natural justice which allegedly contributed to his lodging his resignation.

The defamation claim

[6] The claimant alleges that thee second defendant falsely and maliciously published about allegations which were defamatory. This came about when the second defendant wrote a letter to the Chief Justice on 20 June 2012. That letter contained the following passage:

> *"Sir, I have also received complaints from the Principal of College d'Isangel, in Tanna reporting that his office has received complaints from parents and students alleging that Magistrate Waltersai has been harassing some of their female students.*
>
> *Even if these allegations are still to be proven, I consider these including continuous absence from duty without permission and justification as conduct that could amount to disciplinary offences."*



[7] The letter went on to say that it "*remained*" the recommendation of the second defendant that these matters be referred to the Court Personnel Disciplinary Board of the JSC to deal with the officer concerned and to take appropriate disciplinary actions for the best interests of the judiciary. I infer from this comment that he had previously suggested to the Chief Justice that disciplinary steps ought to be taken against the claimant.

[8] That the 2nd defendant felt strongly about these matters is evidenced by the fact that having made this recommendation he went on to make the following statement to the Chief Justice:

> *"Sir, this report on [the claimant] attitude and conducts is my final one. If no disciplinary action is taken against him by the end of July 2012, I will tender my letter of voluntary resignation because I personally do not want to be part of the judiciary that tolerates this kind of behaviour and is giving a bad image to the community including schools."*

[9] In the statement claim in its current iteration1, the plaintiff pleads:

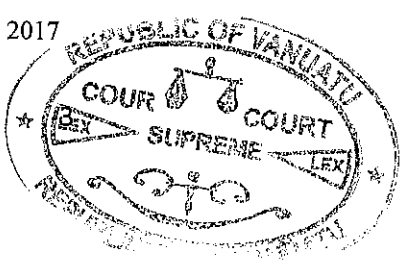
> *"12. In their natural and ordinary meaning the said words meant were understood to mean:*
>
> *(a) Magistrate Waltersai has done something very bad and illegal;*
>
> *(b) Magistrate Waltersai has done unacceptable behaviour that he is seen as criminal;*
>
> *(c) Magistrate Waltersai was demanded and must be dealt with the disciplinary action accordingly because of the allegation seriousness;*
>
> *(d) Magistrate Waltersai has committed the allegation that is displaying a wicked picture to the community including schools and the word schools meant to be many other schools as including the College College d'Isangel."*

[10] In addition, the claimant alleged that the meaning of the words just set out –

> *"were meant to refer to the Claimant and the allegations of harassing some of the College d'Isangel female students that is giving a bad image to the community including schools."*

[11] It was alleged that the letter was distributed as addressed, namely, to the 4th Defendant with copies going to the Chief Registrar, the 3rd Defendant, the Human Resources Officer

[1] Amended Statement of Claim dated 5 December 2017



and all Senior Magistrates and Magistrates who therefore had access to the statements made that the claimant had been harassing some of the female students.

[12] The claim is then made[2] that The Claimant has suffered a general loss, his integrity being put into question, his job and his working relationships with his co-workers and Judiciary of the Republic of Vanuatu has suffered a major setback. He then alleges that in consequence his reputation has been seriously damaged[3].

[13] The damage which the Claimant says that he has suffered from the distribution of the letter include:

(a) Considerable distress, hurt and embarrassment.

(b) That, consequently, "*the claimant as Magistrate, a President of Malampa Association in Tanna and as Paramount Chief has been seriously injured and the claimant has suffered considerable distress and embarrassment. The claimant has further suffered considerable personal anxiety.*"[4]

[14] At paragraph 20 of the Amended Statement of Claim he alleges that he has:

(a) "become a target to be dismissed as to stop his career as Magistrate and his standing as a Magistrate of the Republic of Vanuatu".

[15] He seeks damages "*for his future career as a magistrate and that is a young male embarking his job until his retirement age ...*"

[16] He claims damages for injury to feelings "*lower and damaged his good reputation in the workplace, loss of employment, which was the natural and foreseeable consequence of the published letter by the 2nd defendant's*".

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[2] Paragraph 17

[3] Paragraph 12

[4] Paragraph 19

[17] The defence which is put forward by the 2nd defendant is not entirely clear as to its scope. At paragraph 5 of the statement of defence a number of assertions are made which I will now set out:

"[The defendants say]

(c) say that there has been no evidence to prove that the reputation of the claimant has been seriously injured;

(d) say that the report of the conduct and attitude of the Claimant were put forward to the Commission for consideration;

(e) say that the Commission suspended the claimant on the basis of [the criminal charges];

(f) say that the Commission made recommendations to the President for the suspension and extension of the suspension of the claimant pursuant to section 23(3) of the Act;

(g) say that on 25 April 2013 the Commission at its meeting confirmed the complaints and criminal charges made against the claimant and decided to serve on the claimant copies of the complaints and criminal charges and gave the complainant time to respond to the allegations made against him;

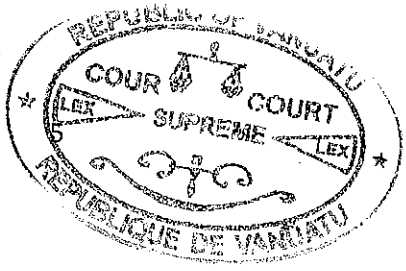
(h) say that the defendants' action fall under sections 23(2) (3),(4)(a), (d), (5),(6)(b), (7) and sections 58(c), (h), (i) (j) of the Act and will rely on the sections for their full terms and effect."

[18] I surmise that the references to the sections of the Act are directed to the point that the reputation of the claimant has not been seriously damaged[5] for the reason that he was subsequently suspended as a magistrate.

[19] The issues which appear to arise from the pleadings and the evidence will now be considered.

Was there a publication of the allegedly defamatory statement?

[5] That is the point made at subparagraph (b) above.



[20] What happened in this case is that the 2nd defendant having learnt of reports about the claimant harassing schoolgirls acted on that information and brought it to the attention of the Chief Justice. Obviously, considerable care needs to be taken by someone in the position of the 2nd defendant when dealing with such a complaint because a person can defame someone by merely repeating what he has been told by another[6].

[21] One issue that does not arises the question of publication. It is admitted that the 2nd defendant wrote the letter that he did and that he circulated to the other magistrates.

where the statements in the letter defamatory?

[22] It is not entirely clear whether the defendants actually accept that the assertions in the letter are defamatory. They would seem at fall within the scope of the definition provided and one leading authority, that is:

> *"Any imputation which may tend to cause a person to be hated or despised is defamatory to him."*[7]

[23] The allegation of harassment of female school pupils brought against an adult man, carrying with it as it does the imputation of sexual interest in the objects of the harassment, would be regarded in most communities as being highly discreditable and a state of affairs which would give rise to widespread condemnation of the perpetrator. In my view, the allegations were defamatory.

[24] However, importantly, in this case the 2nd defendant was not the person with whom the accusation originated. He is repeating what a third party has told him.

[25] There is a number of decided cases which deal with publication of a report of suspicions held by 3rd persons. In *Lewis v Daily Telegraph*[8] the newspaper/publisher printed statements to the effect that the Fraud Squad was enquiring into the affairs of the

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[6] Halsbury's Laws of England, 4th Ed., Vol. 28, paragraph 79 and see discussion below

[7] *Parmiter v Coupland* (1840) 6 M. and W 105 at 108 cited in *Gatley On Libel and Slander,* 10 Ed, p 31

[8] *Lewis v Daily Telegraph* [1964] A.C. 234 at 286

company of which Lewis was the director. Both Lewis and the company brought their actions alleging that the statements meant and were understood to mean that Lewis and the company were guilty of, all was suspected by the police to be guilty of, fraud. The House of Lords concluded that they words complained of were not capable of meaning that the plaintiffs were guilty of fraud, for a person would not, unless he were unduly suspicious or unfair in his approach, draw that conclusion. The editors of Gatley On Libel and Slander[9] note in their discussion of the case that the House of Lords held that the words:

> *"were also capable of conveying the further defamatory meaning that the plaintiffs were under suspicion. Such words would also generally seem to bear the imputation that there are reasonable grounds for the suspicion".*

[26] It is a matter for the judge in a particular case to decide whether the words appear a defamatory meaning.

[27] In this case, I accept that the existence of a suspicion means that there is a question mark over the person whose conduct is the subject of the report, both that there are good grounds for believing that the offences that actually occurred.

[28] Unfortunately, the course of reasoning adopted by the usual ordinary reader of the words (whose standards the court is to adopt as the criterion for whether these words are damaging) would probably also regard it as legitimate to reason that "*where there's smoke there's fire*". The fact that the complaints apparently originated from the parents of more than one student and from more than one student herself would tend to strengthen the view that the complaint had some basis in fact. Further, that the complaints apparently had some credibility in the eyes of the 2nd defendant's informant, the school principal, would strengthen that view. It would hardly be expected that the informant as a principal of a college would lightly come to the view that the allegations were such that they required further enquiry or investigation. That it is a pair inference from the publication that there are grounds for the suspicion is certainly how the second defendant viewed them. Otherwise he could have dismissed them as not worth further enquiry.

[9] Reference previously provided

[29] My conclusion is that the ordinary reader of the words would be likely to take the view that the behaviour of the plaintiff had been suspicious. They would note that even the 2nd defendant conceded that the allegations were yet to be proved. But even an implied assertion that there is reason to suspect that a person has done something discreditable can be defamatory. I conclude that the words in this case were defamatory.

Privilege

[30] A statement maker may have available a defence of qualified privilege where, acting in good faith and without any improper motive, he makes statements that would otherwise be defamatory. The defence is available where it is right in the interests of society that a person should give certain information to another party. If he does so in good faith and without malice, the communication will be privileged[10].

[31] There is no doubt that the Chief Magistrate has responsibility for maintaining order and discipline amongst the magistrates of the Republic[11]. He himself has limited powers to discipline magistrates by way of counselling. There is provision in the JSC Act for removal of the magistrate from office where the JSC has made a recommendation to the President to that effect.[12] Beyond those provisions, there is no detailed procedure prescribed by statute as to how the removal of the magistrate is to be sought. Having regard to that consideration and to the general responsibility of the Chief Justice for the overall proper functioning of the judiciary, it would seem to be entirely legitimate for the Chief Magistrate to raise matters with the Chief Justice in cases where there has been serious misconduct or dereliction of duty which is such as to justify consideration of removal from office. Therefore, communications of the kind which the 2nd defendant, the Chief Magistrate, made to the Chief Justice and the present case were legitimate.

[10] *Davies v Sneed* (1870) LR 5 QB 608 at 611.

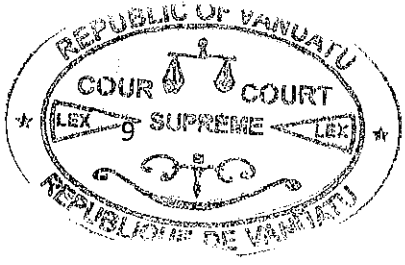
[11] Refer s19 Judicial Services and Courts Act

[12] S23

[32] Little or no argument was addressed to me about the issue of qualified privilege but having regard to the purposes for which the privilege exists, I consider that while the Chief Magistrate may have had legitimate grounds for referring potentially damaging allegations against a Magistrate to the Chief Justice, he was not be protected when he disseminated the allegations more widely. In order to justify the application of qualified privilege to the letter communications-in this case the allegations being communicated to the other magistrates-it is necessary for the 2nd defendant the point to some reason of policy why it was necessary for him to take that additional step. I asked the 2nd defendant about this at the trial of this proceeding. I explored with him whether sexual harassment allegations posed a current threat to the standing of the judiciary and the Republic which he had assessed as being a particular risk. If that were so, dissemination of the information might reinforce to other magistrates how damaging allegations of this kind can be and therefore reinforce the need for good standards of conduct. The Chief Magistrate was not, however, minded to justify circulation of the memorandum to the other magistrates on this ground. While I regarded the Chief Magistrate as an honest and forthright witness I was left with the impression that he may not have given a great deal of thought to the issue of whether it was appropriate for him to circulate the harassment allegations as widely as he did.

[33] I am not able to discern any ground upon which the communication of the allegations to the other magistrates was called for. Such a step might have been necessary once the JSC had been apprised of the allegations if it had recommended to the President that the plaintiff be suspended. In such a case, some explanation would probably have to be given to the other magistrates, in the absence of which there would be speculation about the reasons why the plaintiff had been stood down. But that is not what happened. Matters did not get to that point. That is because in the meantime the plaintiff, as he has admitted, became involved in criminal offending on Tanna Island and it was those incidents which were the basis of the disciplinary charges which were laid by the JSC.

[34] For those brief reasons, I am unable to agree that the 2nd defendant is entitled to the shield of qualified privilege in regard to his communication of the harassment complaints to the other magistrates.



Damage to the plaintiff

[35] The conclusion of the court is that the claimant was defamed by the publication to the other magistrates of the allegations in the letter. That leads to the next question which is what damages sought to be awarded to the claimant.

[36] At common law publication of a libel is presumed to have caused harm. There is no need for the plaintiff to prove actual damage.

[37] The object of an award for damages is to compensate the plaintiff the injury to his reputation. The purpose is not to punish the publisher of the libel[13]. The yardstick which guides the court when attempting to arrive at an appropriate award of damages is to adopt what it considers a reasonable jury would have been disposed to award.

[38] There are a number of criteria however which may assist the court in making the necessary determination. A key factor in this case is the reputation of the plaintiff. I have considered carefully whether subsequent adverse aspects of the plaintiff's behaviour can be taken into account. The defendants in their statement of defence, and Mr Gilu in his submissions, attached importance on the fact that the plaintiff had some months after the date of the publication of the defamatory material appeared in the Supreme Court where he admitted to a criminal offence involving the destruction of property. Two issues arise in regard to this aspect of the defence. The first is whether events that occurred after the point of time at which the reputation of the plaintiff was damaged can be taken into account in assessing the extent of the damage. The second is the relevance of the plaintiff's admission that he had misconducted himself during the incidents at Malekula.

[39] I shall deal first with relevance of the subsequent conduct. The fact was that the reputation which was damaged by the publication in June 2012 had not at that point been adversely impacted by the subsequent events which occurred at Malekula. If the approach is adopted that the wrongdoer must take his victim as he finds him, then an

[13] Although exemplary damages may be able to be awarded in appropriate cases.

argument can be put forward that the events that lay in the future ought to be excluded from consideration when assessing the damage caused to his reputation in June 2012.

[40] The second point concerns whether the public admission of committing criminal damage which came about in late 2012 some 6 months after the offending letter was written have any relevance because it was concerned with quite a different subject matter. If the various parts of a person's character or reputation can be regarded as being compartmentalised, then it might be said that the conduct on Malekula to which the claimant admitted showed that he was a hot-headed person capable of high-handed conduct. The allegations on Malekula therefore were concerned with quite different misconduct from the sexual predator- type allegations which were contained in the letter which the 2nd defendant copied to the various magistrates. The events on Malekula do not, therefore, show that the plaintiff had a reputation which was tarnished in respect to his sexual morality particularly as it was applicable to young women. It is difficult therefore in my view to regard the Malekula events and the admissions which the claimant made to the court about them as having a relevant bearing upon that part of his reputation which was damaged by the letter that the 2nd defendant circulated to the magistrates.

[41] The Malekula events are therefore irrelevant to the question of the extent of the harm which the contents of the letter caused to the reputation of the claimant.

[42] Alternatively, even if the court appearance arising out of the events at Malekula has any relevance, it did not destroy the overall standing of the plaintiff enabling the defendants to contend that the letter of 20th of June 2012, in the overall circumstances, had little effect on his overall reputation and standing.

[43] A further point to be considered is the extent of the publication. I do not know how many magistrates and senior magistrates the letter was copied to. However, the publication being restricted as it was to that class of recipients, did not have the potential to affect the reputation that the plaintiff held in the eyes of his general circle of family professional acquaintances friends and other persons who could have been affected had there been wider publication of the libel. On the other hand, the esteem in which a person is held by his professional colleagues is not to be trivialised. The loss of dignity which the

plaintiff would have suffered by the publication could genuinely have led to him experiencing distress and mental stress of a kind which he has deposed to in his evidence.

[44] I had the opportunity to hear the plaintiff giving his evidence in court. The impression that he made on me was that he was a headstrong person who lacks good judgement and who is inclined to make bad decisions. But I do not think there is any reason to reject his evidence concerning the consequences he suffered the consequences that he did as a result of the publication.

[45] There was no evidence put before the court which would guide it in its enquiry as to what would be a fair and reasonable level of compensation. There is no evidence that would enable the court to measure the relativity between an award of damages for this type of tort and others, such as for bodily injury caused by negligence which I assume is available to litigants who bring cases in the Vanuatu courts.[14] No evidence was put before me of the average individual income earned by citizens in the Republic of Vanuatu. This last factor is one which was taken into account by the Court of Appeal in its judgement in *Moli v Hesston*[15]. The court said:

> *"In our judgment the starting point is to look at the economic situation in this country. We recall that the minimum wage is in the vicinity of 200,000VT per year. Senior and responsible people within the community often earn no more than 1,500,000VT per year."*

[46] It is to be borne in mind that the figures given presumably were current at some time prior to the date of the judgement which was 2001.

[47] In the *Moli* case, the court was concerned with a publication of serious allegations of sexual misconduct by a local businessman who is married who allegedly had dalliances with quite a number of women. No attempt had been made to investigate the truth of the allegations before publication. The court considered that that was a case where in addition to compensatory damages there should also be an award of aggravated damages.

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[14] For a case where this approach was adopted see *McCarey v Associated Newspapers Ltd* [1965] 3 All ER 947 at 960

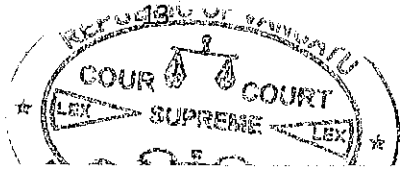
[15] [2001] VUCA 3

[48] In this case, the width of the publication was not the same as that which occurred in the *Moli* case. This was an internally circulated letter whereas in that case the report appeared in a newspaper. Secondly, there was some basis for the second defendant to believe that there was a proper foundation on which to base suspicion-the source of the information being a college principal. Thirdly, the letter expressly stated that the allegations were yet to be proved. That was of course confirmation that it was only a suspicion at that stage which could have caused be displaced by later investigations or enquiries. It was not a forthright allegation that the plaintiff had misconducted himself.

[49] This is not a case, either, where I consider there was any deliberate or cynical intention to damage the claimant. Punitive damages are therefore ruled out. If it is remembered that in *Moli* even though there were more damaging allegations than are the case here and even though publication was much wider still only awarded three million vatu by way of compensatory damages. On the other hand, *Moli* was decided quite a few years ago and there will have been some inflation since that time. Taking all these matters into account, I consider an award of two million vatu is justified. I consider that that figure provides meaningful compensation for the harm done to his reputation. That exceeds a figure that might be awarded for purely nominal damages without being extravagant. The intention is that the amount fixed should reflect the economic realities of the society in which the claimant lives. That figure is to be ascribable to general damages suffered by the plaintiff. He did not lead any evidence of special damages before me and therefore the overall award will be the figure that I have just mentioned.

[50] While I, of course defer to and respect the reasoning of the court in *Moli* it is not a straightforward task applying it in the present situation. Of course, *Moli* is not an exact precedent which is applicable to the present case. But case addressed including the wide range of financial circumstances of people within Vanuatu society. It also considered and compared the levels of wealth, measured in terms of income, of people from Western countries and citizens of Vanuatu.

[51] One matter that seems to be relevant is that the buying power of a given sum of money is the same in the Republic no matter what the background of the person who is claiming it is-whether he be a businessman of financial substance or an impoverished villager.



The worth of an award as the same regardless of whether the person is someone of wealth for someone who is poor. Should the wealthy person get more?

[52] On the other hand, whether or not a sum of money represents a reasonable solatium to a person most depend upon their financial circumstances. A person in the second group who received an award of one million vatu would probably acknowledge that there had been a major improvement in their financial circumstances. A person in the first group, a business man of substance, would probably dismiss such an award as not really making any real difference.

[53] The solatium which a verdict in favour of the claimant provides is in two parts. The very fact that the court makes a public pronouncement vindicating the claimant is part of it. The fact that the court awarded substantial damages means that in the eyes of the claimant's peers the court has viewed the matter seriously and responded with an order of compensation accordingly. Awards of so-called "*derisory*" damages lack this second element.

[54] The claimant does not appear to be a wealthy man. I surmise that persons in his occupational group do rather better financially than people who are at the bottom of the range of monetary incomes received in Vanuatu. The occupational group to which he previously belonged earned annual salaries of approximately 1.3 million vatu. An award of approximately that level, would therefore, provide him with damages equivalent to what he earned in a year.

[55] I am required two come to a judgement which an appropriately directed jury would come to applying their good sense in the matter. Having regard to the above factors I consider that an award of damages of 1.5 million vatu would properly reflect the requirements of justice in this case as explained in the decision in *Moli*.

Vicarious liability on the part of the first defendant for the damages awarded

[56] In the statement of defence which the first defendant has filed there is a general denial of responsibility to pay any damages to the claimant. Those denials can fairly be construed as being applicable to the allegation that the first defendant is vicariously responsible for

the harm caused by the second defendant. Should there therefore be an order made against the first defendant requiring it to pay the damages?

[57] Neither the claimant nor the defendants made any submissions in closing concerning why the first defendant ought not to meet any award of damages which the second defendant had been ordered to pay. This is a matter of some concern. The claimant was permitted to file a reply to the closing submissions of the defendants. In that reply a number of cases are set out dealing with the subject of vicarious responsibility. The claimant was not permitted leave to raise new points in the reply. While it is unsatisfactory that the court has had no assistance on the question of vicarious liability, any prejudice results must rest with the claimant who failed to raise the point as part of this case. It would not be practicable to now reopen the case and call for submissions from the defendants dealing with the contentions made in reply by the claimant.

[58] What happened in this case was that the second defendant who was bona fide carrying out his duties as Chief Magistrate performed those duties in a way which has exposed him to tortious liability for defamation. The defamation was unintentional. It would seem to be just and fair that the first defendant ought to pay the damages which would not have been visited upon the second defendant were he not attempting to discharge his obligations. However given the state of the evidence and the submissions, I am unable to take this matter any further. As I will be leaving the jurisdiction in a few days time there is not going to be an opportunity to schedule a further hearing and to call for further submissions and/or evidence on this point. However, I cannot see any reasoned basis upon which I can enter judgement against the first defendant in regard to the damages of four defamation and I decline to do so.

Causes of action related to claimant's cessation of employment

[59] Counsel for the parties in the course of the case referred to the claim which the claimant brings arising from his resignation as a magistrate as a wrongful dismissal claim. I am content to do so as well. What the claimant alleges is that he had a discussion with the Chief Justice, the 4th defendant on 3 May 2013 during the course of which the 4th

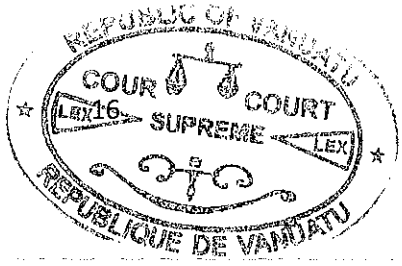
defendant placed improper pressure on him to resign and as result he, the claimant, was constructively dismissed.

[60] Linked to the claim for constructive dismissal is a further cause of action which alleges against the 3rd defendant that he acted ultra vires, made jurisdictional errors and behaved in a misleading or deceptive way when he allegedly made the final decision to dismiss the claimant. The pleadings of this case are very scant in their particulars. However it would appear that the assertion that is being made is that following the resignation which the claimant tendered and are about November 2013 the 3rd defendant who was the chief registrar of the courts gave the direction to discontinue payment to the claimant of his salary. This part of the case involves the implicit proposition that the resignation which the claimant filed was not of itself sufficient to result in his employment being terminated and that some other action on the part of the Head of State, His Excellency the President, was required before the resignation took effect. This did not happen and therefore there was no warrant for the 3rd defendant to take the administrative step of terminating payments to the claimant of his salary.

[61] Before considering this claim generally it is necessary to say something additional about the background. The events leading to the appearance in the Supreme Court need to be described in more detail at this point. The claimant is a chief on the island of Malekula. It appears that the claimant had built a shed on the island which was to be used for the purpose of storing fuel. However the structure was not completed and in December 2013 while he was on the island the claimant, who was at the time armed with a rifle and using a chainsaw, cut down the remnants of the structure.

[62] The claimant appeared in the Supreme Court on two charges which may be summarised as criminal trespass and intentional damage to a structure. The events that the charges were concerned in December 2012. The trial of the charges was set down to take place before Justice Spear.

[63] When the hearing commenced the judge expressed certain views on the viability of the trespass charge which, in consequence, was withdrawn. The parties are in disagreement as to what happened thereafter and therefore it is necessary to make necessary to make brief reference to the circumstances.



[64] The claimant says that after the trespass charge had been withdrawn there was a discussion between counsel and the judge from which, I infer, he, the claimant, alleges he was excluded. He says he was subsequently told that he would have to plead guilty to the remaining charge. He says that he was told that this was necessary because the judge was running out of time and had to return to Port Vila. His account of matters is that he was compelled to enter the plea of guilty against his wishes. The judge stated that he considered the intentional damage charge was proved. He did so on the basis of the statement of facts which the parties had agreed on. He ordered that the claimant was to be discharged without conviction. There were conditions attached to the discharge such as taking part in a type of restorative justice program.

[65] The claimant says that he later applied, apparently to the High Court, for some type of rehearing of the proceedings against him. These did not make any progress though. He says his application was deliberately ignored.

[66] The other principal evidence concerning what happened at the criminal proceeding is to be found in the judgement of Justice Spear.

[67] In his judgement which he gave on 25 March 2013 the judge recorded that he had commenced hearing the charges against the applicant but after having heard some of the evidence that was obvious that count one have no prospect of succeeding. He took the view that whether or not the defendant was guilty on the charge relating to the cutting down of the partially built shared dependent upon whether he had an honest belief that he had such an entitlement. The judge then summarised the evidence. Significantly he noted that in an agreed statement of facts the defendant admitted that on 23 December 2012 he "*chopped down an incomplete house with a chainsaw*" and that at the time of the incident "*he had in his possession a rifle .22*"[16]. Subsequently in his judgement Justice Spear said that the issue quickly became identified as to whether a chief of a village, that is someone in the position of the claimant, had the right to order the removal of a building that could not be considered as having been "*owned*" by him. The judge recorded that:

[16] Paragraph 8 of judgement 25 March 2013

"Over the lunch break, the defendant reflected on the evidence and the issue which had become the focal point of the case and conceded that he did not have the right. 11. When the court convened after lunch, the defendant asked to be re-arraigned and he pleaded guilty to the charge. He also made a public apology in court to those assembled and he indicated that he was prepared to pay compensation and undertake a customary conciliation ceremony".

[68] The judge decided that the consequences of a conviction would outweigh the criminality of the action and he ordered that the defendant was discharged without conviction on conditions.

Discussion of the events of 25 March 2013

[69] It would seem to be inherently likely that the situation was as the judge described it. That is to say, the judge understood that the result which he intended was something that the claimant would was agreeable to. The judge noted that the claimant was re-arraigned which presumably occurred in open court and thereupon entered a plea of guilty to the remaining count. It is unlikely that the judge would have proceeded to take these steps (including entering a plea of guilty to the second count) when in fact the claimant was still insisting on his innocence in regard to that charge. So while he may have been absent from a meeting between the judge and counsel at which there may have been some discussion about these matters, he was very likely to have been present when the plea of guilty was entered. Further, it is unlikely that the judge would have been mistaken about the fact that the claimant made a public apology in the court. Such an apology, if made, is quite inconsistent with the claimant continuing to assert his innocence.

[70] I conclude on the balance of probabilities the claimant admitted at the hearing in March 2013 that he had committed a criminal act. That is to say, I consider that it is established that the claimant cut down the structure without the consent of the owners in circumstances where he had in his possession a firearm. These events plainly gave rise to questions about whether the conduct of the claimant that would of an acceptable standard given that he was a magistrate.

Relevance of the events at Malekula to the meeting with the fourth defendant

[71] On 10 April 2013 the 2nd defendant having learnt about the events on Tanna Island wrote a letter to the JSC summarising the effect of the proceedings which have been brought against the claimant and the key events which he had actually admitted did occur. That is to say it set out that the claimant had been involved in the altercation over the building on Tanna Island and had cut down the structure with a chainsaw at the same time as being armed with a .22 rifle.

[72] I interpolate at this point that at the hearing before me on 14 March Mr Laumae submitted as part of his submissions on the resignation that in fact there was an innocent reason why the claimant had the rifle with him when he went to the building site. I reject that explanation for reasons that I will set out at the appropriate point in this judgement.

[73] The Chief Justice had prior to this time already had some dealings with the Judicial Services Commission (JSC) concerning the claimant. In particular, the Chief Justice had been apprised of the claims about the claimant absenting himself from duty on Tanna Island and the allegation that he had harassed female school students on that island. No action had been taken on them with the Chief Justice stating when he gave evidence before me that they had "passed over" these events. I understood this evidence to mean that while no final disposition had been undertaken in relation to the earlier events, they were not necessarily completely irrelevant from the purposes of the Chief Justice/the JSC. However in the meantime because the relative parties had learnt of the prosecution of the claimant in regard to the events on Malekula[17], it was these events which were now the primary area of interest.

[74] Not long after the outcome of the proceedings in regard to the Malekula events was known, the JSC recommended to the President that he ought to suspend the claimant from duty on an interim basis and this generally occurred on 22 January 2013 which is the date when the 1st "instrument of suspension" was served on the applicant.

[75] The 4th defendant, it should be said, had decided that he should not be involved in the discussions at the JSC affecting the applicant because there was a family connection between the two of them. His position seems to have been there while he took some

[17] That is the charges of trespass and destruction of the building

steps to inform the JSC of the allegations against the claimant, he himself abstained from dealing with the case when the JSC came to deal with it.

[76] The claimant's suspension was later extended on 15 April 2013 when the Head of State executed a document called "Instrument of Extension of Suspension of Magistrate" for an indefinite period "... *pending the resolution of the disciplinary proceedings against him*". Disciplinary proceedings for the purpose of the removal of the claimant from office were instituted. Disciplinary charges against the claimant were formulated and these were notified to the claimant on or about 30 April 2013.

The meeting at the residence of the 4th defendant

[77] On 3 May 2013 the claimant says that he was requested by the 4th defendant to meet him, the 4th defendant at his private residence. The evidence of the claimant was that he attended the meeting together with another person. Once true he told the 4th defendant about his intention to take criminal defamation proceedings against the 2nd defendant arising out of the letter that the 2nd defendant had written to the 4th defendant. The claimant had actually reported to the police the allegations that the 2nd defendant made in his letter to the Chief Justice concerning the claimant harassing schoolgirls. He said that he told the Chief Justice that the allegations were false and he was not happy about it and wanted to bring the Chief Magistrate before the court for criminal defamation. The claimant said that the Chief Justice replied to the following effect:

> *"Waltersai, you must stop the act of trying to prosecute the Chief Magistrate and that you must resign, if you take any legal action against them, the office will damage your reputation, the office will terminate you, you cannot practice any more as a lawyer, your profession as a lawyer will be spoilt or damaged and now that the only option is for you to resign or else the office will terminate you. I must see your resignation letter by the next working day which is the -06/05/2012 and that you must write your resignation letter by tonight and submit it."*

[78] The claimant says that the Chief Justice continued making statements to this effect while the claimant put forward his view that he had legal rights. The claimant said he neglected to pay attention to these and was continually demanding and forcing him to resign as the only option left to him. The claimant said:

> *"I felt that I was putted out of justice, fairness and equality since it was his 1st time to give me legal advice unlike other times he mostly refer people including his family members to seek legal advice from lawyers rather than himself. The Chief Justice's wordings and statement mentioned above has made me affrighted as*

threatening me and forced me to resign with no chance or opportunity given for a fair hearing, evidence and proof of the allegations. Furthermore he effectively forced me by saying that

> *"Waltersai you must go tonight and write that you resign as a magistrate and that your resignation will become effective within 3 months time. He continued to say that: in your resignation letter also right that the office will assist you in your fares to Tanna to collect all your belongings and back to Vila'"*

[79] The claimant said there was no opportunity given to him to consider his rights, no fair procedure and no substantial grounds for the dismissal since I was effectively forced to resign by the Chief Justice.

> *"I was not voluntarily resigned and because I was forced to do so. I just wrote his words on the resignation letter as he forced me to do so".*

[80] The account which the claimant gives of the conversation is to a large extent supported by the evidence of another witness for the claimant witness, Mr Albilue, who accompanied him to the meeting. The evidence of Albilue is deprived of some of its force by the consideration that in its written form it seems to be an exact cut-and-paste of what the claimant said about the crucial discussion concerning the necessity for him to resign and the prejudice to him that would result of he did not accept that recommendation. However having heard Mr Albilue and witnessed under cross-examination, I consider that he did attempt to give an accurate recollection of what happened at the meeting. He was not necessarily accurate in all the details, though.

[81] Both the claimant and Mr Albilue asserted that the 4th defendant actually dictated what the claimant ought to put in his notice of resignation. This point was strongly contested by the 4th defendant. He pointed out that the references to "*the office*" causing harm to the claimant are devoid of meaning in the present context. There is no entity called "*the office*". The 4th defendant said it was out of the question that he would have made reference to "*the office*" and that shows that the words in the document are not his.

[82] A further point that the 4th defendant made which has validity is that the claimant is legally qualified. Why, the 4th defendant asked rhetorically, would he need advice on what to include in a notice of resignation?

[83] In the end it does not seem critical to resolve the question of whether or not the 4th defendant actually dictated the wording which was to be included in the resignation

notice. The essential point is that the claimant says he is aggrieved by the fact that he was effectively summonsed to the residents of the 4th defendant and while there was subjected to considerable pressure to resign his position.

[84] The 4th defendant says that he did not pressure the claimant but he agreed that he did emphasise why the claimant needed to resign.

[85] The picture that I obtained was that the Chief Justice had formed the view that following the admission of criminal acts on the part of the claimant and the proceedings that followed the Malekula incident, it was inevitable that the claimant would have to vacate the office of Magistrate. Further, the Chief Justice seems to have been perplexed by the failure of the magistrate to understand that just because he had been given a discharge without conviction by the judge who presided at the hearing did not mean that he was thereby immune from disciplinary charges. As the 4th defendant said when he gave evidence before me, and correctly, as I see it, the decision that the judge made in the criminal proceedings was limited in its effect to those proceedings and was in no way dispositive of any future disciplinary proceedings.

[86] My conclusions concerning the incident that occurred at the residence of the 4th defendant on 3 May 2013 are that the 4th defendant, as he was at pains to establish in his evidence, has responsibility for the good standing of the judiciary, and was sharply aware of the potential for harm that could be caused by misconduct by individual judicial officers. He considered that the claimant should do what he described as the honourable thing, by resigning.

[87] I accept that he considered that he was giving advice in good faith and that there was no reason why he ought not to express his views on forceful terms.

[88] The importance of the resignation notice cannot be over -emphasised in the present case. Its relevance to a claim for constructive dismissal will be considered next and at that point in the judgement I shall undertake some analysis of the cause of action.

Wrongful dismissal-nature of the cause of action

[89] Counsel told me there is no statutory procedure for seeking redress for wrongful dismissal in the jurisdiction of the Republic of Vanuatu. That being so the claim by the claimant must invoke the common law doctrine of wrongful dismissal. The authorities make it clear that at common law wrongful dismissal is founded on a breach of an implied term of contract that an employer will deal with his employee fairly and in good faith.[18] It is my view that a constructive dismissal claim, if not a sub-type of wrongful dismissal, is also dependent upon the existence of a contract with implied terms of the same kind.

[90] The case which the claimant brings against the defendants cannot therefore succeed unless he is able to establish that there has been a breach of contract. However, the claimant in taking up the position of Magistrate did not do so in execution of a contractual entitlement to do so. His appointment was an act of the executive, albeit the power of appointment requires that the President can only appoint on the recommendation of the Judicial Service Commission (JSC)[19]. That governs the terms of service and provides for matters such as the retirement age[20] and salaries[21].

[91] The nature of appointment to judicial office in the Republic of Vanuatu therefore largely mirrors that of common law jurisdictions. It follows in my view that a claim to be entitled to sue another entity as being a contracting party to an engagement to perform judicial service cannot succeed.

[92] In any case, even if the status of the claimant could be analysed in terms of contract, the Chief Justice was not one of the principals who had entered the supposed contract. That is to say, it cannot be the case that the Chief Justice can somehow be viewed as the employer of the claimant magistrate and, therefore, therefore owing contractual obligations owed to the magistrate in question.

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[18] *Eastwood v Magnox* [2004] UKHL 35 at paragraph 11

[19] Section 18 Judicial Services and Courts Act

[20] Section 23

[21] Section 22

[93] The wrongful dismissal claim must therefore be dismissed.

The ultra vires claim

[94] The pleading in the statement of claim relating to the next point it is very brief:

> ***"C. Ultra vires, jurisdiction in error and misleading or deceptive***
>
> *28. That the 3rd defendant has made the final decision to dismiss the claimant as stated on the 11/11/2013. The said defendant has acted ultra vires, jurisdiction error and misleading or deceptive on his conduct of his decision made".*

[95] The 3rd defendant was the Chief Registrar of the Supreme Court at all material times. He was also a member of the JSC. The factual background to the allegation which the claimant makes in this part of the statement of claim is that he alleges that in November 2013 the 3rd defendant had a discussion with the office accountant and as a result further payments of salary instalments to the applicant ceased. The position that the defendants take in regard to this matter is that the applicant gave 3 months notice of his resignation on 6 May 2013 but that the courts continued to pay him right down to November when the payments stopped. The defendants' argument is that the claimant having brought his employment to an end by notice which was to expire in August 2013 had no entitlement to salary over and above what he was actually paid. It is disputed that the actions of the 3rd defendant amounted to termination of the employment of the applicant.

[96] Although the defendants did not put it in so many words, it would seem that the contention of the 3rd defendants is that he simply put in train the administrative consequences of the termination of employment by the applicant.

[97] I consider that that is the correct analysis of the position and that any claim to the effect that the 3rd defendant was required, before taking the steps that he did, to grant natural justice type rights to the applicant including dealing with him according to procedural fairness[22] as misplaced. The administrative nature of the decision which the third defendant was making made cannot have attracted such obligations.

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[22] I note that the claimant does not actually particularise what aspects of procedural fairness were breached but I surmise that what I have just written correctly summarises his intentions.

[98] It may be that the claimant is suggesting that other defendants owed duties to the applicant in regard to the termination of his employment. However, the applicant having resigned, it was beyond the power of any of the defendants to dismiss him. There cannot therefore have been any ultra vires or statutorily unjustified exercise of power which would entitle the court to intervene.

[99] There is no need to discuss in detail the other parts of the "*ultra vires*" part of the statement of claim such as the contention that the 3rd defendant acted in a misleading or deceptive manner by claiming that his decision to take such steps as he did was mandated by the JSC when in fact it was, it is claimed, not so authorised. There is no need to go into those questions, again, for the reason that the appointment of the applicant as a magistrate was terminated by his resignation.

The claim in negligence

[100] A claim is brought against the fourth defendant in negligence. The substance of the claim is that the Chief Justice owed a duty of care to the claimant which he negligently breached because of the way that he acted during the course of the meeting which took place in May 2013.

[101] In considering this question I first intend to make brief reference to questions of principle and in that regard I intend to be guided by the following passage extracted from the textbook *The Law of Torts in New Zealand*[23]

> *"5.2.03 Overview*
>
> *The position we have now reached can be summarised in this way.*
>
> *The requirement in any negligence case for the defendants to owe the plaintiff a legal duty to take care exists in order to confine the ambit of liability within reasonably acceptable boundaries.*
>
> *A multitude of cases has determined whether there is a duty and a great variety of differing circumstances. In making their decision the courts look to the accumulated experience of past courts and deciding these cases. The existence or ambit of a duty in any particular case is usually well-established and is not a*

[23] *The Law of Torts in New Zealand, 4* Ed. Stephen Todd and others, Brookers Ltd, Wellington, 2005

live issue. For example, there can be no argument about whether a driver owes a duty to other road users to take care and his or her driving.

In novel or borderline cases where the duty question needs to be decided, the courts have found it helpful to divide the enquiry into two stages. First they ask whether the defendant should reasonably have foreseen injury to his or her "neighbour", in the sense of a person who is closely and proximately affected by the defendant's conduct. Secondly, they weigh up any broader implications for the community in recognising or denying a duty.

The two-stage approach provides us with a structure for determining disputed duty issues, but cannot in itself direct us towards any particular conclusion. Nor indeed, can the Caparo enquiry into what is "fair and reasonable." The point is well made and the leading judgement of Cooke P in South Pacific Manufacturing Company Limited v New Zealand Security Consultants and Investigation Limited

A broad two-stage approach or any other approach is only a framework, a more or less methodical way of tackling a problem. How it is formulated should not matter in the end. Ultimately the exercise can only be a balancing one and the important object is that all relevant factors be weighed. There is no escape from the truth that, whatever formula be used, the outcome in a grey area case has to be determined by judicial judgement. Formulae can help to organise thinking but they cannot provide answers."

[102] Before I discuss the question of whether there was a duty of care which was breached it is necessary to give further consideration to what happened at the meeting on May 2013. Thereafter I will set out my views about the viability of this course of action.

Additional factual findings in relation to the May 2013 meeting

[103] In the first place, I find that the meeting took place at the instigation of the Chief Justice rather than of the claimant. The next question is whether in the course of the meeting the Chief Justice did in fact make statements about the disadvantages that would be caused to the claimant if he persisted with making his complaint to the police about criminal liability on the part of the second defendant and are not resigning. On the one hand, I have already mentioned that I accept that Mr Albilue who accompanied the claimant to the meeting was generally a reliable witness. I have considered this carefully because of the point that was made on the half of the defendants about the improbably identical accounts that the claimant and Mr Albiloue gave of the meeting in their statements of evidence in chief. On reflection, I consider that the fact that their evidence took such a form was probably the result of the way that there evidence was prepared by counsel. It is unsatisfactory that evidence should be prepared for trial on the basis that the statement of one witness is treated as the equivalent of a precedent for the other witnesses so that the evidence of the other witness is drawn up by "*cutting and pasting*". But the fact that

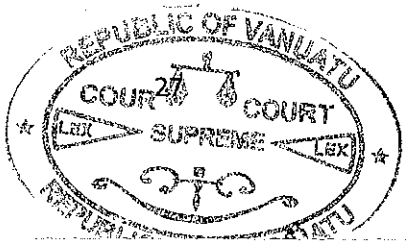
the evidence. In this way does not necessarily detract from the personal credibility of the witness.

[104] I accept that while Mr Albilue may have been mistaken about whether the Chief Justice made mention of the concept of "*the office*", in general terms I consider that his evidence does establish that the statements which the fourth defendant made have included warnings to the applicant that even if he did not resign he would lose his position in any event.

[105] The Chief Justice obviously had firm views about the inappropriateness of the claimant continuing as a magistrate. He accepted as well that he had asked the claimant to come to his house. He accepted that he told the claimant why he should resign although he said that he had never coerced the claimant in the course of the discussions to resign. He disputed that he had said anything about "*the office*" or other persons or institutions acting against the interests of the claimant if he declined to resign.

Conclusion on negligence claim

[106] The first issue is whether the fourth defendant was subject to a duty of care owed to the claimant. I do not consider that it was. This was not a case where the claimant was seeking the advice of the fourth defendant as to what would be in his best interests. The circumstances in which the meeting took place make that clear. The fourth defendant took the initiative in setting up the meeting and in effect demanded that the claimant attend it. At the meeting there does not appear to have been any general discussion of the alternatives available to the claimant with the fourth defendant providing comment on the relative merits of each one. By his conduct at the meeting, the fourth defendant made it clear that there was one option on the table and that was that the claimant should not proceed with the criminal libel complaint and should resign. The context of the meeting objectively considered was quite different from the situation where the parties to the meeting would have been clear that the function of the person in the position of the fourth defendant was to give dispassionate advice about how the best interests of the claimant could be served in all the circumstances.



[107] The second reason why I consider there was no duty of care arises from consideration of the position which the fourth defendant occupied under the Constitution. His responsibility was to safeguard the judiciary generally and to ensure its good standing as a whole. It was not his job to provide legal counsel to individual judicial officers who found themselves in difficulty.

[108] Even if the fourth defendant was not giving legal advice to the claimant (which is the primary element of the claim which the claimant brings) it may be that a person in the position of the fourth defendant when engaged in the different process of counselling a member of the judiciary might be subject to a duty of care.

[109] Of course, heads of bench may in appropriate cases counsel and advise their individual judges.

[110] The influence of the head of bench on his subordinate judges is potentially a strong one based upon respect for the position of the former, and generally, an appreciation of his or her personal experience and wisdom. Common sense, though, suggests that that it is an influence that ought not to be misused. Conduct that amounted to bulldozing an individual into taking a step that he or she did not want to would probably amount to a misuse of the influence inherent in the head of benches position. Advice given coupled with a clear and even forceful explanation as to its basis would not be objectionable particularly if it was made clear that in the end the decision was that of the individual judge.

[111] The observations just made, though, about what if any limits there are on the proper advice that ahead of bench may give do not mean that he is under a duty of care breach of which could result in the award of damages to your personal and the position of the claimant. Just because consensus could be reached that there are certain limits to how a person should appropriately behave in a given situation does not mean that it automatically follows that a duty of care upon which a claim of negligence can be based comes into existence.

[112] One consideration which tells against the imposition of a duty of care is that it may be supposed that a magistrate who is legally qualified as the claimant in this case would understand that he had legal rights which could not be taken away from him. The implicit

argument that such a person should have a legitimate expectation that the head of bench would, when advising him, give advice that prioritised his private interests in contrast to those of the institution of the judiciary as a whole, is not an attractive one. It tells against the recognition of a cause of action. Any Chief Justice must have wider responsibilities in a given case than assisting an individual judge to obtain an outcome that ensures the greatest benefits to that judge, without having regard to the interests of the institutions of justice as a whole.

[113] There is a further point which persuades the court against recognising a duty of care. The claimant's counsel did not refer me to any precedent case in which a duty of care had been found to exist which was analogous to the present case. The decision in this case therefore must be approached on the basis that it will recognise a novel duty of care. One of the constraints on so doing is that the court must be careful to ensure that the law develops in a coherent and consistent way. This causes the difficulty in the present case, I consider. The consequences of the finding that there had been a breach of a duty of care in this case would seem to conflict with the existence of a cause of action recognised at common law which enables a plaintiff to sue for misfeasance by a person in public office. The law of New Zealand would appear to be consistent with that of other jurisdictions where the tort has been subject to a more recent development. In my New Zealand commentary the tort as described in the following terms:

> *"336. The tort of misfeasance in public office has its origin in the premise that public powers are to be exercised for the public good. The tort is committed where a public officer abuses his or her office and causes damage to another person. The plaintiff must prove the following four elements: first, that the defendant is a "public officer"; secondly that the defendant acted in the exercise or purportedly exercise of his or her office; thirdly, that the defendant acted with malice towards the plaintiff, or with knowledge that he was acting in validly and that damage to the plaintiff would result; and fourth, that the plaintiff suffered damage as a result of the defendant's conduct.*[24]

[114] The misfeasance cause of action is therefore constrained within strict limits. To allow a cause of action in this case based upon negligence in which a wholly different approaches taken to testing for liability would be anomalous and impermissible in my view. It would mean that a claimant could escape the restrictive requirements of the misfeasance in

[24] *Laws of New Zealand,* volume "Tort", paragraph 336

public office cause of action by framing his case and negligence. This in my view tells against the case for the claimant that a cause of action in negligence ought to be recognised in the present case.

[115] In the end the court has to make a judgement about whether it is just and reasonable to allow a cause of action in a case where the claim is novel. I consider that the weight of arguments against recognising such a cause of action in the present circumstances means that the court should not recognise a duty of care.

[116] In my assessment the claim would not succeed anyway because of issues of causation which I will attempt to explain briefly.

[117] The proposed duty of care is not particularised in the statement of claim but that must involve a claim that the fourth defendant did not take reasonable care to give accurate advice. I assume that the argument is that the ultimate loss that was caused to the applicant is that he had he not been given the advice he was he would not have resigned and would have retained his position as a magistrate.

[118] This then gives rise to the question of whether the advice which the fourth defendant provided was something that a careful Chief Justice in his position would not have given. I am unable to agree that the duty is breached in this way. The fourth defendant was not wrong has forecast that there was a good probability that the claimant would be dismissed if the matter went to the JSC. Nor was he wrong in suggesting that there would be a stigma associated with the claimant if he was dismissed by the JSC. He cannot therefore have breached his (argued) duty to go careful advice.

[119] I come to the conclusions concerning the potential risk of dismissal for the following reasons. The fact that the claimant had shown himself capable of taking on the law into his own hands by cutting down the structure that he did and at the same time to carry with them a firearm strongly suggests that he did not have a sufficient understanding of his responsibilities as a magistrate. In my assessment, it would not have been misleading for the fourth defendant in this context of this case to tell the claimant, in effect, that his best interests would be served by resigning.

[120] At this point I need to notate further submission that Mr Laumae made in his closing submissions. Mr Laumae disputed that there were good grounds for supposing that the claimant might be dismissed if the issue went to the JSC. The submission focused on the fact that the claimant had a firearm with them when he demolish the building. Mr Laumae said that in fact the reason why the claimant had a rifle with him was that he before the demolition activity the claimant had been in the plantation doing some shooting. It was then counsel's contention that when the presence of the firearm was viewed in this context that it was not sinister at all.

[121] Mr Gilu correctly pointed out that this was an account that that the claimant had not put forward in his sworn statement of evidence for this proceeding. I also note that given that it was clearly a central matter to the seriousness of the allegations which were before the Supreme Court, it was surprising that the claimant did not tell Justice Spear that that was how he came to be in possession of a firearm. I reject these submissions. The supposed innocent explanation for carriage of the firearm is rejected, too, on the basis that it is inherently unlikely and secondly that it has not been put forward by the claimant and his evidence at either the hearing in the Supreme Court before Justice Spear or before me.

[122] It follows that if there was no innocent explanation for the claimant carrying a firearm during these events. That he did so reflects very poorly upon him and I am sure that the JSC would have taken a most adverse view of his conduct so that it was likely that he would have been dismissed. Certainly it cannot be said that the fourth defendant was careless when his suggested that that was likely to happen.

[123] Similar considerations mean that the applicant has not established that any loss was caused by negligence on the part of the fourth defendant. The case for the claimant is that had he not been given the advice that he was, he would have successfully resisted the disciplinary charges against him and would have remained in office as a magistrate thereby avoiding the loss which he says he was caused by vacating his office. For the reasons that I have already given, I am not satisfied on the balance of probabilities that the JSC would have dismissed the disciplinary charges against the claimant.

[124] The claimant appears to have had the firm, but mistaken, belief that because he had been discharged without conviction by Justice Spear, that put him beyond the reach of disciplinary proceedings before the JSC. He was left in no doubt that the fourth

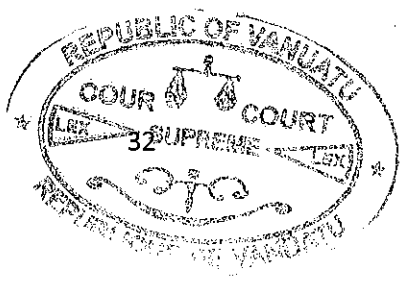
defendant in urging his resignation rejected that process of reasoning. I consider that the fourth defendant was correct in doing so. The JSC would be giving consideration to the same facts as Justice Spear reviewed in the criminal case. But Justice Spear was applying quite a different statutory test when assessing what legal consequences should flow from the conduct of the claimant. The question that the JSC would be asking in the light of the established facts was, broadly, whether the claimant was a proper person to remain in office as a magistrate. The judgement that Justice Spear gave was not addressed to the latter question.

Questions arising from the letter of resignation

[125] It was part of the case which the claimant brought that his resignation as a magistrate was not formally received or commented upon by either the President or by the JSC. Linked to this element of this claim is the further contention that the actions of discontinuing payment of his magistrate's salary was not formally sanctioned by either of the two entities to which reference has just been made.

[126] I accept that the broad factual contentions which he makes about the lack of consideration by the president or JSC about his notice of resignation are correct. The only response that I have been able to locate in the evidence is that the third defendant wrote to the plaintiff on behalf of the government thanking the claimant for his service as a magistrate after he had submitted his resignation.

[127] It is correct that pursuant to section 23(6) Judicial Services and Courts Act that the JSC may at the request of a magistrate allow him or her to vacate his or her office. This power was probably conferred on the JSC for a number of reasons. One of those might be that desirable to ensure stability of the judicial establishment in the Magistrates Court. Another is that the power to control resignations may have been inserted into the act for the protection of magistrates to prevent improper influencing or victimisation of judicial officers: s4. It may also be an object of the section to prevent magistrates from resigning for the purpose of pre-emptying disciplinary charges pending against them.



[128] In any case, what is made clear is that it is only if the magistrate can demonstrate a proper reason for vacation of office such as ill-health that leave will be granted and that the magistrate will retain the pension and benefits referred to in section 23(8).

[129] I do not accept that that was the statutory intention that a magistrate, such as the present claimant who has misconducted himself and then resigns, was intended to retain the pension and benefits that accrued to him under the act.

[130] Further, I do not accept that the Act should be interpreted in such a way that where a magistrate resigns without obtaining the leave referred to in section 23-and the applicant here does not claim that he obtained such leave – he should be able to enforce a claim to unpaid salary. The claim which the applicant brings must have some basis. The court cannot order damages representing the lost emoluments of office on some broad ground such as good conscience for from subjective considerations of justice. Where an applicant has resigned without consent, and in circumstances where he has admitted serious misconduct, I do not accept that it was this the intention of the drafters of the statute that he should be able to make a claim for compensation for loss salary et cetera.

[131] Finally, a further ground for rejecting the claim is that the circumstances of the claim mean that it is analogous to a case of a claimant taking advantage of his own wrong. The applicant has breached the Act by resigning without obtaining permission. It is made clear in the Act that the onus is on magistrate who wishes to resign to obtain permission. The applicant resigned without obtaining permission and thereby breached the Act. The JSC did not. It is because of his unsanctioned resignation that his salary was discontinued thereby compelling him to bring an action for damages to recover its equivalent.

[132] This part of the claim is dismissed.

Claim that the third defendant made final decision to dismiss the claimant, a decision that was ultra vires

[133] I have previously made reference to the letter which the JSC wrote to the claimant on 11 November 2013. That letter asserted that the JSC had "*mandated [the third defendant] to write to you to inform you that your resignation became effective on 6 August 2013, being the date on which you specified in your letter of sixth of May 2013*". The letter then

continued by thanking the claimant for his service. The claimant pleads that this amounted to the third defendant making a decision to dismiss the claimant.[25]

[134] I do not consider that the claim is a valid one. The claimant is inviting the court to construe the letter in a way which is at variance with its express terms. That is to say, the letter which recorded the resignation by the claimant cannot reasonably be read as constituting notification of a decision by the JSC to dismiss him.

[135] There is no other evidence that the third defendant or any party associated with the JSC in fact resolved to dismiss the claimant. This cause of action, too, is dismissed.

[136] It also appears in succeeding paragraphs of the statement of claim that the claimant contends that the third defendant conducted himself negligently in connection with purportedly making the decision to dismiss the claimant in the circumstances which I have described earlier in this section of the judgement. I am unable to accept that any duty of care breach or loss for negligence has been established and that part of the claim, too, cannot succeed. This claim involves the circumstances in which the third defendant gave instructions to the accountant to discontinue payment of the claimant's salary.

[137] I am unable to agree that there is any particular legal significance attributable to these supposed omissions. The actions of the second defendant and the accountant were the administrative sequalae which would inevitably follow following the discontinuance of the claimant's status as a magistrate. In the absence of any statutory provision or decided case which mandates a contrary conclusion, I regard these matters of being of no significance and, in particular, regard them as not giving rise to any cause of action for which the claimant ought to be able to recover damages.

Result and costs

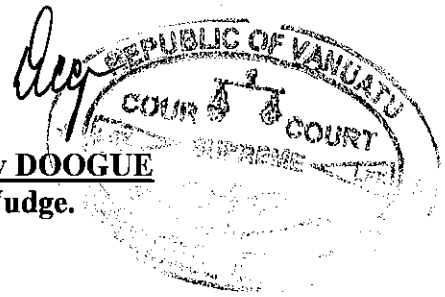
[138] The claimant has succeeded on his defamation claim. He has failed on a number of other claims. His pleading was unnecessarily diffuse and introduced causes of action which had little prospect of success and as a result the court's time and that of opposing counsel

[25] Paragraph 28 ASOC

was taken up with considering matters that ought not to have been introduced into the amended statement of claim. I therefore direct that costs are to lie where they fall.

DATED at Port Vila, this 16th day of March, 2018.

BY THE COURT



Jeremy DOOGUE
Judge.