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

Civil
Case No. 17/1377 SC/CIVL

BETWEEN: **BUNNINGS HARDWARE LIMITED**
First Claimant

AND: **WILCO LIMITED**
Second Claimant

AND: **QBE INSURANCE (VANUATU) LIMITED**
Defendant

Coram:	***Hon. Chief Justice Vincent Lunabek***
Date of Hearing:	***4 & 5 September 2018***
Written Submissions:	***17 May 2019*** ***17 April 2020*** ***31 August 2020***
Counsel:	***Dane Thornburgh (and Garry M. Blake) for the Claimants*** ***Mark J. Hurley for the Defendant***
Date of Judgment:	***26th July 2024***

JUDGMENT

Introduction

1. This is an insurance claim for loss suffered by the Second Claimant as a result of Cyclone Pam which struck Port Vila on the evening of 13th March 2015. Wilco Limited held insurance issued by the Defendant in respect of loss and damage to its property and hardware businesses. Subsequent to the cyclone the ownership of Wilco Limited was acquired by the First Claimant, Bunnings Hardware Limited. The rights of Wilco Limited under the insurance were assigned to the First Claimant. Both companies are claimants and the proceedings have been conducted on the basis that together they are the insured entity under the policy.

Relief sought – Damages for consequential loss of the insurance policy

2. On 9th June 2017 the Claimants issued these proceedings claiming judgment and damages of not less than VT179,793,554 pursuant to Section 2 (Consequential Loss) of the insurance policy. A separate claim for material damage suffered by Wilco Limited under Section 1 of the policy has already been settled and plays no part in these proceedings.

Liability under the Insurance policy was admitted by the defendant

3. The proceedings were issued whilst insurance adjusters and the parties were still in discussion over the losses covered by the insurance policy. During this process liability under the policy was admitted by the Defendant and the issues between them concerned the extent of cover given under the policy, and the methods of assessment to be applied. In short, it became a matter of determining the quantum of the Claimants' entitlements.

4. The parties and the Court have been assisted throughout by expert loss adjusters skilled in assessing major insurance losses. Mr Paul Vincent, a Director of Vincent Forensic Accountants of Brisbane was engaged by the Claimants, and Mr Stephen Grandidge, an Executive Adjuster employed by McClarence Global Claim Services of Brisbane was engaged by the Defendant. At trial the Court had two reports from Mr Vincent dated 13 June 2016 and 11 June 2018, and two reports from Mr Grandidge dated 6 January 2017 and 9 May 2017. Both experts were called to give oral evidence and were cross-examined on issues where their evidence was challenged. Both Mr Vincent and Mr Grandidge are highly experienced and qualified loss adjusters. They acknowledge that the assessment of losses, in particular business profits, is not an exact science and reasonable minds and reasonable experts can be expected to differ.

5. After the proceedings were commenced the Defendant acknowledged that it was liable for VT31,214,415 which was paid on 1st February 2017.

Further payment made due to a calculation error

6. The trial then proceeded and as the expert insurance adjusters reconsidered their assessments a calculation error was identified and the Defendant paid a further VT6,391,883 to the Claimants. That payment was made on 13th September 2018.

Sworn statements, Experts reports and written submissions of the parties simplify the identification of the issues on the extent cover

7. The trial proceeded. The Claimants at the outset formally pressed their claim for VT179,793,554 as pleaded, although as the evidence unfolded it became clear that this sum included a gross loss of profits claim of VT173,638,289 which made no allowance for "*averaging*". At the end of the trial, and with the benefit of the parties' written submissions, it became clear that the experts agreed, and the parties accepted, that the averaging requirement was to be applied. This substantially reduced the loss of profit claims. That requirement appears in the last paragraph of the following section of the policy which will become relevant to one of the issues later discussed. The policy relevantly provides:

> *BASIS OF SETTLEMENT:*
> *Item No. 1: Insured Gross Profit*

The insurance under this item is limited to loss of Gross Profit due to; (a) Reduction in Turnover and (b) Increase in Cost of Working and the amount payable as indemnity thereunder shall be:

(a) In respect of Reduction in Turnover:

The sum produced by applying the rate of Gross Profit to the amount by which the Turnover during the Indemnity Period shall, in consequence of the Damage, fall short of the Standard Turnover;

(b) In respect of Increase in Cost of Working

The additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in Turnover which, but for that expenditure would have taken place during the Indemnity Period in consequence of the Damage, but not exceeding the sum produced by applying the Rate of Gross Profit to the amount of the reduction thereby avoided.

Less any sum saved during the Indemnity Period in respect of such of the charges and expenses of the Business payable out of Gross Profit as may cease or be reduced in consequence of the Damage.

Provided that if the Declared Value of Gross Profit at the commencement of each Period of Insurance be less than the sum produced by applying the Rate of Gross Profit to the Annual Turnover, (or its proportionately increased multiple thereof, where the Indemnity Period exceeds 12 months) the amount payable hereunder shall be proportionately reduced.

8. Averaging applies as the declared value of gross profit of VT300 million was for less than the sum produced under the Rate of Gross Profits to the Annual Turnover formula (VT672,361,043).

9. Early in pre-trial discussions between the parties there was also an issue whether the Indemnity Period (over which the loss was to be estimated) was 8 months or 12 months. By the end of the trial it was agreed that the Indemnity Period is 12 months, and the expert witnesses proceeded on that basis.

10. Complex analyses of financial statements and calculations and assessment processes that were foreshadowed by sworn statements including those from the expert insurance adjusters became greatly simplified as the trial progressed, and finally by the written submissions of the parties. Ultimately the parties identified five issues that required the determination of the court. These issues are clearly identified in paragraph 23 of the closing submissions of the Claimants which identified the five issues by reference to Table 1 prepared by Mr Vincent, which shows differences between his evaluation and that of Mr Grandidge. At paragraph 24 of those submissions the court was informed that these are the only issues that the court needs to determine.

11. Based on Table 1 the final submissions in response by the Claimants observe that the Claimants have asserted a sum owing of VT77,534,147 but the Defendant has only admitted to amounts

owing of VT37,606,298 (being the two amounts already paid) thereby resulting in a difference of VT39,927849 between the parties.

Background

12. By way of background, before turning to the five questions posed by the parties, brief reference to the business enterprises of Wilco Limited should be made. Prior to the cyclone it operated a hardware business in Port Vila (Vila Hardware) and in addition operated the following three businesses at Tagabe:

    I. A Hardware Store (Budget Hardware);
    II. A Home Furniture Centre selling white goods, furniture and other household items (HFC);
    III. A Hire Purchase Business which was sustained from credit sales of white goods and furniture from the HFC Business (HP).

13. Cyclone Pam destroyed the Tagabe Store and the three businesses identified above which operated from that location.

14. Subsequent to Cyclone Pam and the destruction of the Tagabe Store the Claimants say they attempted to mitigate the loss of gross profits arising from the damage to HFC and the HP turnover by utilising 10% of the Port Vila Store floor space (previously used to display and sell hardware products) to establish a new home centre furniture and hire purchase business at Port Vila, and to display and sell its range of home furniture.

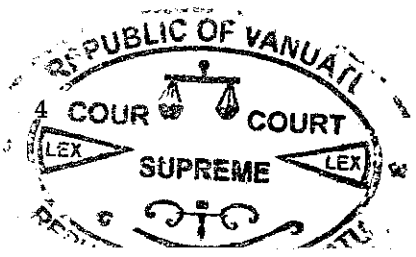
15. Although Vila Hardware and Tagabe Hardware substantially sold the same products (ie. hardware and building supplies) prior to the cyclone Vila Hardware was located 3.6km from the Tagabe Budget Hardware. The Claimants say that many Tagabe Hardware customers were from the large village of Mele which is 8km from Vila Hardware and that Tagabe Hardware customers were well serviced after the cyclone by numerous competitors located in the vicinity of the Budget Store who were undamaged in the cyclone.

Five questions – issues to be answered by the Court

16. The five questions identified in Mr Vincent's Table 1 are conveniently referred to as:

    (1) Loss of "Profit";
    (2) Increased costs of working, ie. additional labour costs to reinstate business;
    (3) Professional fees – preparation of claims;
    (4) Additional increase in cost of working;
    (5) Hire Purchase sales written off.

17. The written submissions of the parties address each of these topics and expand on the matters that require the decision of the court.



18. I now turn to each of the questions that have been posed by the parties.

Question 1: Loss of Gross Profit

19. The issue posed by this question requires an assessment in accordance with the policy conditions of the loss of gross profit suffered by the Claimants. This requires the application of a complex process of adjustment described by Mr Vincent in Section 6.4 of his first report. There is disagreement between the parties over the extent of the adjustment which should be made to the pre-cyclone gross incomes of the businesses. Mr Vincent considers that adjustments should be made that are considerably higher than the adjustment which Mr Grandidge considers appropriate. The following table shows the different adjustments which each expert proposes for each business.

	Vila Hardware	Budget Hardware	HFC	HP
Mr Vincent	0% First 6 week after Cyclone 10% Post Cyclone Turnover	53.5% Pre-Cyclone Turnover	53.5% Pre-Cyclone Turnover	16.1% HFC Post Cyclone Turnover
Mr Grandidge	0%	33.44% Pre-Cyclone Turnover	33.4% Pre-Cyclone Turnover	16.1% HFC Post-Cyclone Turnover

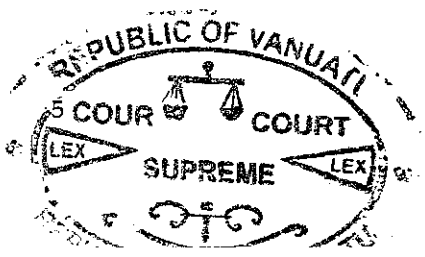
20. The reasons for their differing adjustments are set out in their reports. They depend to a considerable extent on differing assessments as to how potential customers might be expected to behave during the period pre-cyclone and post-cyclone. These are subjective speculations. By reference to Table 1 referred to above the differing adjustments produce a monetary difference between the parties which is said to be VT28,177,786.

21. The arguments of the Defendant against allowing this amount are directed first to the Claimants' assertion that the 10% loss of space at Vila Hardware used to rehouse the Tagabe businesses after the cyclone has resulted in a 10% loss of Vila Hardware profits, and secondly to Mr Vincent's "*aggressive*" adjustment rates of 53.5%.

22. The Defendant does not accept the Claimants' argument that the loss of 10% floor space results in a 10% loss of sales at Vila Hardware. On this point Mr Grandidge opines:

> "*It is standard practice in medium to large retail outlets to have single items on display to sell from. The majority of stock intended to be sold is generally stored away from the customer. Also, it is our experience that hardware items are often sold without display as trades are ready to specify the product required*".

23. Further, the Defendant argues that the claim for 10% loss of sales does not attempt to address the fact that Vila Hardware would have benefitted from sales to customers who would normally have attended the Tagabe outlet.



24. On the second point concerning Mr Vincent's adjustment rate, Mr Grandidge responds by challenging the assumptions on which it is based. He says:

> *"It would appear that the growth rate used has been calculated using the post loss revenue at the Vila store without taking into consideration, that despite the propositions made in relation to the disruption to the business, that certain of the sales had been transferred from the Tagabe store. In other words VCA (Mr Vincent) have ignored any sales that may have been made to customers who would have normally attended to the Tagabe store. Even though additional stock had been made available at Port Vila with the renting of the additional premises.*
>
> *Although the Insured and their consultants may wish to argue that as a result of the extent of damage across Vanuatu they would have expected extraordinary business growth this ignores the fact that many contractors imported materials directly from outside of the country when repairing large developments.*
>
> *We believe that the Loss of Revenue figures calculated by both consultants overstate the likely revenues post loss, we believe that there is no argument for a claim for reduction of turnover at the Port Vila Operations. Assuming that there were not disruptions then the growth in revenue is 41.8%. But that being said there is an argument that this growth includes sales that would otherwise have been made from the Tagabe operations.*
>
> *Applying a small discount to the growth figure of say 20% this would reduce the growth to 33.44% which would result in a loss of Gross Revenue (including VAT) in the amount of VT281,682,312 which is generous and reasonable."*

25. The reference to VT281,682,312 can be best understood from a table that appears at page 368 of the trial book; para. 15.1 of Mr Grandidge's first report. It is the application of that gross revenue assessment which lies behind the calculation which separates the parties on this issue by the VT28,177,786 figure.

26. As already noted the opinions of the experts on each side of these arguments are not based on precise science. Their estimates are to a degree subjective and speculative. They are opinions on which reasonable experts can differ. I can see force in both sides of their arguments. In the circumstances I think broad justice is likely to be achieved by taking a mid-point and allowing in favour of the Claimants half the amount in dispute under question 1, and I so decide.

Question 2: Increased costs of working, ie. additional labour costs to reinstate business

27. In their final submissions the parties are agreed that this claim concerns a claim for wages paid to Mr Troy Harris, a Director of the Claimants, in the sum of VT676,896 and to Mr James Koam of VT75,576. The Defendant has now conceded that it should pay the costs of Mr Koam. The argument concerns the amount claimed as costs incurred for the services of Mr Harris. The Defendant disputes this claim on the basis that as a Director Mr Harris has a duty to mitigate the company's loss. In addition Mr Grandidge's evidence is that it would appear Mr Harris' time was for the purposes of salvaging stock and not carried out to avoid diminished reduction and to ensure its turnover so he considers it is not a claim under Section 2 of the Policy.

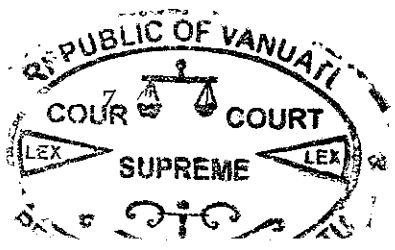
28. I accept that a director of an insured company would be expected to assist in mitigating loss suffered by the company. However, if the director had not undertaken that physical work, it would have been necessary to employ someone other than the director to do it. As a director, Mr Harris probably achieved the required result quicker because he would have known what was required without instructions. In my opinion, the claim made for the services of Mr Harris constitutes an item payable under the Policy as an additional labour cost to reinstate the business. His costs should be paid by the Defendant.

Question 3: Professional fees – preparation of claim:

29. The claimants have sought costs incurred with three separate entities under this heading. It appears that in the first instance Marsh Risk Consulting was engaged to prepare the claim on behalf of the insured but apparently after a misunderstanding occurred between the Claimants and that entity its services were terminated. Then, Vincent's Forensics Accountants were instructed and Mr Vincent's expert reports were in due course forthcoming. The claims for costs associated both with Marsh Risk Consulting and with Vincent's Forensics Accountants have been paid by the Defendant. It is the claim for costs by the third entity, Thornburgh Lawyers, that gives rise to this question. The insurer contends that it should not be required to pay fees of Thornburgh Lawyers whose role was rather to advocate a claim position rather than to prepare details to be presented in the form that reflects a cover available in the policy. Thornburgh Lawyers were the solicitors on record for the Claimants, and would be entitled to legal fees in that capacity. However, the amount allowed as part of the costs of these proceedings would not cover preliminary advice given to the insurer about components in a proposed claim, nor cover costs involved in assisting the insurer to formulate claims that complied with the conditions of the policy. To that extent I consider that Thornburgh Lawyers, even though they are legal practitioners, should have their costs of their early work covered by the policy. However, care must be taken not to allow any double up to occur by double counting costs properly recoverable as part of their preparation for the current proceedings. Dividing the costs' claim between the two stages of work undertaken by the solicitors can only be resolved on an arbitrary basis. I consider one half of the Thornburgh Lawyers' costs should be paid by the Defendant, and I so decide.

Question 4: Additional increase in cost of working

30. The amount which the Claimants seek to recover under this topic concerns an allowance for a proportion of expenses deducted from the Gross Profit claimed under that head of loss relating to five items where the averaging provision was applied. I have earlier set out the terms of Item No. 1 appearing under the Basis of Settlement provision of the policy (see [7] above). Increase in Cost of Working is covered under paragraph (b) in that item. In my opinion, as a matter of construction of that clause of the policy the averaging provision is to apply in respect of items claimed as increases in cost of working, and accordingly it would be contrary to the intent of that clause to allow the amount being deducted under the averaging condition as a separate claim arising under another provision of the policy. In my opinion this item is not recoverable by the Claimants.



Question 5: Hire Purchase Sales written off

31. The claimants included a claim for Hire Purchase loan repayments that were written off as unrecoverable as a result of the cyclone. Repayments were unrecoverable either because the economic situation of the hirer after the cyclone made further payments unrealistic, or because the hard goods had been destroyed and could not be repossessed, or a combination of both factors. A list of the loan agreements written off is attached as Annexure 17 to Mr Vincent's final report. It shows outstanding payments of VT17,286,741 and in para. 6.7.2 of his report Mr Vincent says he allowed this amount. However the claimants are seeking a greater sum which Table 1 earlier referred to shows an amount of VT15,558,067 as in issue.

32. I propose to decide the underlying issue of whether the loss of outstanding hire purchase sales is recoverable under the policy, and the parties can apply that ruling to the facts as they know them if the figure in Table 1 is not the correct figure.

33. The Defendant denies that this head of loss is covered by the policy for two reasons. First, the hire purchase goods have been sold to third parties and removed elsewhere. It is therefore not property situated at the location of the insured properties. Secondly, the hire purchase goods were in the possession of third parties and therefore do not fall within the definition "*The Property Insured*". That definition reads:

> *"All real and Personal Property of every kind and description (except as hereinafter excluded) belonging to the Insured, or for which the Insured is responsible or has expressly assumed responsibility to insure prior to the occurrence of any damage.*

34. Mr Grandidge would disallow this head of loss on the second ground: see paragraph 13.6 of his first report. However in paragraph 13.7 he observes "*The insured argue that the claim is made consequent upon the HP Loan Agreements 'became uncollectable originating from Cyclone Pam and where there were no goods available to repossess subsequent to the Cyclone. This, it would seem is an argument that the loss has arisen from the event and not damage*".

35. However, Mr Grandidge does not address the question whether the loss is one from the event.

36. The definition of "*The Property Insured*" is an extremely wide term – "*all real and Personal Property of every kind and description ...*" What the claimants say is lost here is the value of the choses in action being the rights of recovery of indebtedness of the hirers, and argue, in effect, that the choses in action have been lost by the event of the cyclone.

37. I can find no definition of Personal Property or exclusion clause in the policy which is contrary to this interpretation.

38. I therefore agree with the claimants' argument. The reality of the situation is that the cyclone destroyed any prospect of the hire purchase debts which were written off being recovered. The losses of the value of those choses in action in my opinion constitute the loss of personal property

within the definition of "*the property insured*". I award the claimants the amount lost or the hire payments written.

Other issues – Interest and costs

Interest

39. The parties have asked that I also rule on the entitlement of the claimants to interest on amounts payable to them, and on the costs which the claimants are entitled to recover in these proceedings. On the first question, I consider interest should run on amounts found owing to the claimants from the date of commencement of the proceedings, and not before. The processes of assessing the claimants' losses were considerable, and I do not think there is any reasonable basis upon which interest should be awarded from a date before the commencement of the proceedings. It follows that the claimants are entitled to interest on the payment made on 1 February 2017 from the date of commencement of the proceedings on 9 June 2017 to that date, and on the second of the payments interest to 13 September 2018. In respect of matters now payable under this judgment interest will run from the commencement of the proceedings to the date of payment, in all cases at an interest rate of 5%.

Costs

40. On the second question, I consider the claimants should recover their costs of these proceedings on the standard party and party basis. The issues in the proceedings have been complicated and in these circumstances I do not think that there should be any costs penalty imposed on the respondent for delays or the fact that at one point a calculation error was detected. In so far as delays are concerned they are to be compensated in any event by the payment of interest.

Final Directions

41. In giving these reasons I have made reference to Table 1 at [7], and elsewhere and from that table or from written submissions of the parties that particular amounts as being in issue. I recognise the possibility that the parties may agree that different figures should have been used. I will therefore publish these reasons and then adjourn the matter to enable the parties to bring in minutes of order to enable final judgment to be entered. In the event that the parties cannot agree each side is to lodge their proposed minute, and the court will determine the judgment sum.

DATED at Port Vila, this 26th day of July, 2024.

BY THE COURT

Hon. Chief Justice Vincent Lunabek