

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

Civil
Case No. 16/323 SC/CVL

BETWEEN: FRANKO AFKHAMI
Claimant

**AND: RODNEY N SMITH TRADING AS TELSAT
PACIFIC**
Defendant

Date of Hearing: 23 December 2019
Before: Justice G.A. Andrée Wiltens
In Attendance: Mr T. J. Bottleg for the Claimant
Mr E. Nalyal for the Defendant
Date of Decision: 3 April 2020

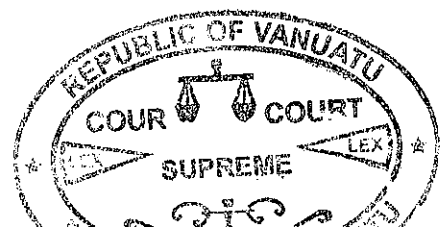
JUDGMENT

A. Introduction

1. This matter came before me after being case-managed by a fellow Judge. It has not progressed through the Court process smoothly. It involves a claim for damages due to negligence. The cause of action stems from March 2015.

B. Background

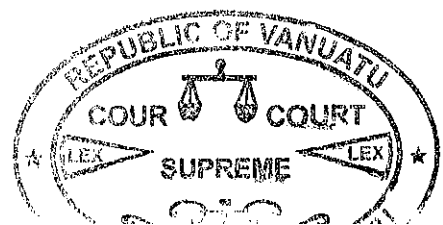
2. During Cyclone Pam's destructive track through Vanuatu, two of the defendant's communication towers at Teouma were felled to the ground. The older tower was 30m high, the new replacement tower was 25m high. Both fell onto Mr Afkhami's adjoining property. Mr Afkhami maintains the towers were poorly manufactured, negligently erected and insufficiently tethered to the ground; as well as being inadequately maintained after installation. His concern was at least partly responsible for the replacement work being undertaken at the time.



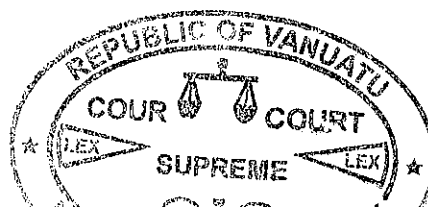
3. When the 25m tower fell, it made direct contact with the roof of a building being constructed by Mr Afkhami. The effect of this, according to Mr Afkhami was that the damage this caused enabled Cyclone Pam's ferocious winds and torrential rains to gain entry into his building causing considerable damage.
4. Mr Afkhami accordingly claimed substantial damages, as follows:
 - VT 5 million to rebuild the building;
 - VT 1 million loss of personal property;
 - VT 72,000 for loss of 9 months rent; and
 - an additional 10%.
5. Mr Smith, trading as Telsat Pacific, accepts that the new tower fell onto Mr Afkhami's bungalow. Mr Smith further accepts his responsibility to make good the damage caused. However, he challenges what this damage actually entails.
6. As liability was not disputed, the parties agreed that the only issue for the Court to determine was the quantum of damages to be awarded to Mr. Afkhami.
7. Neither counsel had sought to cross-examine any of the witnesses. Accordingly, all the evidence before the Court was in the form of sworn statements. Counsel sought to file written submissions, based on the available evidence, as to the quantum of damages that should be awarded. Neither wished to augment their written submissions by subsequent oral representations.
8. Accordingly, I directed Mr. Botleng file and serve his submissions by 13 January 2020, and Mr. Nalyal to file and serve his submissions by 27 January 2020. I would then provide a reserved written judgment "on the papers".
9. In the event, Mr Botleng filed his submissions on 28 January 2020. Mr Nalyal filed his submissions on 28 February 2020 – having been warned on 24 February 2020 that the judgment would be issued without the assistance of his submission, and this then prompted his quick response.
10. This is now my decision as to the quantum of damages Mr Smith is to pay and the reasons for that.

C. The Evidence

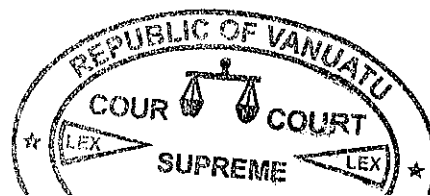
11. The Claimant's evidence comprised of sworn statements by Mr Afkhami, Mr Jameson, Mr Tor and Mr Qualao.
12. The Defendant's evidence comprised of sworn statements by Mr Smith, Mr Mainguy (x2), Mr Dick and Mr Avock.



13. There are numerous areas of contention. Accordingly each witness' account is now summarised, before my determination of the facts of the matter. I will then address the quantum of damages.
14. I have not had the advantage of seeing any of the witnesses, nor had the advantage of cross-examination to test the evidence. I have looked for consistency between the various accounts, and also considered whether the stated events were inherently likely. Ultimately, I have had to have regard to the onus of proof. In this matter Mr Afkhami needed to establish his contentions on the preponderance of evidence meaning his version had to be more likely than not in order for his claim to succeed to the extent he was seeking.
15. Mr Afkhami stated that he had constructed a bungalow on his Teouma property, Lease Title 12/0941/033, for the purpose of long-term rental. This bungalow was constructed with a cyclone-rated screw system with cyclone shelters and Crimsafe shutters.
16. He appended a Kramer Ausenco report dated 8 April 2015, and a Qualao Consulting Ltd report dated 13 April 2015.
17. Mr Afkhami stated that he had indirectly warned Mr Smith about the poor condition of the old tower and raised the risk of damage to his property in April 2014. Mr. Smith replied, reassuring him there was no issue.
18. Mr Afkhami stated that his new bungalow was unaffected by Cyclone Pam, but had sustained damage after Mr Smith's new 25m tower was uprooted and fell onto the bungalow roof "...allowing wind and rain to enter the bungalow." He said that the damage sustained was significant, "...requiring replacement of the entire roof structure, roof decking, walls, doors, ceiling, electrical, plumbing and painting." He said that personal property inside the bungalow had also been damaged. Mr Afkhami relied on the reports by Kramer Ausenco and Qualao Consultancy Ltd as confirmation of the damage caused, and also as confirmation that the sole cause of the damage was the tower falling onto the bungalow roof.
19. Mr Afkhami wrote to Mr. Smith regarding Telsat's insurance in order to fix the damage. Mr Smith responded that he would contact his insurance company once Mr Afkhami had supplied more information. After receiving the two reports referred to, Mr Smith's position altered in that he then challenged whether the bungalow had been correctly constructed. Mr Smith's final email in the chain of correspondence is brusque and dismissive.
20. In August 2015 Mr Afkhami sought a local builder's quote to repair (rebuild) the bungalow. Mr. Sali Tor's quote was appended to Mr Afkhami's statement and came to a figure of VT 4, 750,450.
21. The Kramer Ausenco report was compiled after discussions with Mr Afkhami and visual inspection of the site and the damage by the report's author. It was completed on 8 April 2015, with suitable photographs and the following findings:
 - "The only wall showing damage is the wall on which the Telsat tower fell. The header beam above the window shows significant sag as well as buckling to the wall cladding (emphasis added);

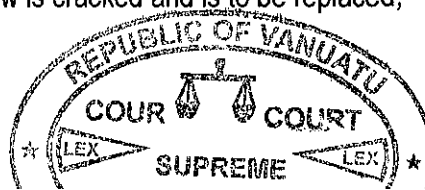


- It appears the sliding window panels to this window have popped out on impact of the fallen Telsat tower. This has caused the internal pressure within the structure to build immensely and has resulted in pushing the main sliding door out;
 - Upon failure of the sliding door the internal pressure was somewhat released as the wind was able to flow in and out of the building through the broken window and sliding door;
 - During the build-up of the internal pressures after the window failure, extensive damage would have occurred to the internal elements including ceiling, walling, cladding etc;
 - No other windows experienced any damage;
 - There appears to be no issue with the roof trusses except where the Telsat tower has landed. The roof sheeting appears to be intact with no evidence of lift off."
22. Kramer Ausenco concluded that had the Telsat tower not fallen over and dislodged the windows out of the residential structure, there would have been minimal damage during the cyclone. The damage to the existing structure it found is a direct result of the Telsat tower falling over and dislodging the windows. From this point on, extensive damage occurred to the building including, but not limited to, water damage, ceiling damage and broken sliding door.
23. Kramer Ausenco see confirmation for their conclusion in the fact that the wall opposite to where the tower fell also has a window, and this was undamaged.
24. Kramer Ausenco recommended, that in order for the bungalow to be returned to its previous condition, that the roof sheeting, trusses and ceiling be removed; that the impacted wall, header beam and window be removed; and that the impacted wall, header beam, window, affected roof trusses, ceiling and sliding door be replaced and rebuilt – along with any other internal wall damage.
25. The Qualao Consulting Ltd one page report also came with some photographs. It baldly stated that the house did not suffer any damage from the cyclone directly, but that damage was "...through the fallen Telsat towers"; a fall considered to have been "very dramatic." The report described the tower which fell onto the roof as "...damaging it so that the wind and horizontal rain then penetrated the house doing more damage."
26. The Qualao Consulting Ltd report considered the entire roof structure, roof decking, walls, doors and window needed to be replaced; as well as related damage such as "...ceiling, electrical, plumbing and painting and personal belongings."
27. Mr Jameson, the senior engineer at Kramer Ausenco, in his sworn statement considered a second Kramer Ausenco report of 12 May 2016 to be accurate. The only difference noted between this report and the first Kramer Ausenco report of 8 April 2015 is that the second report was, apparently, revised on 20 April 2015 and on 12 May 2016. In addition, the second report is in colour. Mr Jameson also appended to his statement his personal CV relating to his experience and expertise. This was the full extent of his evidence. Although not stated in his



statement, I must assume that he was made aware of Mr Smith's challenges to his conclusions and that this is why he checked the report and confirmed that in his view it was accurate.

28. Mr Qualao confirmed that he had examined the bungalow prior to completing his report, which he considered was accurate. He too appended his CV to his sworn statement. His statement did not expand on the contents of the report. Although not stated, I assume he was given a copy of the Kramer Ausenco report which has enabled him to be so concise in his opinion.
29. Mr Tor merely appended his quotation to his sworn statement.
30. Mr Smith, in his sworn statement, challenges the Kramer Ausenco report. He stated: "Anybody can see that the whole roof structure was installed wrong, but Kramer didn't notice." He went on to explain that the photographs showed the tower section did very little damage to the roof, and he therefore considered it should not have not affected the wall structure, unless it was wrongly built. He does not set out any expertise or qualifications which might enable the Court to place weight on these assertions.
31. Mr Smith went on to say there were no cyclone shutters installed – he does not say on what basis he is able to make such a statement. Regardless, he then went on to state that the windows and doors would therefore have blown out anyway, even "...without the additional jolt from the bump on the roof." He pointed out other loose debris in the photographs produced, what he felt were more likely to have caused the damage to the windows. He blamed Mr Afkhami for complaining about the state of the old tower, which had then led to the new tower being in the process of being erected when Cyclone Pam hit. He considers that to a degree Mr Afkhami has brought this problem on himself. Mr Smith also considered this to be a natural disaster for which he should not be held liable. I disregarded this protestation in view of the concession made as to liability.
32. Mr Smith pointed to the fact the building was unfurnished, with tools and paint tins still present under the sink area. He stated that the property was simply not ready for renting. He presented a number of additional photographs and made comments regarding each – those photographs are of assistance. He concluded that Mr Afkhami's claims were outrageous, as the roof was only very slightly damaged.
33. Mr Mainguy is a civil engineer in Port Vila. He was asked by Mr Smith to assess the damage caused by the fallen tower. He did this by looking at photographs provided by Mr Smith. He confirms in his report of 1 July 2016 that it was difficult to confirm the extent of the damage from photographs only. He stated that the photographs confirm that the tower hit the side of Mr Afkhami's building which resulted in "dints [sic] on the roof sheet, eaves and soffits." He stated that, given that fact, it was hard to believe that the entire structure needed to be re-constructed. However, he was not in a position by solely looking at the photographs to be able to properly assess or confirm that as he had been unable to inspect the premises.
34. Mr Mainguy produced a second sworn statement, after he had been permitted to visit the site and inspect the building. This report is dated 13 February 2017. He noted the following:
 - "the steel flashing was dented [sic] and must be replaced;
 - The cement sheet wall cladding above the window is cracked and is to be replaced;



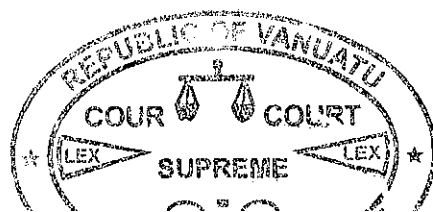
- The external soffit is no longer there and may have fallen during the incident if it was present at the time."
- 35. Mr Mainguy inspected the internal beam above the window. He stated that "...it was slightly dented [sic], but is not structurally damaged". He stated a number of items were added after Cyclone Pam, such as the internal ceiling; but as of the date of inspection (9 February 2017) the electrical and hydraulic work had not been completed. He repeated that the structural integrity of the building was not affected by the fallen tower, and that only cosmetic items needed to be replaced, at minimal cost.
- 36. Mr Mainguy second report also appends photos with comments, presumably his, beneath each. He too suggested that the Trimdek roof sheets were wrongly installed.
- 37. Mr Dick is a Valuer. He set out in his sworn statement his expertise and experience. He was asked by Mr Smith, on 13 June 2016, to value the replacement cost of a building on Mr Afkhami's land. Mr Dick inspected the property the next day and noted that it was still under construction. He sets out a full description of the building in his statement and concluded the overall standard of the construction was "very basic." He noted a number of matters requiring completion and considered the building then "...not yet habitable."
- 38. Mr Dick calculated the replacement cost of the bungalow was VT 1.6 million. He calculated that a further VT 870, 000 was required to be spent to get the property up to a habitable state, at which point he considered it was likely to attract tenants at between VT 20,000 - 25,000 rent per month.
- 39. Mr Avock is a supervisor employed by Mr Smith. He has knowledge of the tower and Mr Afkhami's bungalow construction. Three weeks after Cyclone Pam he went to the site to inspect it. He stated that the only damage he saw was a bent flashing on the roof.
- 40. Prior to Cyclone Pam Mr Avock saw that Mr Afkhami's bungalow was still not completed. He saw the front door blown open by the wind on occasion. Even in June 2016, the bungalow was incomplete.

D. Mr Botleng's Submissions

- 41. Unfortunately, Mr Botleng could not have understood what was directed, as the first 5 pages of his written submissions address matters other than quantum, and they do not assist me.
- 42. Even when addressing the real issue Mr Botleng's submissions only canvass matters of principle. What the Court required, by way of assistance, was submissions more particularly setting out at what level the damages should be set. To submit that the Court "...grant the relief sought" was just unhelpful.

E. Mr Nalyal's Submissions

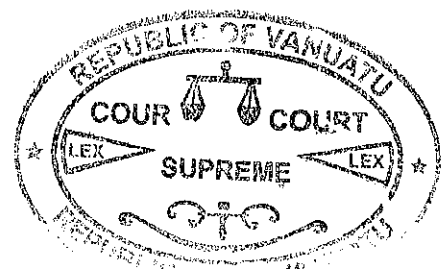
- 43. M. Nalyal correctly pointed to Mr Afkhami's obligation to mitigate his loss/damages. However, he did not go on to explain what Mr. Afkhami could have done to minimise his loss; nor what consequences should flow.



44. Mr Nalyal correctly submitted that neither the Kramer Ausenco report nor the Qualao Consultancy Ltd report recommends a complete rebuild – which is what Mr Afkhami seeks in this Claim and has obtained a quote for. Further, neither Report attempts to place a value on the work required to put Mr Afkhami back in the position he was in prior to this mishap. In the circumstances, Mr Nalyal points to Mr. Dick's evidence, and submits an award in the range of VT 100-200,000 is appropriate.

F. Discussion

45. Mr Afkhami sought VT 5 million to rebuild his bungalow. As Mr Nalyal has submitted, neither of the Claimant's "experts" has recommended that such is required.
46. Mr. Afkhami sought VT 1 million for the total loss and damage to personal property. There was no clear evidence of what personal property was inside the bungalow at the time of Cyclone Pam which was either totally lost or damaged.
47. Mr. Afkhami sought 8 months lost rental at VT 90, 0000 per month. Mr. Dick's evidence is that the property was uninhabitable. The photographs confirm that. Mr Dick also stated that further funds had to be expended to get the property up to standard, and that once completed, the property would attract between VT 20,000 and 25,000 rental per month.
48. Mr. Afkhami sought a further 10% on top of all the amounts. I assume he attributed that to inflation, but that may not be a correct assumption, as he also sought both costs and interest.
49. I reject the suggestion that the roof was incorrectly constructed. Mr Smith has no demonstrably expertise to be able to state such with conviction. Mr Mainguy was better placed, but may have been influenced by Mr Smith's views. However, even if that contention is correct, that had no bearing on Mr. Afkhami's loss.
50. The loss was caused by the new tower being uprooted from one of the concrete bases and being moved 5 meters closer to Mr. Afkhami's bungalow before it broke free of the guy wires and was effectively thrown down onto the roof of the bungalow. The fact that the second tower also fell is of no consequence to this proceeding.
51. The construction of the tower was of narrow gauge steel piping, which was in good condition, as it was the new replacement tower that caused the damage – not the old and rusted taller tower. This is confirmed in one photograph which shows a long intact section of the tower still leaning on the bungalow roof. Mr Smith's "bump on the roof" seems to be an insufficient recognition of the actual force imparted by the falling tower.
52. I accept the reports prepared by Mr Jamison and Mr Qualao, not only in terms of the damage caused, but also as to the cause of the damage. Mr Smith's alternative theories do not have the benefit of a close inspection of the site nor the expertise of two senior engineering professionals. Also, Mr Smith has a vested interest as a hard-nosed businessman, an attitude he demonstrated clearly in his unnecessarily sharp emails to Mr Afkhami. The views of Mr Avock I find of little assistance, given who he is employed by and the lack of details provided to support his observations.



53. I am unable to determine on the evidence whether there were cyclone shutters in place. Regardless, the accepted evidence makes it more likely than not, that the cause of the damage to the bungalow was the falling of the tower onto the roof which caused firstly the windows to pop out and then the door to be forced open by the resultant pressure. Had the tower not fallen on the roof, it is, on the accepted evidence, more likely than not that the damage to the bungalow would not have occurred.

G. Result

54. In the absence of any clear evidence as to the amount required to make good the damage pointed out by both the Kramer Ausenco and Qualao Consultancy Ltd reports, I award damages in the sum of VT 400,000. That is higher than it would likely have been had this case been resolved in 2015, and is due to inflation. However I cannot attribute any of the delay to Mr. Afkhami – this is not a situation where he could have ameliorated his losses.

55. This amount is also a quarter of Mr. Dick's valuation of the building's value. That seems to me to be an appropriate reflection of the damage caused to the partly completed building.

56. Mr Afkhami is additionally entitled to interest on his damages award at the Supreme Court rate of 50% per annum from the date of his claim, namely 17 February 2016 until the amount is settled.

57. I decline to award any damages for personal property, as there is no evidence before me to support that claim. Equally, there is no award for loss of rental, as the property was uninhabitable, then and now. Finally I cannot understand the claim for an additional 10% - that is also not established on the evidence and is unjustified.

58. Mr. Afkhami has won his case to an extent. He is therefore entitled to his legal costs on the party/party basis, which I set out at VT100, 000. The costs to be paid within 21 days.

59. Pursuant to Rule 14.5(1) I now schedule a Conference at 8am on 29 April 2020, to ensure the judgment has been executed or for the judgment debtor to explain how it is intended to pay the judgment debt. For that purpose, this judgment must be personally served on the Defendant.

**Dated at Port Vila this 3rd day of April 2020
BY THE COURT**

G.A. Andree Wiltens
Justice G.A. Andree Wiltens

