IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction) **Civil Case No. 49 of 2014**

BETWEEN: LOUMAN AGRICULTURAL, PASTURAL AND INDUSTRIAL VENTURES LIMITED
Claimant

AND: REPUBLIC OF VANUATU
Defendant

Hearing: ***9 July 2014 at 2 pm***
Before: ***Justice Stephen Harrop***
Appearance: ***Robert Sugden for the Claimant***
Jenifer Warren (SLO) for the Defendant

JUDGMENT

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1. The nature of today's conference/hearing was clearly foreshadowed in the Minute I issued on 9 June 2014. The Republic had applied back on 9 June namely the date of that last conference to set aside the default judgment as to liability which was entered on 29 April 2014. In support of that application it filed sworn statements from Agnes Tari Siro sworn on 9 June and Christopher Ioan sworn on 9 June also.

2. Mr Sugden was given the choice as to whether he was instructed to oppose the application to set aside the judgment and if he chose to do so, on behalf of the claimant then I indicated that that application would be argued at today's conference. That indeed is what has occurred. Mr Sugden has been at pains to say that this is a case which he client would like to resolve on a practical level but despite numerous efforts it has been frustrated by an absence of response from the Republic as to the substance of the case and as to the underlying practical issues on the land.

3. Mr Sugden filed promptly after the last conference an application for dismissal of the application to set aside the judgment as being an abuse of process and indemnity costs were sought against the defendant. More recently, yesterday, a sworn statement of a director of the claimant, Mr McGreal was filed and served. Ms Warren personally had not seen this document prior to the conference but has had an opportunity to look at it during the conference. It is brief and not difficult to come to grips with.

4. The jurisdiction to set aside a default judgment is contained in rule 9.5 of the Civil Procedure Rules. In brief the application must explain why the case was not initially defended and must then give details of the defence to the claim. It is required to have a sworn statement in support of the application.

5. The Court is given power to set aside the default judgment if it is satisfied that the defendant has done two things: (a) shown reasonable cause for not defending the claim and (b) has an arguable defence either about liability or quantum.

6. In this case I am not satisfied of either of those matters. I explained in some detail in the Minute of 9 June, which I will not repeat here, why I could not accept that there was a sufficient reason for not filing a defence. It appeared to me that the State had had difficulty obtaining instructions but there was no attempt to try to preserve its position after filing the response. I accept on the evidence I have now read that the State Law Office tried valiantly to obtain instructions and was unable to do so. But the defendant is not the State Law Office it is the Republic and the Republic itself has not to my mind established that there was reasonable cause for not filing a defence within time or certainly before the default judgment was entered on 29th April. There is some evidence that a person who might have been an important witness Mr Kalpram was on leave for 22 working days from 17 March. While that may have had an impact on the timeliness of the giving of instructions to the State Law Office, I cannot accept that it is a sufficient excuse for not filing one after he returned to work.

7. It also appeared to me that the Republic was complaining about not receiving any request for the default judgment but as I pointed out in my Minute of 19 June, it has no right to expect

that when it does not follow up a response with the defence: that is the effect of rules 4.4 and 4.5 in my view.

8. Even if however I take a benevolent view and find that the defendant has shown reasonable cause for not defending the claim prior to the entry of the default judgment as to liability, I am not satisfied that it has shown , in an appropriate way, that it has an arguable defence as to liability.

9. Ms Warren submits that by annexing a draft statement of defence to Ms Siro's sworn statement it has done enough and reliance is placed on a comment in the Jenshel textbook on *Civil Court Practice in Vanuatu* where it is said in a comment made on rule 9.5 (2) (c) that a common way to satisfy the need to give details of the defence is to attach a draft defence to the application.

10. In my view that is a way in which the requirement might *partially* be satisfied but without sworn evidence from someone who has personal knowledge of the relevant facts confirming that the contents of the proposed defence are true then in my view there is nothing before the Court which can meet the obligation of the applicant to provide details of its defence. There would be no point in the provision that a sworn statement must be filed if that could be satisfied by a simple sworn statement from someone with no personal knowledge of the facts relating to the claim and proposed defence such as Ms Siro (to whom I intend no disrespect) simply recording the history of events on the file and attaching a proposed draft defence.

11. An applicant for setting aside a default judgment has the onus to establish that it should be set aside. Normally the Court is quite readily prepared to grant such applications albeit with appropriate costs awards in favour of the disappointed claimant where there is a serious issue to be determined on evidence placed before the Court. Here there is no evidence placed before the Court by the defendant by any person having personal knowledge of the events which are referred to in the claim. On the claimant's side there is evidence from Mr McGreal confirming the truth of the claim although that is not a precondition to opposing the application to set aside. But the claim itself in paragraph four squarely alleges that representatives of the defendant entered onto the farm without the claimant's permission and

particulars are given. There are also particulars given of the damage which was caused subsequently.

12. In the draft defence which of course I have read the defendant admits committing the acts complained of but denies there was a trespass because it says it had Mr McGreal's permission to enter the farm. That is something which Mr McGreal refutes in his most recent statement. The particulars set out in the draft defence assert that Chief Kaltalua Billy Amearaliu as community representative had liaised with Mr McGreal about the water tanks. It is then asserted that Mr McGreal agreed that the defendant could enter onto the property to construct the two water tanks and it says that was a verbal permission which I take to mean an oral permission.

13. As a minimum, I would therefore have expected a sworn statement from that Chief corroborating what is asserted in this draft document. There is no such evidence before the Court.

14. In overview then the defendant which carries the onus of satisfying the Court that it has an arguable defence as to liability has had ample opportunity to discharge that onus but has not done so by a sworn evidence. Ms Warren asked whether more time could be given to provide this kind of evidence but Mr Sugden opposes that. In my view the matter needs to be dealt with promptly and taking into account that the State has had ample opportunity to put such evidence before the Court as it thinks it should prior to today's hearing.

15. For these reasons I decline the State's application to set aside the judgment as to liability. The case will continue to the next stage which is the assessment of damages in favour of the claimant for the undisputed trespass which has been established by the judgment as to liability and for the damage which is also been established albeit not as to the level of compensation or damages required to be awarded.

16. The claimant earlier sought more time within which to file sworn statements to prove its losses and since then the application to set aside the default judgment has occupied both counsel and the Court.

17. Mr Sugden wishes to engage with the State law office to try to find a practical way forward from this point and so it is appropriate rather than making directions about a timetable for the filing of sworn evidence proving loss to allow the parties sometime to see if that formality can be avoided. Accordingly the next conference will be on **Thursday 21 August 2014 at 2 pm** when the parties can advise me where things have got to in terms of those discussions.

18. As to the costs on the application to set aside judgment, the claimant having succeeded is entitled to standard costs with these either being agreed or if not taxed. I award no costs in relation to the application filed by Mr Sugden on 13 June to dismiss the application as an abuse of process. While I am certainly not saying that the contents and basis of that application were inappropriate, in the end this matter has been determined on the hearing of the application to set aside judgment and the additional application did not add anything to the issue that I have determined today.

BY THE COURT