IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 17/1500 CoA/CIVA

BETWEEN: EZ COMPANY LIMITED
First Appellant

AND: GEORGE LAPI
Second Appellant

AND: REPUBLIC OF VANUATU
Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John W. von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon Justice David Chetwynd
Hon. Justice Paul Geoghegan

Counsel: *Mr. E. Molbaleh for the Appellants*
Mr. L. Huri for the Respondent

Date of Hearing: *11 July 2017*

Date of Judgment: *21 July 2017*

JUDGMENT

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1. This is an appeal by the appellants against a judgment in their favour in the Supreme Court for VT1,144,000 being damages for breach of contract. The appellants contend that the award is inadequate, and that the trial judge erred by not sufficiently taking into account evidence which supported a higher assessment.

2. The assessment of damages at trial followed a judgment of this Court in EZ Company Limited v. Republic of Vanuatu [2015] VUCA 8 which returned the matter to the Supreme Court for assessment of damages on facts which had been found by the Court of Appeal.

3. In short, the facts were that on 25th January 2011 the second appellant on behalf of the first appellant entered into an agreement with the Public Works Department as agent for the respondent. The nature of the work was specified as roadside clearance, pothole patching and regrading of roads on Malekula island. The first respondent was to supply fuel and four machines, namely one dump truck, one loader, one grader and one roller at the rate of VT10,000 per hour per machine for the works to be carried out. The maximum completion period for the contract was six months and the period for the works was to be two months. The contract provided that the Republic would fix a commencement date for the works, and when it did so the contractor was obliged to begin within seven days. The Court of Appeal held that the effective commencement date was 23rd December 2011. However by letter dated 20th February 2012 the contract was suspended by the Public Works Department pending further notice.

4. It is common ground that the appellants were, by that notice, required to stop work. The suspension was never lifted. The appellants' machinery remained on site pending further instructions. On about 21st August 2012 the appellants formally gave notice to the Public Works Department that the suspension was in breach of contract, that the appellants had suffered substantial damage, and were continuing to suffer loss as the suspension was affecting their obligation to repay loans and put their assets at risk. The appellants gave seven days' notice to the Public Works Department to pay off sums claimed as amounts due under the contract. The notice advised that if the sum was not paid by 28 August 2012 the appellants would make a claim for the illegal suspension for the contract. The appellants received no response.

5. The unexpected suspension of the contract works seriously affected the appellants' cash flow, and they were unable to move their heavy machinery from Malekula to other parts of Vanuatu to seek work. Regrettably, by the time the contract was effectively terminated by the appellants on 28 August 2012 the machinery had begun to deteriorate. As they were unable to meet the costs of moving the

machinery, it remained where it was and has deteriorated to the point that it is no longer capable of use.

6. Before the contract was suspended the appellants worked one grader for 108.5 hours over 16 days, and received payment of VT1,085,000.

7. At trial the appellants claimed:

   (a) 44 days suspended work, 4 machines, 28 hours per day at VT10,000 per hour – VT280,000 per day for 44 days = VT12,320,000;

   (b) other damages:

      (i) Credit Corporation Limited loan VT4,117,679;
      (ii) Term Deposit redeemed by Credit Corporation VT577,753;
      (iii) Cost of replacing machines damaged from deterioration VT21,300,000;

   (c) Personal damages:
      (i) Damage to name and business reputation VT6,000,000;
      (ii) Loss of business profit for 5 years VT54,250,000;

   (d) Interest at 20% on total damages claimed;

   (e) VAT on total damages claimed.

8. The trial judge noted that only one machine had been used during the first 16 days of the contract work. He considered that not all machines would be operating all the time, and reduced the claim for 44 days suspended work to 44 days at 8 hours per day = 352 hours. As the Court of Appeal pointed out the damages suffered for the hours not worked should not be assessed at the full rate of VT10,000 per hour as allowance should be made for operating expenses such as fuel, maintenance and drivers wages. The judge noted that at an earlier point in time the appellants had hired a dump truck from the Eratap Chief and Community Area Council at the rate of VT6,750 per hour. The judge assessed the loss of profits over the period not worked at the difference between VT10,000 per hour and hire cost, namely at

the rate VT3,250 per hour. This calculation produced a result of VT1,144,000, the sum which was ultimately awarded as the total damages.

9. The trial judge said it was obvious from the appellants' evidence that at the time of signing the roadwork contract they did not have the necessary machinery and therefore entered into loan arrangements with Credit Corporation to finance the machines to be used to carry out the contract. The judge held that their contractual obligations with the respondent were totally independent of any arrangements with the finance company. Further, the judge considered there was no evidence that during the suspension of the contract the appellants tried to find other work opportunities for the machinery, and were themselves responsible for not maintaining it in good working order. He considered the claims for personal damages were not made out on the evidence and therefore must be rejected. No interest was allowed on the amount awarded.

10. The appellant now contends that the trial judge misunderstood or overlooked important evidence. The second appellant had filed sworn statements which deposed that during the first 16 days of the contract only one machine had been used, namely a grader which completed the roadside clearance. That work having been completed all four (grader, tipper, roller, and loader), would have been in daily use for the rest of the contract period. This evidence was not contradicted at trial, and in our opinion justified substantially high damages than were awarded. Perhaps all four machines may not have worked constantly for eight hours each day. However the claim as formulated assumed only seven hours work per day. Perhaps machines may have broken down from time to time, but it would have been open to the appellants to work beyond seven hours a day to make up for lost hours. In the circumstances we consider the damages should be assessed on the basis that the four machines worked 28 hours per day for 44 days.

11. We agree with the trial judge that a significant deduction must be made from the gross fee of VT10,000 per day to account for fuel, other operating expenses and maintenance. However we do not think that the net loss of profits were fairly

compensated by simply deducting the total hire costs paid to a third party for a tipper truck. The third party's hire charges would include a profit component on the value of the equipment hired. The charges would probably also reflect the fact that this type of machinery would be hired at a premium over cost to reflect the fact that hired machines are often sitting idle waiting for the next hirer. We consider a more reasonable deduction from the gross hourly rate would be the sum of VT5,500 per hour, giving a net profit for the hours loss of VT4,500 per hour. The damages for the 44 days' work suspended would therefore be VT5,544,000.

12. As part of the claim for loss of profit we think the appellants should receive compensation for holding costs relating to their machinery, that is compensation for the fact that the machines were sitting idle awaiting the Public Works Department to lift the suspension. As the appellants had no information as to when this might occur, we think it is unrealistic for the respondent to suggest that during the period up to 28 August 2012 the appellants should have removed their machinery elsewhere looking for other work. Their machinery was effectively sitting idle for six months before the contract was terminated. There is evidence that the machinery was worth approximately VT20 million. On the basis that the holding charges, which include the cost of maintaining these machines as the respondent contends should have happened, were about 20% per annum, we allow an additional sum by way of damages of VT2 million to compensate this loss.

13. We do not consider any allowance should be made for the capital sum borrowed from Credit Corporation Limited or for loan repayment, including the term deposit, which were made to Credit Corporation as part repayment. These expenses were part of capital costs which were necessarily outlaid so that the appellants were in a position to undertake the contract work. They are not entitled to recover these capital costs. The actual interest liability incurred by the appellants to Credit Corporation Limited also forms part of their capital costs and is not recoverable. However the appellants are entitled to interest on their damages which makes some allowance for this outgoing.

14. The claim for the cost of replacing the machines which have deteriorated on site is not recoverable. Allowance has been made for the cost of maintaining the machines until the contract was terminated on 28 August 2012. Damages for loss of profits to that date have also been allowed. Thereafter, the contract was at an end. The appellants then had to decide themselves how to deploy the machines and care for them.

15. We agree with the trial judge that evidence does not entitle the appellants to damages for loss of reputation. The claim for VAT is misconceived as VAT is not payable on court awarded damages.

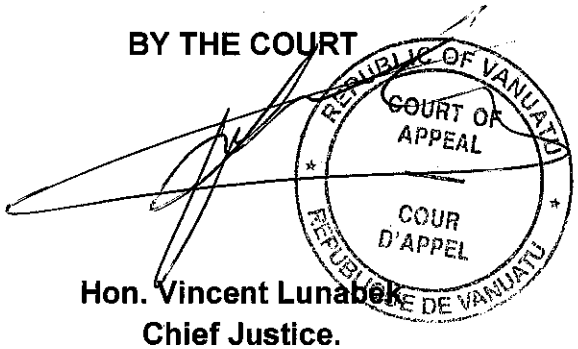
16. This claim is for damages caused by a breach of contract which interfered with the ongoing commercial business of the appellants. The business was heavily dependent upon capital equipment employed in it. It was readily forseeable that the appellants would suffer further losses at commercial interest rates if anticipated income was withheld. In such cases it is appropriate to award interest at a commercial rate [*see:* Hungerford v. Walker (1989) 171 CLR 125]. In this case, the Court is further aided by the evidence that the appellants were required to pay interest at the rate 17% to the Credit Corporation (not including penalty rates for overdue payments). We consider the evidence justifies an award of interest at the rate 17% per annum. Moreover, in a commercial context such as this, interest should run from the date when the loss is suffered as it is part of the damages suffered, not from the date when proceedings were issued. In this case we consider interest should run from a midpoint between the date of suspension 20 February 2012 and 28 May 2012, *i.e.* from 28 May 2012 at the rate of 17% per annum.

17. For these reasons we consider that the appellants have established that the trial judge erred in his assessment. The award in the court below should be set aside and in lieu thereof judgment should be entered in the appellants' favour for VT7,544,000 together with interest at the rate of 17% per annum from 28 May 2012 until payment.

18. The respondent must pay the appellants' costs of both trials and of this appeal. The appellants were separately awarded their costs of the previous appeal to the Court of Appeal and that order will remain. Costs to be allowed on a standard basis.

DATED at Port Vila this 21st day of July, 2017

BY THE COURT



Hon. Vincent Lunabek
Chief Justice.