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

Civil Appeal
Case No. 17/1124 CoA/CIVA

BETWEEN: AND Property Limited

Appellant

AND: Ronald Vuduy

Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd
Hon. Justice James Geoghegan

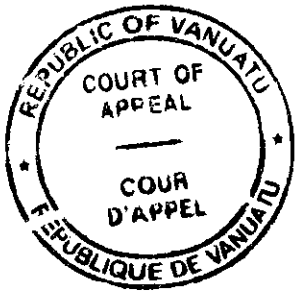
Counsel: *Mr. D Thornburgh for the Appellant*
Mr. D Yahwa for the Respondent

Date of Hearing: *14 July 2017*

Date of Judgment: *21 July 2017*

JUDGMENT

1. This is an appeal against a judgment on quantum. It followed on from a summary Judgement against the defendant ("AND") in favour of the claimant ("Mr Vuduy") dated 11th August 2014 with damages to be assessed. A hearing took place and following that the judgment on quantum is dated 17th February 2017.



2. The original claim concerned building works at the appellant's property. Mr Vuduy's case was that a Director of AND, one Mr Jeremy Dick, asked him for a quotation to build fences and walls on AND's development site at Pango. The site consisted of two blocks of land. Mr Vuduy gave a quote of VT 50,000 per linear metre for concrete walls 2.2 metres high. The quotation was accepted and the work carried out. When it was completed Mr Vuduy asked for payment and he issued a detailed invoice totalling VT 8,582,750. After giving credit for VT 1,000,000 he was expecting to be paid VT 7,582,750. That payment never came and proceedings were issued on 14th November 2011. A defence was filed but summary Judgement was entered when it became clear AND accepted that Mr Jeremy Dick was a Director and had authority to bind the company contractually. The only issue between the parties was quantum.

3. In the judgment of 17th February the Judge found for Mr Vuduy and entered judgment against AND for VT 7,852,750 together with interest at 10% per annum from 2 July 2012 until payment, plus standard costs.

4. AND filed an appeal against that decision. There are 4 grounds of appeal.The first is that, *"The trial Judges findings ....as to evidence of the witnesses is against the weight of evidence"* and that it, *"...is an error of law to expect that the Defendant had to prove their case to a certain standard"*.

5. The second ground is in relation to adverse comments by the Judge about the failure of AND to call Mr Jeremy Dick as a witness at the hearing. AND submits that was an error of law and any adverse comments should have been directed at Mr Vuduy as Claimant. The appellant again submits that it was for Mr Vuduy as claimant to prove his case.

6. The third ground is that the Judge wrongly rejected evidence from a witness for AND (Mr Doug Bailey) which consisted of an Email exhibited to a sworn statement made by another Director of the company, Mr John Ernest Keith Salter. Mr Salter was called and gave evidence. Mr Bailey

neither made a sworn statement nor attended at trial to give evidence. The appellant submits that the Judge should not have rejected that evidence as, *"hearsay, inadmissible, untested opinion"* and "*selfserving, gratuitous and unreliable*" because the Claimant had not challenged it as such and AND had not been given an opportunity to address the issues raised by the Judge.

7. The fourth and final ground was a catch all submission that the Judge's findings were errors at law and fact and against the weight of evidence.

8. In his Judgement the Judge says he preferred the evidence of Mr Vuduy. He comments that :-

"...the claimant himself provided 4 sworn statements in support of his claim with several annexures and was extensively cross examined by defence counsel. He spoke from personal first hand knowledge about facts and events with which he had a professional, commercial interest and involvement".

The Judge then continues:-

"The defendant company on the other hand, called witnesses who had no close personal knowledge or involvement with the claimant or the building contract that was undertaken by him....All defence witnesses spoke from hindsight and offered measurements, quotations and opinions years after the events of 2012."

9. In view of what the Judge had seen and heard he says that he had :-

"...no hesitation in saying that I accept and prefer the claimant's evidence which was unshaken and given in a forthright manner."

The Judge did not believe Mr Vuduy had been exaggerating his claim and he pointed out that he had provided an *"unchallenged"* boundary survey.

10. The Judge then went on to consider the issues identified by counsel for AND as being relevant. These were, the length of the wall built, the linear metre rate, the terms of the contract, the scope of works and whether a payment of VT 2.2 million had been paid in respect of the works covered by the invoice. As can be seen there is some overlap between those issues but the Judge accepted they were the issues that needed to be resolved.

11. He discussed the first two issues together and found that the defence evidence in relation to the length of the walls built and the linear metre price was unreliable in that it consisted of quotations for similar but different work. One was a labour only quote and the other a labour and materials quote. The Judge identified marked differences in the quotes and noted one had been given in 2014 and the other in 2015. Both quotes gave overall measurements of the work to be done and both arrived at a length of wall of some 112 metres. However, the Judge noted that neither had broken down their measurements between the different walls detailed in Mr Vuduy's invoice. He found the evidence to be *"incomplete and contradictory"*. The only other evidence of an alternative linear rate was in the Email mentioned earlier. Before dismissing the evidence as set out earlier the Judge considered it and said it illustrated the difficulty and unreliability of evidence given in hindsight.

12. In relation to the third and fourth issues identified by counsel, the Judge said:-

"In this regard the defendant has produced almost no evidence disputing the claimant's evidence or denying the content of the claimant's Invoice especially the small jobs enumerated under item (3).

He added:-

I accept the contents of the claimant's Invoice as an accurate summary of the scope and type of works done by the claimant at the defendant company's premises which is largely undisputed except for the VT50,000/lm rate figure.

13. As to the fifth issue the Judge noted that the payment of VT 2.2 million was made some 6 months prior to Mr Vuduy's invoice. He considered it unlikely that payment could relate to work detailed in the invoice and was for work completed prior to December 2011.

14. The first ground of appeal suggests the Judge's decision was against the weight of evidence. The appellant has not established that. For example, on appeal there was some discussion about that "*unchallenged boundary survey*". That evidence consisted of very precise measurements made by Mr Vuduy down to three decimal points. It was submitted on AND's behalf that the measurement was a measurement of the total length of the walls and did not take into account the doorways that had to be made in the walls. In fact, Mr Vuduy's evidence had taken the doorways into account because the total length measured by Mr Vuduy was 132 metres. There were 8 or 9 doorways to be allowed for and they varied in width between approximately 1 and 1.5 metres. If these doors are taken into consideration the total length of the walls built would closely approximate the 125 metres invoiced. The measurements given in evidence on behalf of AND are of the invoiced length less the total width of the doorways.

15. The Judge clearly preferred the evidence of Mr Vuduy than that for AND on those issues. He was entitled to. This is not the Judge requiring AND to "*prove its case to a required standard*" as is suggested in the Grounds of Appeal. It is the Judge considering the evidence before him and deciding what evidence is reliable and what is not. The ground advanced on appeal misunderstands the litigation process. The Judge received evidence from the claimant Mr Vuduy. That evidence was tested in cross examination. The Judge must have been satisfied that Mr Vuduy could *prima facie* establish his claim on the balance of probabilities. If he had not been so

satisfied he would not have called on the defendant AND to produce its evidence to challenge what he had seen and heard. AND did call its evidence but the Judge did not accept it was of sufficient weight and reliability to rebut the claim.

16. The second ground relates to the lack of evidence from Mr Dick. As the Judge says AND in its defence:-

"... accepts that Jeremy Dick... apparently accepted the claimant's verbal quotation for the building of a 2.2 metre high fence with footing at the price of VT50,000 per lineal metre without adherence to the established and agreed practice ...". "

The Judge added later:-

"Much criticism was made by defence counsel about the absence of Jeremy Dick and the failure of the claimant to call him as a witness in support of his claim. In my view the criticism was unfounded."

As the Judge points out, no one called Mr Dick as a witness or filed a sworn statement by him. There is no property in a witness and AND could have called Mr Dick but they chose not to. The Judge is entitled to take that failure into account. It is not requiring the defendant to prove its case, it is noting the defendant did not bring any evidence to rebut that of Mr Vuduy.

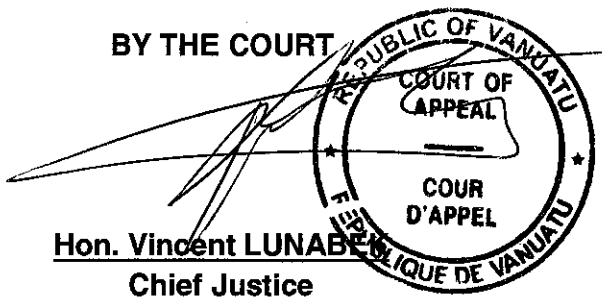
17. The third ground deals with evidence the Judge described as hearsay. AND says the evidence was not challenged in the Court below. That is irrelevant. The evidence was in an Email from someone who did not file any statement and who was not called to give oral evidence. As a result the evidence in the Email was incapable of being tested in cross examination. The Judge was entitled to treat that evidence in the way he did.

18. We find no merit in the fourth ground of appeal. AND has not demonstrated any error of law or any error of fact in the Judgement appealed.

19. In all the circumstances the appeal is dismissed. The appellant will pay the respondents costs, such costs to be taxed if not agreed.

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

BY THE COURT



Hon. Vincent LUNABEK
Chief Justice