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

Civil Appeal
Case No. 22/562 CoA/CIVA

BETWEEN: NATIONAL HOUSING CORPORATION
Appellant

AND: INTERNATIONAL GREEN STRUCTURES LIMITED
First Respondent

AND: JOHN TERRY
Second Respondent

AND: REPUBLIC OF VANUATU
Third Respondent

Coram:	***Hon. Chief Justice Lunabek, V*** ***Hon. Justice Mansfield, J*** ***Hon. Justice O'Regan, M*** ***Hon. Justice Saksak, O*** ***Hon. Justice Goldsbrough, EP*** ***Hon. Justice Aru, D*** ***Hon. Justice Trief, V.M.***
Counsel:	*Godden, A for the Appellant* *Morrison, N for the First Respondent* *Malcolm, J and Ms Mahuk, S for the Second Respondent* *Huri, L for the Third Respondent*
Dates of Hearing:	*10 August 2022*
Date of Judgment:	*19 August 2022*

JUDGMENT

[1] On 4 March 2022, the applicant, National Housing Corporation (NHC), applied to this Court for an order enlarging the time for it to appeal against a decision of the Supreme Court, *International Green Structures LLC v National Housing Corporation* Civil Case No 17-156 dated 20 January 2020. In that judgment, the Supreme Court Judge entered judgment in favour of the first respondent, International Green Structures LLC (IGS), for US$3,944,341.59 plus interest and costs. The costs award included an award of indemnity costs in favour of IGS and the second respondent, Mr Terry. The Judge found that the third

respondent, the Republic of Vanuatu (the State) was liable to meet the obligations of NHC under the judgment.

[2] The State filed a notice of appeal to this Court against the Supreme Court judgment, but discontinued that appeal in July 2020.

[3] NHC's application for enlargement of time was accompanied by a notice and the grounds of appeal it would pursue if permitted to appeal out of time. On 3 June 2022, NHC filed an application for fresh evidence, principally being the report of, and selected evidence before, a Commission of Inquiry that was set up after the Supreme Court judgment to investigate the circumstances in which NHC had entered into the contract under which the liability to IGS arose.

[4] The matter was scheduled for hearing at 9am on 10 August 2022, but just before the hearing was due to begin, counsel for NHC, Mr Godden, filed an application for leave to withdraw the applications. The application to withdraw was based on the fact that a deed of release had been entered into on 13 May 2021 between IGS and the State under which a payment schedule was established for the State to pay an agreed amount of VT 300,000,000 to settle IGS's claim. The State has complied with the payment obligations. The last payment was apparently made on 18 January 2022.

[5] For reasons which are not apparent to us, counsel for the State, the Solicitor-General, did not provide a copy of the deed of release to counsel for NHC or to the Court, nor did he inform NHS or the Court that the case had been settled by the payment of VT 300,000,000. Neither did counsel for IGS. The Court still does not have a copy of the deed: we have had to rely on representations from counsel about its existence and the fact that the payment has been made.

[6] The hearing before this Court proceeded on 10 August so the Court could receive submissions on the application for leave to withdraw the appeal.

[7] The Court was provided with over 1,600 pages of material in relation to the applications for enlargement of time and application to adduce fresh evidence. But, as it now transpires, the Court was not provided with the key document that evidenced the settlement of the litigation and, consequently, the lack of utility in any appeal proceeding despite counsel for both IGS and the State being aware of the deed of release and the fact that the payment schedule had been complied with.

[8] The material provided to the Court in support of the applications for enlargement of time and for the admission of new evidence indicates a number of concerning aspects of the transactions between NHC and IGS and the way the litigation had been conducted on behalf of the State. If the appeal had proceeded, we would have wished to be provided with explanations of a number of features of the contract under which NHC and the State were found liable by the Supreme Court Judge and why the Judge was not informed about a number of aspects of the contract and the conduct of the parties pursuant to it.

[9] In the Supreme Court, NHC was not represented and the defence of the claim was left to the State. The amount of the judgment sum awarded by the Judge was the amount claimed by IGS. The Judge recorded that there was no challenge to that amount in the Supreme Court. The State's appeal was confined to issues of quantum, but, as noted earlier, it was withdrawn in July 2020.

[10] However, there was some unanswered (or, perhaps more accurately, unasked) questions about the contract and the conduct of the parties under it. We put a number of points to counsel for IGS, Mr Morrison, to give him an opportunity to comment of IGS's behalf about the matters that were of concerns to us.

[11] It is not clear to the Court how IGS became the principal party under the contract. The contract provided that the main contractor was GRD Corporation Vanuatu Limited (GRD) and that IGS was the "technology provider". We were told GRD went into liquidation and it seems IGS assumed the benefit and burden of GRD under the contract. Nothing in the record before us indicates how this occurred or why the contract did not come to an end when GRD went into liquidation. IGS's assumption of GRD's rights and obligations was obviously an issue that needed to be addressed but it does not appear that the witnesses were asked about it, nor was the issue raised with the Judge. Mr Morrison could not explain this although he said he was not sure the Judge was not told this.

[12] When asked why IGS kept working on the contract after the failure to open the letter of credit (referred to below) and the advent of Cyclone Pam, Mr Morrison said he thought there had been a waiver of contractual rights and encouragement by NHC to IGS to continue. There was nothing in the record to indicate that this had occurred and, if it had, it would have meant IGS had to prove a different claim, not a claim for damages under the original contract.

[13] We put it to Mr Morrison that it appeared that IGS was seeking to get as much as possible for as long as possible, knowing that NHC did not have the means to pay because it was not able to open the

letter of credit as required under the contract. We asked for his comment and he did not demur. We also asked whether IGS was buying materials or technology rights from a parent or sister company, and if so whether the parent or sister company was also taking a profit margin. He said he did not wish to comment on that.

[14] As mentioned earlier, the State did not challenge the quantum of IGS's claim. But a number of aspects of the quantum that appeared problematic. For example:

(a) The contract provided that NHC was required to arrange an irrevocable letter of credit for an unlimited sum to the credit of IGS, providing for payment to IGS of all amounts owing under the contract on production of invoices and supporting documentation. NHC was required to do this within 30 days after the inspection of two model houses that were constructed soon after the contract was signed. This was not achieved, perhaps unsurprisingly because it is highly unlikely that a bank would agree to a letter of credit with an unlimited payment amount, and equally unlikely that this could have been arranged without the backing of the State. Notwithstanding that failure to procure the opening of the letter of credit, it seems that IGS's claim included payment for work that was undertaken in circumstances where it was clear that NHC did not have the required payment facility in place. Not only did IGS continue to undertake work, it is apparent from its claims that the amounts charged to NHC were calculated on the basis of costs incurred, plus an overhead allowance of 15 per cent, plus a profit allowance of 18 per cent, which meant that the total cost figure of US$2,747,031 was inflated to US$3,727,722.24. This was further inflated by an interest claim (interest until 30 June 2019) of US$234,119.35. In the end only four houses were actually built on Vanuatu land.

(b) IGS's evidence in support of its quantum claim was to the effect that it had built four model houses in Vanuatu, that it had 50 houses stored in Dallas, Texas, USA and Port Vila and also tools, construction drawings and training materials. IGS's representative deposed that there were 30 kitsets stored in Port Vila but there was no explanation where the other 20 were. Nor was there any indication that NHC or the State were provided with them or the tools, construction drawings and training materials or a set-off for their value.

[15] On the face of it, the State appears to have been found liable for almost US$4 million for four "low cost" houses. It is clear that there were many aspects of the quantum that needed to be challenged but were not.

[16] We asked Mr Huri why these matters had not been raised in the Supreme Court. His answer was that counsel for the State had focused on liability under the contract rather than quantum. That is not satisfactory.

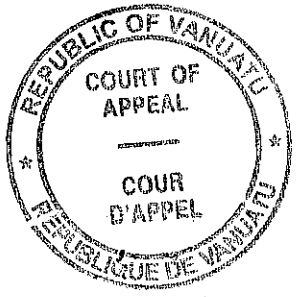
[17] It appears that having conducted the Supreme Court proceedings in a way which did not adequately put forward the points that could have been raised by both NHC and the State to defend IGS's claim, the State then established a Commission of Inquiry. The report of the Commission of Inquiry was an aspect of the new evidence that Mr Godden said he wished to adduce in this Court if the appeal had been allowed to proceed. Given the very large liability of the State under this contract, it seems to the Court that the focus should have been on defending the claim in the Supreme Court, rather than waiting until after a significantly adverse judgment and then instituting a Commission of Inquiry.

[18] This is an instance where the State has become liable for a large amount under a contract that was entered into by an agency (NHC) which has effectively incurred a liability on the part of the State. We observe that, for the future, it is important that attention be paid to the terms negotiated and, where a dispute arises, the conduct of the litigation in order to ensure that the State's exposure is effectively managed. Instituting a Commission of Inquiry after the State has faced a large liability because of inattention to these crucial steps does not remedy the fact that the State has faced a large liability that is unaffected by the outcome of the Commission of Inquiry.

[19] Despite these concerns, we are satisfied that the settlement of the claim by the State renders the NHC's proposed appeal pointless. In those circumstances, we give leave to NHC to withdraw its application for enlargement of time to appeal.

[20] Counsel for Mr Terry sought an award of costs of VT 50,000 against NHC in this Court. We are satisfied that this is appropriate, given that submissions were filed on Mr Terry's behalf and he was unaware of the deed of release. We do not, however, make any award of costs in favour of the other respondents.

[21] The orders of the Court are:



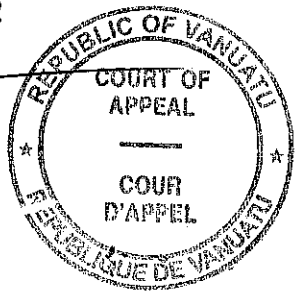
(i) Leave is given to NHC to withdraw its application for enlargement of time to appeal to this Court;

(ii) NHC must pay costs to Mr Terry of VT 50,000; and

(iii) There is no award of costs in favour of the other respondents.

DATED at Port Vila this 19th day of August, 2022

BY THE COURT



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Hon. Chief Justice Lunabek, V