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

Civil Case No. 115 of 2000

BETWEEN ROBERT MURRAY BOHN trading as WESTERN PACIFIC MARINE
Plaintiff

AND: VANUATU MARITIME AUTHORITY of P.O Box 320, Port Vila, VANUATU
Defendant

Coram: **Chief Justice**

Mr. Nigel for the Plaintiff
Mr. Hurley for the defendant

REASONS FOR JUDGMENT

On 9th September 2002, the Court made the following Orders:-

1. *That, the plaintiff is entitled to the payment of VT20,000,000 on the total agreed contract price of VT27,000,000 which means that he is entitled to the payment of VT6,500,000 for the work done on quantum merit basis in his claim in Civil Case No. 115 of 2000.*

2. *That, the plaintiff is entitled to interest to be paid out of that amount of VT6,500,000 at 10%.*

3. *That, the costs are awarded for the plaintiff and costs to be taxed failing agreement.*

4. *That, the written reasons will be provided in due course.*

The reasons of the Judgment are produced below.

By Summons dated 3rd November 2000, the plaintiff claims the amount of VT13,500,000 due and owing from the Defendant pursuant to agreement and/or on the basis of quantum merit. The defendant files a set-off and/or counterclaim and claims for the sum of VT13,500,000 against the defendant.

The Plaintiff and the Defendant entered into a contractual agreement on the 31st of May 1999. The written agreement was purposely for the salvage of M/V LIH PENG and M/V LAUDOREK. The two derelict vessels posed a threat to public health and safety, property, navigation, and the marine environment in the Port

Vila harbor. Briefly, the plaintiff is to provide competent salvage crew and facilities for salvage work.

The total remuneration for salvage work under the agreement was VT27,000,000. Half of the remuneration was paid up front. (VT13,500,000).

The term of salvage operations was not to exceed 30 days from the commencement of the contractual agreement. The plaintiff sought to comply with the terms and conditions of the contract, however, found problems.

There was lack of competent qualified personal in Vanuatu. There was lack of equipment at the early stages of the contract. It is understood that such problems are to be solved by the plaintiff. The plaintiff formally sought a contract extension. The defendant did not reply.

There were lack of co-operation and increasing difficulties between the two parties. At last French divers were brought. They established a work program to competently raise the two vessels. The Lih Peng salvage was completed. The Laudorek salvage was completed other than approximately 10% vessel in small pieces.

The defendant by then realized that the plaintiff failed to work within the time limit as specified in the contract, he then terminated the contract.

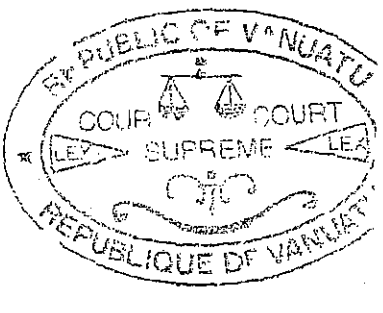
ISSUES

There were various issues that the court considered-

1. Was there ever any effective termination of the agreement?
2. What were the legal relations between the parties after the defendant's letter of 21 December 1999 to the plaintiff?
3. Is the Plaintiff estopped by reason of-

   (i) payment of VT27 million only entitled to be paid on full completion of works
   (ii) time of the essence in the contract

4. Is the Plaintiff entitled to further payment under the agreement or on quantum merit from the defendant?



EVIDENCE

PLAINTIFF'S EVIDENCE

The plaintiff provided five witnesses. The first witness who is Mr. Bohn said he acquired his salvage business in about April 1999. The contract was made

between himself and the defendant on the 31st of May 1999. He said the terms of the contract were drawn between the defendant and Mr. Bernard. Mr. Bohn was involved with the financial side of the contract. Mr. Bernard was responsible of the day to day running of the contract.

Mr. Bohn sought to comply with the terms and conditions of the contract. He failed because he encountered problems. He said there were lack of qualified personal and equipment in Vanuatu at the early stages of the contract. By letter dated the 7th of July he formally sought a contract extension. The defendant gave no response. Mr. Bohn then proceeded only on an implicit understanding.

Beyond the 30th of September 1999, there was lack of co-operation and increasing difficulties between the parties. Mr. Bohn said the defendant gave a negative response to the entirely similar request of assistance in that respect in bringing overseas divers. Mr. Bohn said he went to overseas in November and December. He left the final invoices with Mr. Bernard on departure in anticipation of completion. To that end, the French divers were present. They established the work program to competently raise the Lih Peng.

Mr. Bohn said there were explosions at the Laudorek site and she was being further broken into pieces. He said he did not envisage the delays caused by Roosen's failure to confirm appropriate disposal site. He said he did not envisage the detention of the Kimbe, which was expected to assist with the final disposal. Mr. Bohn said he was stunned and unaccepting termination letter dated 21st December 1999 from Roosen. He wrote on the 28th and 31st December 1999 to Roosen. Mr. Bohn put Roosen on notice that the salvaged vessels would be disposed off. He requested a formal observer from the defendant. Roosen was overseas. Roosen's response came after the scuttling of the Lih Peng.

Mr. Bohn said he was also a member of the VMA board in that period. He complained of lack of minutes or agenda's being circulated by Roosen. He said Roosen appeared to be acting in an obstructive manner towards him. He said he endeavored to establish a warm working relationship with Roosen. He claimed that Lih Peng salvage was completed. He said the Laudorek salvage was completed other than approximately 10% vessel in small pieces in shallow water.

The second witness is Mr. Daniel Oddi. He said he was well qualified in explosives and salvage. He said he found Bernard to be a professional supervisor to work for. He said he found the elements of expertise (explosions) well managed. He said he was involved in respect to the Laudorek in-

1. Cutting
2. First explosion to loosen from sand base
3. Further cutting
4. Second explosion to break into parts
5. Further cutting
6. Securing and attaching pieces to the stern of the Pertiwi in readiness for its removal to deepwater on the high tide.

He said between the 4th and 6th January he returned to work the next day and found out that pieces secured the previous day were gone. He said he did not travel to Pertiwi or release these pieces. He said he dived the sight of the buoy attached to the bow. He did not recognize that as part of the Laudorek. He saw small pieces of the Laudorek remaining in shallow water. He thought there were more pieces in shallow water that he remembered. He said he believed the contract work had been completed in a good and proper manner

The third witness for the plaintiff is Mr. Anasa Rakawa. He said he came to Port Vila in about 1999 on Yacht Harmony. He rented a mooring. He dived and surveyed the harbor to find a free mooring. He located a vessel bow section. He said he put a marker on it. He said after explosions on the Laudorek he took up the mooring in early 2000. He said his marker had been moved but relocated the same bow section. He said there were other and new pieces of wreckage 'nearby' and in the general vacinity. He confirmed by evidence that whatever vessel it was it cannot be Laudorek. He said his bow mooring was clearly identified and the bow was videod at 28m.

The fourth witness is Mr. Guy Bernard. He was the plaintiff's project manager. Mr. Bohn relied on him to liase with Mr. Roosen to advance the project. He said it was impossible task because they are different people. He said the contract was settled when Roosen was 'fresh off the boat'. He said Roosen know little or nothing about the Vanuatu environment. He said the 30 days contractual period was entirely unrealistic when Noumea and international equipment vessels from Fletcher became immediately unavailable.

He said local divers were unrealistic and projects could only be completed with proper overseas expertise. He said there were alternatives to disposal sites, which were explored and promoted together with third parties. He said Roosen entirely changed the relationship between the parties in October when he demanded salvage plan with specifications according to international standards. Mr. Bernard said he complied with the request.

An important meeting was held on the 25th of November with Roosen. He said a tour on the salvage side was completed. He said Roosen actively encouraged him to complete the salvages. He said the main discussions related to the disposal and whether Ifira's land disposal site was acceptable. He said Roosen went away to liase with his board. He was left to complete the salvage pending those decisions.

He said there was suspension of Kimbe in mid December. The suspension was made and then lifted. The Kimbe had already been used on the Salvage project. The Kimbe had removed the house from the Laudorek to dry land. She was to remove the remaining pieces. It became impossible. There were no suitable vessels available to the Plaintiff.

He said the Lih Peng salvage was completed. He said the Laudorek salvage was completed other than 10% of vessel in shallow water. He said by 21 December

1999 the contract had moved to an entirely different basis from that of 31 May 1999 and particularly time was not of essence.

The last witness was Captain Paul Peter. He said he witnessed the scuttling of the Lih Peng. He said he did not see the disposal of the Laudorek because he was on leave on the New Year. He was in Port Vila for a couple of days after New Year. He said the Laudorek was disposed of between the 4th and the 6th of January 2000. He said he viewed the explosions and played and official role in their supervision. In his evidence he said the supervision was properly managed.

DEFENDANTS EVIDENCE

The first witness for the defendants was Mr. Ian Lockley. He said if he was told his contract was expired he would either endeavor to re-negotiate it or he would continue 'voluntarily' and seek reward. He said it was not uncommon in the salvage industry for a contract to be completed in that manner.

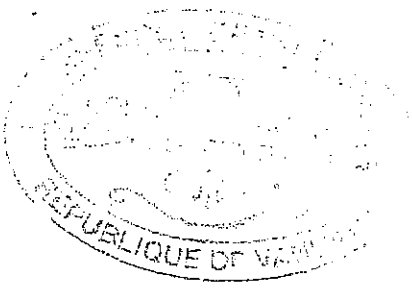
He said he dived into unidentified bow section. It had a mast. The Laudorek did not have a mast. He said he saw the 10% of scattered pieces of the Laudorek remained in relatively shallow water. He went with other divers to locate the pieces of the Laudorek. He said nothing was located. He said the Pertiwi would have had difficulty moving 30 to 40 tons of salvage wreckage on her stern and within the time frames detailed in the logbook.

He said he did not captain any such vessel himself, only steered one in controlled conditions. He agreed in cross-examination that his information relative to his report was gained solely from defence persons. He said he made no contract with any of the actual salvage operators. He even agreed that-

(i) the pricing for the job was on the low side
(ii) the use of the local divers is unrealistic
(iii) it is not safe to do salvage work in conditions of heavy rain
(iv) good communication is an important asset in the salvage industry
(v) some of the delays in the project were at the behest of the defendant
(vi) The Lih Peng salvage job was complete
(vii) The Pertiwi 9 had the capacity to lift and move individual piece of salvage material up to 30 tons.

The second witness for the defendant is Mr. John Roosen. He said he was an employee in the VMA. He said Mr. Bernard was not co-operative nor responsive to direct questions in correspondence put by him on behalf of the VMA. Mr. Roosen said he lost confidence with the plaintiff's ability to carry out the work because of-

(i) The lengthy delays
(ii) The ongoing excuses



(iii) Safety issues, including, the slipping of the Lih Peng with divers nearly and the flying piece of debris from the Laudorek
(iv) Lack of progress to carry out the contract at the time of the termination letter
(v) Doubts about the competency of those engaged on behalf of the plaintiff.

Mr. Roosen said his actions did not delay the plaintiff from carrying out their responsibilities in accordance with the contractual terms. He said he was never informed by anyone on behalf of the plaintiff to the timing of the explosions. He said he had to dispatch someone to keep an eye on the operations.

He further said he had the authority to enter into the contract. He said Kimbe was unauthorized to carry out activities relating to the salvage operations. Mr. Roosen said the contract had expired on 30th of September 1999. He said no written requests were made for an extension of the contract in the post – 30th of September 1999 period. In his evidence he said he completely lost faith in the Plaintiff's ability to ever carry out the salvage operations competently. He said there is no legal reason to prevent him to terminate the contract.

He said he wants to employ the overseas expert to complete the job which has been inaccurately advertised and at the Plaintiffs expense. He said the plaintiff has made the salvage of the Laudorek vessel far more difficult and more expensive than if the plaintiff had never commenced his activities.

The third witness for the defendant is Mr. Conroy. He said he saw a flying piece of debris of approximately 1 to 11/2 square meters from the detonation of the Laudoreck on 24th November 1999. He said he saw them flying from one side of Iririki Island to the other. He said his evidence is significant to an extent that it was one of the reasons, which influenced Mr. Roosen in loosing faith with the Plaintiffs ability to safely and competently carry out the salvage operations in accordance with the contractual terms.

He said he was also on board the 'Jackpot' vessel on 28th February 2002, when the echo sounder screen identified parts of a vessel in the Paray Bay area.

The fourth witness for the defendant is Mr. Peter Philips. He said he has dived in the Paray Bay area and identified the same 'bow section' of the Laudoreck. He said on the 11th March 2002 he went with another diving instructor, Mr. Philips took underwater photographs. In one of the photographs he identified part of the vessel he had seen on the videotape.

Mr. Philip identified where he moored his dingy on 11 March 2002 at approximately yellow sticker '25' on Exh D12 and then moved towards yellow stick '16' on Exh D12, a distance of 100 meters or so.

Mr. Philips gave evidence that the reason why he was unable to take any underwater photographs when he dived from the 'Jackpot' vessel on 28 February 2002 was because the visibility was so poor.

The fifth witness is Mr. Denis Swan. He said the bow mooring for the vessel 'Harmony was not the Laudoreck. He said the mooring was created before the Laudoreck was moved from its salvage site' Mr. Swan said he witnessed two different explosions in relation to the Laudoreck vessel. He also saw the Kimbe vessel being used as a basis for cutting the welding work that was being undertaken to the Laudoreck. Mr. Swan said he also saw a line attached to the Pertiwi, which appeared to be dragging something into the inner harbor.

Mr. Swan estimates that he has seen approximately 25% to 30% of the bow section and other pieces of the Laudoreck which is still in the Paray Bay area.

The sixth witness was Mr. Supkit Poorahong. He gave evidence that the Noumea divers release wreckage into the inner harbor. He said that Guy Bernard was on the Pertiwi throughout the Laudorek dumping process. He said Mr. Guy Benard gave all instructions to the French divers from on board the Pertiwi. Mr. Poorahong said that the echo sounder on the Peertiwi was used to find deepwater in Paray Bay.

Mr. Poorahong said that Mr. Benard instructed him to make additional entries in the Pertiwi 9 logbook to falsify the position of the disposal of the Laudoreck. He said large pieces of the Laudoreck, which had been cut up on the Plaintiff's behalf, were dumped in Paray bay.

The last witness is Mr. Joel Moses. He said the Laudoreck had been pulled 'close up to the Marine Wharf. He said he saw the 'house ' of the Laudorek on or beside the Wharf.

FINDINGS OF FACTS

- There was a written agreement for salvage of M/V Lih Peng and M/V Laudorek entered into between the parties on 21st May 1999.
- Total remuneration under the agreement was Vatu 27 Million, VAT inclusive.
- Half of the agreed remuneration was paid "up front".
- The original 30 day completion period was extended to 30th September 1999.
- The salvage of the Lih Peng was completed or substantially completed by at or about 31st December 1999.
- The contract was specific in nature. It is specific because the term of salvage operations was not to exceed 30 days from the commencement of the Agreement. This is regardless of unforeseeable weather conditions and difficulties that might suffice. The contract has failed to clarify its terms in relation to such unforeseeable circumstances.

- The local circumstances in Vanuatu are unique given its weak nature of technology and professionals. A high minded person may find it terrible and a lot of times, frustrating. Both parties felt the same. The defendant was frustrated because work has been done slowly. He wanted the plaintiff to comply with the terms of the contract. The plaintiff on the other hand were experiencing difficulties. Such difficulties were expressed in their evidence. Disregarding such difficulties by the plaintiff and the amount of work done the defendant terminated the contract.

- Time was only ever "of the essence" in respect to the Lih Peng and that became a dead issue at least before 21st December 1999.

- No written or oral extension of time was ever given to the extension of contract from 30th June 1999 to 30th September 1999 by the defendant.

- The parties agreed terms to:

  "*where possible ... personnel shall be sourced in Vanuatu*"
  was not achievable and a cause of significant delay and infact incompatible with another term;
  "*western provides for:*
  1. Competent salvage crew and facilities for salvage work".

- After 30th September 1999, and when overseas personnel were accepted as being necessary, the defendant made significant changes to the previous contractual relationship with the plaintiff.

- The communication between the plaintiff and defendant deteriorated and there was antagonism between the parties.

- Mr. John Roosen did not act in concert with his board or receive approval and mandate from them for actions he took.

- The Lih Peng was floating awaiting scuttling at 21st December 1999 and disposed of in accord with the contract on 31st December 1999.

- The defendant elected to provide no observer for the disposal of either vessel.

- The Laudorek was broken into "disposable" size pieces by 21st December 1999 and at least some parts had been moved from the salvage site.

- By 6th January 2000 approximately 10% of the Laudorek remained, in small pieces, unremoved in relatively shallow water at the salvage site and still remains today.

- A bow piece being approximately equivalent to 20 to 25 percent of the Laudorek is now at 28 meters and has been used as a mooring and is not a part of the original Laudorek vessel.

- The only evidence as to the whereabouts of the remaining 90% of the Laudorek is as recorded in the Lih Peng log book by the Chief Officer of that vessel.

- The evidence shows that the contract was settled when the defendant was 'fresh off the boat'. The term of 30 days was executed as a time limit for completion of the contract. The plaintiff experienced difficulties and problems. There was lack of competent qualified personal in Vanuatu. There was also lack of equipment at the early stages of the contract. Although that is a personal matter for the plaintiff to administer, however such difficulties affected the very nature of the contract between the parties.

By letter dated 7th of July 1999, the plaintiff sought a contract extension. The defendant failed to reply in such a difficult and cloudy situation. The plaintiff then proceeded on an implicit understanding. That is to say that the work continued. Overseas-qualified personals were brought in. The salvage of the two vessels was developed.

There was lack of co-operation and increasing difficulties between the parties. There were different personalities who ensured the survival of the contract. The defendant speaks English and the plaintiff speaks French. The defendant went overseas and stayed for two weeks. The communication was broken. The plaintiff wanted to advance the matter, however, they failed due to such constraint. The weather was bad for sometimes. This caused delay in the operation.

The Lih Peng salvage was completed competently by the plaintiff. The Laudorek was completed other than 10% of the vessel in shallow water. The contract had moved to an entirely different basis from that of 31 May 1999.

The Court accepts the submission that the evidence of witness Supkit Pooahong must be given little or no weight by the Court. The Court must discourage "trial by ambush" and that is what the defendant sought to achieve by the calling of this witness. It was clear that the witness himself had been called to give evidence entirely unexpectedly and that after the trial had all but concluded and been adjourned for some 4 weeks. The defendant's counsel himself was unaware of the content of this witness' evidence until some 4 days before he appeared and one month after the plaintiff's case had closed. The rule in *Browne –v- Dunne* is protective of efforts at trial by ambush and clearly applies here. The defendant's case must be clearly put to the plaintiff's witnesses in cross-examination so as they have the opportunity to respond to it. This did not happen and could not have, as the defendant did not know its own case until shortly before this witness gave his evidence. Clear instances of evidence contrary to the rule in *Browne v. Dunne* were:

1. Statements that the Noumea divers release wreckage into the inner harbour. Not put to witness Oddi.

2. Statements that Guy Benard was on the Pertiwi throughout the "*Laudorek dumping*" process. not put to witness Benard.

3. Statements that Guy Benard gave all instructions to the French divers from onboard the Pertiwi. No put to witness Benard.

4. Statements that the echo sounder on the Pertiwi was used to find deepwater in Paray Bay. Not put to witness Benard.

5. Statements that air bags were used to float pieces of the Laudorek into Paray Bay. Not put to witness Oddi or Benard.

6. Statement that witness contacted Bohn re visit of Cay Jarner in respect to log book. Not put to witness Bohn.

The defendant accepts the criticisms made in relation to the breaches to the rule in *Browne v. Dunne*. However, they say the breaches to the rule in *Browne v. Dunne* are completely incidental to the main thrust of Mr. Poorahong's evidence. This proposition must be rejected. The breaches are fundamental and as such jeopordise the case of the plaintiff.

The evidence of the plaintiff on this point to the contrary must be accepted.

The following documentary evidence is also accepted.

1. <u>Memorandum of Agreement and Associated correspondence.</u>

   The plaintiff was the only realistic tenderer of 2. Overseas expressions of interest sough "ridiculous" amount for payment which could not be contemplated.

   The plaintiff was awarded the contract to encourage local industry and increase a skill base. The parties jointly recognized that issues embodied in the initial memorandum were idealistic at best. It was extended, varied or entirely superseded by changed relations between the parties.

   Most importantly the concerns re Lih Peng cause "*time of the essence*" were unfathomed and dismissed at an early stage.

   The parties jointly (though with disharmony) moved towards a mutually suitable determination of the need to salvage the two vessels. This was achieved by early January. Between 21st December and early January only disposal occurred. This was minimal relevant to the overall works for salvage.

2. <u>Photos/Video's/Charts/Log Books</u>

   The original location of the vessels is established. The site of disposal of the Lih Peng is established. That by entry into log book, photo and oral

evidence. The entry into log book was apparently accurately recorded by the Chief Officer more than a month later, and duly signed and accepted by the master.

The site of disposal of the Laudorek is established by entry in log book at the same time as the Lih Peng entry. There is circumstantial supporting evidence as to its disposal provided by oral evidence of Oddi and Benard and the payment for services of the Pertiwi by the Plaintiff.

The photos and videos show:

(i) The original vessels;
(ii) The Laudorek proceeding through a lengthy dismantling process to January 2000;
(iii) The Lih Peng's scuttling;
(iv) Part of the Laudorek on dry land;
(v) Parts of the Laudorek in shallow water being equivalent 10% of vessel;
(vi) A bow section which cannot be part of the Laudorek but is a piece of the many pieces of heavy scrap material in the harbour. This piece used by Anasa for a mooring and located in or about October/November 1999.

3. VMA Board minutes and correspondence.

These show an ongoing intent of the defendant to be flexible and negotiable with the plaintiff. An intent to mutually work toward a sensible outcome and going beyond the terms of the original memorandum of agreement. They show lack of objective information and response being given to the Board by Roosen. (e.g. Time devoted to "explosions" but not salvage plan).

THE LAW AND ITS APPLICATION

The law applicable to the issues in these proceedings transverses many traditional and developing areas of contract law. The relationship between parties and the payments between those parties on termination of the relationship should lead to a just result. Thus the basis for development of areas of law and legal concepts such as factual matrix, unjust enrichment and quantum meruit. All of these concepts, inter alia, have relevance to this proceeding.

1. Factual Matrix Concept.

In *Reardon Smith Line Ltd v. Yngvar Hansen – Tangen [1976] 1 WLR 989* Lord Wilberforce explained that, when constructing a contract, the Court must *"place itself"* in thought in the same factual matrix as that in which the parties were when the contract was made. Therefore, notwithstanding the

parole evidence rule, the Court is able to receive evidence of the circumstances surrounding the contract, and the aim, object or commercial purpose of the contract on the basis that it forms part of the factual matrix against which the parties contracted, (contract law in Australia 2nd edition Carter and Hartland pg. 211).

2. Election to continue performance/estoppel.

It is not at all infrequent for a promisee (VMA) to find that the right to terminate has been lost by reason of the promisee having elected to pursue an alternative right, namely, to continue performance. Continuation of performance is inconsistent with termination. See *United Australia Ltd v. Barclays Ltd* [1941] AC 1 – (Carter and Hartland pg. 636).
The general purpose of estoppel is to prevent an unjust departure by one person from an assumption adopted by another as to the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment – (Carter & Hartland pg. 638).

Unreasonable delay in the exercise of a right to terminate may sometimes create an estoppel. An election to terminate must be made within a reasonable time and what constitutes reasonable time is an issue of fact depending on the circumstances of the case.

3. Unjust enrichment/Quantum meruit.

There are three elements which make up the concept of unjust enrichment:
(i) Benefit received by defendant (VMA);
(ii) Benefit at expense of plaintiff (Bohn);
(iii) Injustice. It would unfair, unconscionable or inequitable for the defendant to retain the benefit – (Carter & Hartland pg. 791).

In tandem with this concept is that of reasonable recovery of remuneration for services rendered on a quantum meruit. This entitlement is described as having a dual character. Sometimes it is a legitimate remedy in contract, sometimes a quasi-contractual remedy. If services are rendered and a benefit given the plaintiff, where purported to act under agreement, is entitled to recovery on a quantum meruit.

4. Proof of Amount for Recovery

In order for the Court to award on the plaintiff's claim it must be satisfied as to the amount to award. As Justice Coventry stated in CC 117 of 2000 *Karie v. Jimmy* which was confirmed by the Court of Appeal in CAC No. 2 of 2002 "*Whilst a Court must not guess, a reasonable figure can be awarded on the face of the evidence*".

In the present case, the contract price is of VT27,000,000. The contract is for the salvage of two (2) ships: M/V Lih Peng and M/V Laudorek. Half of the agreed remuneration which is VT13,500,000 was paid "*up front*".

The other half of the agreed remuneration was to be paid at the completion of the contract work. The ship M/V Lih Peng was disposed off on 31st December 1999. I assess the remuneration for that to be VT13,500,000 in accordance with the contract.

M/V Laudorek salvage was completed other than approximately 10% vessel in small pieces in shallow water. On the totality of the evidence, the work done by the plaintiff in respect to M/V Laudorek is not completed. Half of the work in respect to that ship is completed. Half of the work is yet to be done. I assess the work done on M/V Laudorek to be in VT6,500,000. The plaintiffs are entitled to that amount.

On the facts as found by the Court, the work done by the plaintiff corresponded to the following amount:

	VT13,500,000
+	VT 6,500,000
	VT20,000,000

I find for the plaintiff in the amount of VT20,000,000 on the total agreed contract price of VT27,000,000 on the basis of quantum meruit.

DETERMINATION OF THE ISSUES

1. Was there ever any effective termination of the agreement?

The plaintiff asserts no. The Court accepts the following submission.

The facts confirm there was no authority or request from the board to terminate the contract on 21st December 1999.

The law asserts that the defendant was either estopped from any termination or had exercised an election for the contract to continue. Much time and significant work relative to contract had occurred since that election. The formal request for extension on 7th July had not received formal response. This casual relation had continued between the parties, in respect to duration, ever since.

The defendant seems to hopefully attach some magic to the words,

> "*This letter is without prejudice to, and the Authority hereby expressly reserves all of its rights and remedies including without limiting the generality of the foregoing proceeding against you to resolve any and all damages especially in relation to the expired contract involving the F/V Lih Peng and the M/V Laudorek*".

That cannot be so. There was unreasonable delay in respect to the exercise of any right to terminate. The only outstanding issue was disposal

and the plaintiff was reasonably acting on the assumption that the resolution of that issue would allow completion. The defendant clearly elected to continue with performance from 30th September 1999.

The answer to question 1 is in the negative: (no).

2. What were the legal relations between the parties after the Defendant's letter of 21st December 1999 to the Plaintiff?

The contract which existed at that date continued to be performed by the plaintiff. That contract was a variation of the original memorandum of Agreement. That memorandum was initially varied in respect to duration, when that was extended to 30th September 1999. After that date it was further amended in many respects and time was not of the essence. The amended contract continued with no fixed duration. This is clear from the factual matrix. The defendant elected to abandon the contract at 21st December 1999 and breached it by failure to provide observers to disposal.

3. Is the plaintiff estopped by reason of:-

(i) payment of 27 million only entitled to be paid on full completion of works.

No.

At least the plaintiff has substantially performed the contract and with the abandonment of the contract by the defendant must be entitled to substantial payment.

The defendant cannot be allowed to obstruct the plaintiff's ability to complete the final phase of the contract work and then retain half of the moneys provided for by the contract, that would be unjust and unconscionable.

(ii) time of the essence in the contract.

No.

This was clear from all of the evidence and not contested by the defendant. Interestingly since December 1999 the defendant has done nothing about the remaining debris in shallow water at Iririki for more than 2 years. Time was not of the essence of the contract which existed as at 21st December 1999. This is again clear from the factual matrix.

4. Is the plaintiff entitled to further payment under the agreement or on a quantum meruit from the defendant?

At law the plaintiff is entitled to fair payment for fair work done. The defendant should not receive the benefit of the plaintiff's work. That would be unjust.

There is sufficient evidence for the Court to establish a reasonable figure for the plaintiff's claim. The plaintiff is entitled to the amount of VT20,000,000 for the payment of the work done on quantum meruit. The plaintiff shall retain the amount of VT13,500,000 paid to them by the defendant *"up front"*. The defendant shall yet to pay to the plaintiff VT6,500,000 to make up the total amount of VT20,000,000.

Those are the reasons of the Order dated 9th September 2002.

Dated at Port Vila, this 28th day of April 2003.

Vincent LUNABEK
Chief Justice