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

CIVIL CASE NO. 130 OF 2009

BETWEEN	**MAISON DU VANUATU** Claimant
AND	**VANUATU COMMODITIES MARKETING BOARD** Defendant

Coram: *Justice J. Macdonald*

Counsels: *Mr B. Bani for the Claimant*
Mr H. Jenshel & Ms J. Harders for the Defendant

Date of Hearing: *7 & 13 October 2010*

Date of Judgment: *22 October 2010*

JUDGMENT

Introduction

1. The claimant is a company duly registered in New Caledonia.

2. The defendant is the statutory corporation established under the Vanuatu Commodities Marketing Board Act [CAP. 133].

3. On 7 October 2006 the claimant and the defendant entered into a contract whereby the defendant appointed the claimant as its sole importer and distributor of Vanuatu kava in New Caledonia.

4. Clause 4 A] 2 of the contract required the defendant to specify clearly, in each licence issued to any kava export holder in Vanuatu, that kava shall be exported solely to the claimant and to no other destination in New Caledonia.

5. The contract further provided that 15% of the claimant's shares were to be freely allocated or given to the defendant, and an advance payment of VT 5,000,000 would be made available to the defendant within seven days of the agreement being signed, to assist its financial position. The advance payment of VT 5,000,000 would be deducted from dividends payable to the defendant over a period of two years.

6. The term of the agreement was for five years, renewable at the end of each term by mutual consent.

7. Either party had the right to terminate the agreement by giving the other party at least one month's written notice.

8. Either party also had the right to terminate the agreement without notice, if there was valid proof that the other party had breached any of the provisions of the agreement.

9. In the event of termination due to breach, the party in breach was to compensate the other party by payment of the sum of VT 15,000,000 for the period of the agreement. Such compensation was to be reduced in proportion by dividing such sum by five years to establish the value of each year of the agreement, and how much the other party at breach should pay the other party for the remaining years of the agreement.

The claim

10. The claimant alleges that the defendant breached clause 4A] 2 of the contract by failing, neglecting and refusing to specify clearly in each licence issued by the defendant to any kava export license holder in Vanuatu, that kava shall be exported solely to the claimant.

11. By its conduct the claimant says that the defendant had terminated the contract, and such termination was unlawful.

12. As a consequence the claimant says it has suffered loss of VT 1,084,337,500, with additional loss suffered from July 2009 until October 2011 (being until the end of the five year term of the contract) still to be assessed.

13. Loss has been calculated on the value of all Vanuatu kava exported to New Caledonia, which the claimant says that, as the sole importer and distributor, it has not received.

The defence

14. The defendant denies any breach of contract, and says that by failing to provide at least one month's written notice to terminate the contract (as required by clause 8) the claimant had repudiated the contract by the commencement of these proceedings. The defendant accepts such repudiation.

15. The defendant further says that the claimant has treated the contract as remaining on foot.

16. Alternatively, the defendant says that the claimant by its inaction until October 2009 (when it filed this claim), has waived any right it might have had (which is not admitted) to rely on any of the matters alleged in the particulars in the claim, as a basis for terminating the contract.

17. In the course of closing submissions Mr Jenshel, for the defendant, conceded that the contract was terminated at the earliest in January or February 2007. This, however, was not a concession that the contract was terminated by reason of any breach by the defendant.

18. As to damages, in the event of breach, the defendant says that it was an express term of the contract (clause 9) that upon termination the party at fault

would compensate the other party to a maximum of VT 15,000,000 and therefore any liability is limited to that sum.

19. The defendant further says that the claimant has failed to mitigate its loss by obtaining an alternative supply of kava or otherwise.

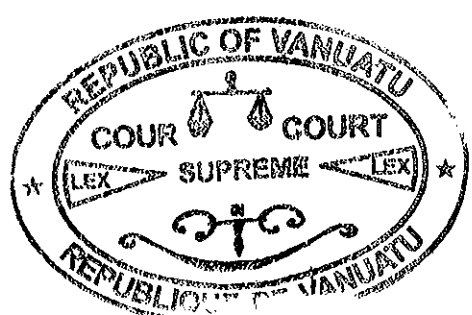
Evidence

20. The claimant called two witnesses. The defence called none.

21. Mr Terrien, a co-director of the claimant, (his wife was the other director) had sworn and filed two sworn statements. Both had been substantially shortened as result of my determination of the defence objections as to admissibility. I record that Mr Bani, for the claimant, offered little resistance to the objections.

22. Consequently, Mr Terrien's evidence was reasonably limited. In his first sworn statement he referred to the signing of the contract. He referred to the claimant complying with clause 4A]5 of the contract and giving 15% of its shares to the defendant. He referred to the earlier litigation between the parties in this Court (Civil Case No. 216 of 2006), in which it was held that the present contract was valid and enforceable. He said that the claimant had never given notice of termination for breach of contract, but had always tried to get the defendant to comply with its obligations.

23. On the issue of damages, Mr Terrien gave evidence that the claimant's lost revenue was based on a figure of VT 2,500 per kilo of kava. Then on the strength of figures provided by the Institut de la Statistique et des Etudes Economiques Nouvelle-Caledonie on the import of kava from Vanuatu between 2006 and 2009, he calculated the claimant's loss up until June 2009 to be VT 1,084,337,500. This represents the total quantity of Vanuatu kava priced at VT 2,500 per kilo. As mentioned before, this leaves the period from July 2009 until October 2011 as still to be assessed.



24. In his second sworn statement Mr Terrien confirmed that the claimant complied with clause 5 of the contract by paying VT 5,000,000 to the defendant within seven days.

25. In cross-examination Mr Terrien accepted that he was the one who set the official price for kava. The claimant had an accountant but copies of the company's accounts were not produced. He accepted that he had not provided details of the expenses involved in the importing and distribution of the kava. Mr Terrien referred to profit margins. He accepted that some venture capital was involved and that the accountant had those details. He also accepted that such matters as freight, taxes, warehousing, insurances and customs had to be taken into account, but again he provided no details.

26. Mr Calo, the other witness for the claimant, confirmed that he was present when the contract of 7 October 2006 was signed.

Submissions

27. I have considered the written and oral submissions of counsel. I do not propose to repeat them, beyond that which is necessary to determine the claim.

28. One matter Mr Bani raised was the prospect of an adjournment to assess damages for the period from July 2009 until October 2011. Mr Jenshel opposed that, arguing that a split hearing was never contemplated.

29. In my view a split hearing was indicated by the pleadings, but there are other difficulties with that and I will refer to them later.

30. I note that Mr Bani conceded in his final submissions that the claimant had failed to prove its loss. By that he was referring to the specified sum of just over VT 1.1 billion. I further note that when pressed on the meaning of the penalty provision (clause 9), and whether that provided a limitation on the

amount that could be recovered from the party in breach, Mr Bani did not appear to give any response.

31. For the defendant, Mr Jenshel's principle submission was that there is no evidence of breach, and none is identified.

32. Even if there was a breach, Mr Jenshel submits that there is no evidence of any connection between the breach and the loss claimed. And, while he accepts that the Court is obliged to do the best it can on the evidence available, he submits that does not assist the claimant. While there might have been an expectation of loss, given that this was a new business, there is no evidence as to the costs of its establishment.

33. Mr Jenshel submits that all the claimant has done is to say that a certain volume of kava has been imported into New Caledonia over a certain period of time, and, based on VT 2,500 per kilo, that equates to the loss suffered.

Conclusions

34. I am not satisfied that any breach of contract has been proved. This was Mr Jenshel's principle submission. Mr Bani had the opportunity to respond to this but did not. I sensed that he had no answer.

35. To establish a breach I would have expected evidence of the defendant having issued a licence to another exporter of Vanuatu kava to New Caledonia, and of failing to 'specify clearly' in the licence that the claimant was the sole importer and distributor in New Caledonia. There was no such evidence.

36. Even if I am wrong in that conclusion, the claimant has failed to prove any loss. Certainly that applies to the specific figure in the claim (just over VT 1.1 billion), and Mr Bani conceded that to be the case.

37. I further find that the claimant has failed to establish any formula by which any other loss might be calculated, and therefore an adjournment to conduct a further hearing to assess damages is quite pointless.

38. Furthermore, the hearing contemplated by Mr Bani would have to take place after October 2011, which in the circumstances is plainly untenable.

39. In any event, I am satisfied that the contract caps damages at VT 15,000,000.

Result

40. The claim is dismissed with costs to the defendant. I assume that counsel will be able to reach agreement on that issue but if not the matter will be determined by the Court.

Dated at Dunedin this 22nd day of October 2010

BY THE COURT

.....
J. Macdonald
Judge

REPUBLIC OF VANUATU COUR COURT LEX SUPREME LEX