

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

Civil Case No. 78 /2012

BETWEEN: **PAUL TOM HIWA**
Claimant

AND: SAM YAPUT
Defendant

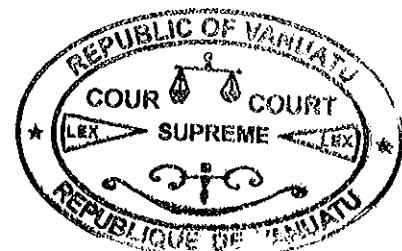
Hearing: **6 December 2012**
Before: **Justice Robert Spear**
Appearances: **Stephen Joel for the Claimant**
 Willie Kapalu for the Defendant
Decision: **10 December 2012**

JUDGMENT OF THE COURT

1. This is a claim for Vt 1.4 million being the balance alleged to be owing under a contract for the supply of goods and services. The claim is defended on the sole pleaded basis that the defendant Sam Yaput was not privy to any such contract with the claimant Paul Hiwa.

2. The evidence for the claimant is by the sworn statement of Paul Hiwa of 6 August 2012. The evidence for the defence is by the sworn statement of Sam Yaput of 12 October 2012.

3. At the commencement of the hearing, counsel confirmed to me the indication given at previous conferences that there would be no cross examination of any witness nor was any objection taken to any evidence in the sworn statements.



Claimant's case

4. Paul Hiwa states that he and his wife have operated a small business known as *Mohil's Business* for a number of years. It is involved with the importation of shop goods from China. In that respect, they are assisted by a Chinese friend named Gu Wen Bing otherwise known as *Johnny*.
5. In 2010, Paul Hiwa states that Sam Yaput approached them seeking to enlist their assistance with the importation of goods from China for the his store in Port Vila. An oral agreement was entered into on these terms:-
 - a) Sam Yaput was to specify the goods he required;
 - b) Johnny would travel to China and arrange for the purchase and the shipment of the goods by container to Vanuatu;
 - c) Sam Yaput would pay for the goods as required (including any alternatives as confirmed by either email or fax);
 - d) Sam Yaput would pay all costs involved in the freight of the container including customs' dues, and clearance and handling charges in Vanuatu. .
6. Johnny travelled to China in March 2010 and purchased various goods in accordance with Sam Yaput's order. Johnny arranged for them to be shipped by container to Vanuatu. Some of the goods purchased were alternatives to that originally specified but found not to be available. Those alternatives were duly confirmed with San Yaput before the goods left China.
7. At or about the time that Johnny travelled to China on this contract, Sam Yaput paid an amount of USD 4,930 on account of the freight charges. That was then equivalent to Vt 500,000. The receipt was signed both by Paul Hiwa and Johnny.
8. A payment on account of the purchase costs of the goods was requested by Paul Hiwa on 18 August 2010. Sam Yaput paid Paul Hiwa Vt 2,003,000. This was before the goods left China. Johnny was still in China at this time.



9. There was a delay by Paul Hiwa in the payment of the freight charges which incurred an additional penalty of Vt 500,000. Paul Hiwa paid that himself as he accepted that it was his responsibility.
10. The overall final costs of the goods purchased in China for Sam Yaput, transported to Port Vila and received by Sam Yaput was USD 34,118. That left an outstanding balance of Vt 1,400,000 which Paul Hiwa paid to the Chinese supplier on 5 July 2011. Payment had not been forthcoming by Sam Yaput.
11. Paul Hiwa seeks recovery of the balance of the cost of the goods obtained and provided to Sam Yaput being the amount of Vt 1,400,000.
12. As previously mentioned, the statement of defence simply asserts that Sam Yaput never entered into any contract with Paul Hiwa but instead with a man called Johnny from China.

Defendant's case

13. The evidence for the defendant is that in 2010 he was approached by Paul Hiwa's wife who indicated that 'they' (it can be safely assumed that this meant Paul Hiwa and his wife) had a friend from China by the name of Johnny who was involved in importing goods from China. Sam Yaput then met with Johnny at Paul Hiwa's home. Paul Hiwa was not present at that time. Sam Yaput explains that he provided details to Johnny of the goods that he wished to obtain from China.
14. Johnny went to China to purchase the goods. Sam Yaput complains that a number of items that he had ordered were not included in the list of goods and that other goods were put there in place. Of course, against that is the evidence from Paul Hiwa that Johnny had confirmed the alternative goods (alternative to goods that were not available) in an email or fax exchange between Johnny and Sam Yaput.
15. At paragraph 7 of his sworn statement, Sam Yaput states, "*I told him (Johnny) to order these goods and the costs should be around Vt 2,000,000.*"



If there are extra costs then the Chinese (Johnny) has to inform. I was not informed of extra costs until the container of goods arrive in Vanuatu.”

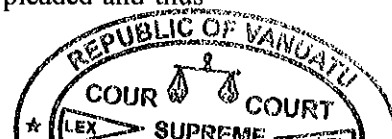
Consideration

16. There is a dispute raised by the evidence as to whether the alternative goods were or were not confirmed between Johnny and Sam Yaput either by email fax or otherwise. All I am left with is the bare assertion by Paul Hiwa that this occurred as against the bare denial by Sam Yaput. However, the difficulty here is that this defence by Sam Yaput has not been pleaded and so Paul Hiwa would not have appreciated that he had to call evidence to address this point. The pleading is solely confined to the position that there was never a contract between Paul Hiwa and Sam Yaput.

17. I am satisfied that the balance of the price of goods purchased in China, transported to Port Vila and received by Sam Yaput is Vt 1,400,000. The pleadings take no issue at all as to the quantum of the claim or that Vt 1,400,000 is the outstanding amount. CPR 4.5 sets out the requirements for a defence. In particular: a statement of defence must deal with each fact in the claim (CPR 4.5 (3)); if a defendant does not agree with a fact stated in the claim then the defence must specifically deny that fact and state what the defendant alleges happened (CPR 4.5 (4)); if a defendant does not deny a particular fact, the defendant is taken to agree with it CPR 4.5(5)). That is basic to the principles of pleadings both in Vanuatu and other common law countries.

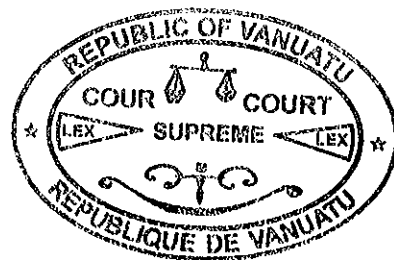
18. No application was made to amend the defence to the effect that the cost of the goods was capped at Vt 2,000,000 or questioning the accuracy of the account.. In any event, the evidence from Sam Yaput is not even particularly exact in that respect. His evidence is simply that he indicated to Johnny that the goods should be around Vt 2,000,000 and that if there were extra costs then Johnny was to inform him.

19. I am not prepared to allow the defence to introduce an issue as to whether it was agreed that, if the cost of the goods was to be in excess of Vt 2 million, then Johnny was to inform Sam Yaput of this. It was not pleaded and thus Paul Hiwa is not required to answer it.



20. Furthermore, no issue relating to the quantum of the claim for the outstanding goods has been properly put into dispute by Sam Yaput such that Paul Hiwa could have considered that he would need to call evidence on that point. Of course, that evidence would likely have had to have come from Johnny.
21. That leaves this case focussed on one single issue and that is whether this contract for the supply of goods was between Sam Yaput for the one part and either Paul Hiwa or Johnny for the other.
22. Mr Kapalu asserts that Sam Yaput never knew that he was dealing with Paul Hiwa. In legal terms, Mr Kapalu submits that the deal was struck solely with Johnny and that there is no privity of contract between Sam Yaput and Paul Hiwa. However, that ignores the effect of Paul Hiwa's evidence that Johnny was either a business partner or an agent of Paul Hiwa. At best, Sam Yaput's evidence is that if Paul Hiwa was the principal and Johnny his agent then this was never disclosed to Sam Yaput.
23. The law in this respect is well settled. It is neatly summarised in the following extract from *Cheshire's and Fifoot's Law of Contract*¹, at 7.35
- "If A has negotiated a contract with B who is acting on behalf of C then the contract is really between A and C and the privity rule is not to the point.*
24. At 7.36 when addressing the case of an undisclosed principal,
- "if a contract is negotiated between A and B and B does not reveal that she is acting as C's agent, then C may nevertheless intervene to take B's place if C can show that B was acting throughout as C's agent. It is irrelevant that A entered into the contract in ignorance of this fact"*

¹ 8th Australian Edition



25. This is expressed slightly differently but to the same effect in *Bowstead and Reynolds on Agency*² at Article 78

"1. An undisclosed principal may sue or be sued on any contract made on his behalf... by his agent acting within the scope of his actual authority. Where a contract is involved, the agent on entering into it must have intended to act on the principal's behalf.

...

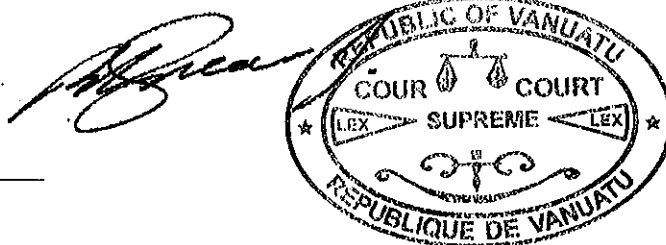
3. Where an agent enters into a contract, oral or written, in his own name evidence is admissible to show who is the real principal, in order to charge him or entitle him to sue on the contract".

26. Accordingly, even accepting Sam Yaput's evidence that he did not know that he was dealing with Paul Hiwa or that Johnny was only Paul Hiwa's agent, the evidence before me clearly establishes that Paul Hiwa was the principal and thus the contract was between Paul Hiwa and Sam Yaput.

Conclusion

27. I find that the contract was between Paul Hiwa and Sam Yaput. Furthermore, that an amount of Vt 1.4 million became due and owing by Sam Yaput to Paul Hiwa by at least 21 November 2011. This was when the first demand for payment (made by Paul Hiwa through his solicitors) was acknowledged by Sam Yaput's solicitors.
28. Judgment is according entered for the claimant against the defendant in the sum of Vt 1.4 million and interest thereon at 5% per annum from 21 November 2011 together with costs on standard basis to be agreed or taxed.
29. An enforcement conference will take place at 8 am on Monday 11 February 2013 at the Supreme Court Office. Mr Joel is responsible for the appropriate summons to be issued out of this Court and served on Sam Yaput in good time before that enforcement conference.

BY THE COURT



² 17th Edition