

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

Civil Case No. 129 of 2007

**BETWEEN:**           **PETELO TUFALE**  
*Claimant*

**AND:**                 **LAKATORO TRADING CENTRE LIMITED**  
*Defendant*

*Before:*               **Justice RLB Spear**

*Appearances:*     **Marie Noelle Patterson for the Claimant**  
**Jack Kilu for the Defendant**

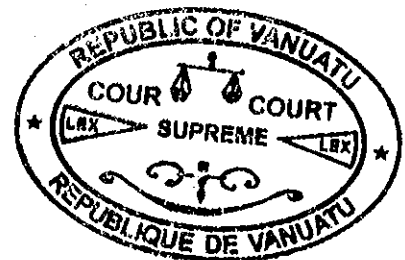
---

**JUDGMENT**

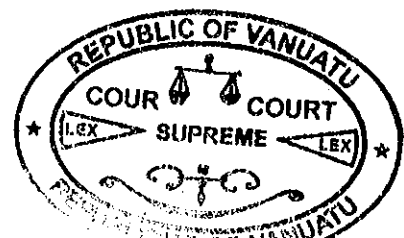
**Delivered 15 March 2013**

---

1. This is a claim by Petelo Tufale calling on the defendant LTC to account to him for remuneration that he asserts is properly due to him under various building contracts. The claim is denied by LTC on the basis that nothing further is owed to Mr Tufale in respect of those building contracts and that he has been remunerated accordingly.
2. This is a sad case where family members have fallen out with each other. Mr Tufale is a building contractor based on Malekula with many years of experience in joinery, carpentry and general building work.

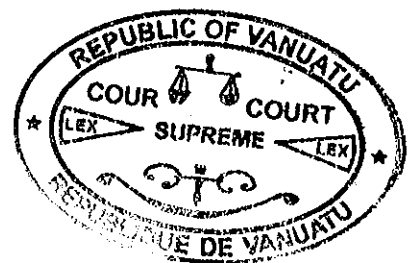


3. Mr Tufale was introduced to Benard Nguyen in the late 1990s once Mr Nguyen became involved with Mr Tufale's daughter, Nivalette. Mr Nguyen and Nivalette Tufale subsequently married. Accordingly, Mr Tufale became Mr Nguyen's father in law.
4. Mr Nguyen and Nivalette Tufale were residing in Port Vila but moved to Lakatoro on Malekula around 1995-1996. Initially, they stayed at Mr Tufale's house. It appears that Mr Tufale found work for Mr Nguyen at Lakatoro. In the late 1990s, Mr Nguyen set up his own business with his wife Nivalette and a local businessman, Sato Kilman. That business was incorporated on 16 January 2001 as the Lakatoro Trading Center Limited (LTC).
5. Mr Tufale states that he helped Mr Nguyen set up LTC but that is disputed by Mr Nguyen who says that he established that business with his wife Nivalette and Mr Kilman. Mr Nguyen stated that LTC subsequently received substantial funding from a Santo-based Chinese businessman.
6. Even with the best view of Mr Tufale's evidence, it is clear that he never had any internal involvement with the setting up of LTC although it is equally clear that his daughter Nivalette was actively involved as a director, an employee and a shareholder of LTC. Additionally, another of Mr Tufale's daughters, Falai Louze, worked as the cashier at the LTC store at Lakatoro until 2003.
7. The dispute that arises here can best be understood by a consideration of a building contract that LTC entered into with UNELCO in 2001 for the construction of a commercial building, an associated residence, and other related buildings. There is generally no dispute as to the nature of the relationship between Mr Tufale and LTC in respect of that UNELCO contract. In short, it was agreed that LTC would enter into the building contract with UNELCO. Mr Tufale would be engaged by LTC as the project manager of the construction works. LTC would source and supply all necessary building materials for the construction works as requested by Mr Tufale. The various



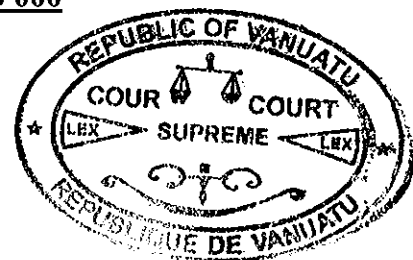
construction workers would be employed by LTC although the actual hiring and supervision of them would be undertaken by Mr Tufale.

8. Mr Tufale was emphatic that he was not employed by LTC. In the amended defence, LTC asserts that Mr Tufale was an employee. However, it appears clear on the evidence that Mr Tufale was more an independent contractor for LTC rather than an employee.
9. In respect of the UNELCO works, it was agreed between Mr Tufale and Mr Nguyen for LTC that Mr Tufale's remuneration would be the balance left after payment of the construction materials (inclusive of the LTC mark-up) and the labour costs.
10. The total payment received by LTC from UNELCO was Vt 6,398,961 of which Mr Tufale received Vt 2,741,053; which amounts to approximately 43% of the total contract price. There is no dispute about that.
11. The difficulties between the parties arose with four construction contracts that LTC then entered into with the European Union (EU) in 2001 for the construction of 4 schools on Malekula. Mr Tufale prepared the tenders for the construction work on behalf of LTC. Again, Mr Tufale was the project manager of the contract works and he carried out much the same role as he had with the UNELCO works. He supervised the construction works. He notified LTC what building materials were required from time to time and LTC would provide them. He hired the construction workers although they were actually employed by LTC and paid by LTC pursuant to work records supplied by Mr Tufale.
12. The 4 construction contracts for the schools on Malekula were supplemented by additional agreements that included the supply of furniture for the schools, the supply of labour for electrical installations for one of the contracts and the construction of staff housing at the schools.

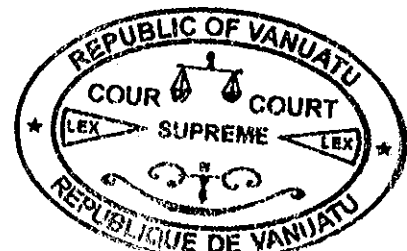


13. This was a substantial group of contracts resulting in LTC receiving a gross return to LTC of Vt 136,475,539 for the 4 principal contracts and an amount not addressed by the evidence in respect of the additional works.
14. Mr Tufale states that he understood that his involvement as project manager for the EU works would be on the same basis as for the UNELCO works. Mr Tufale states that he prepared all the tenders for the contracts that were submitted by LTC to the EU as Mr Nguyen had no experience or expertise in that respect. Furthermore, once the contracts were finalised, Mr Tufale engaged all the construction workers, ordered all the necessary material through LTC and generally managed the various construction projects. He states that this was exactly the way that he had operated with Mr Nguyen and LTC in respect of UNELCO works. Mr Tufale further states that he had prepared the tenders for the EU contracts on the basis that his remuneration would be approximately 45% of the gross contract price.
15. Mr Tufale stated, however, that all he has ever received for all his work on the EU contracts was Vt 4,150,000 as follows:

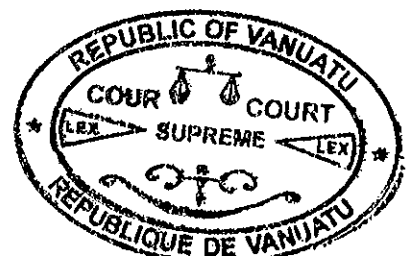
a)	by way of goods;	
	i)	a Toyota Hilux 1 800 000
	ii)	an aluminium boat 300 000
	iii)	an outboard motor 400 000
	iv)	a cement mixer 200 000
b)	Cash	
	1)	project South West Bay contract 250 000
	2)	Projects or Rensari contract 500 000
	3)	Project Olal <u>700 000</u>
	<b>Total</b>	<b><u>Vt 4 150 000</u></b>



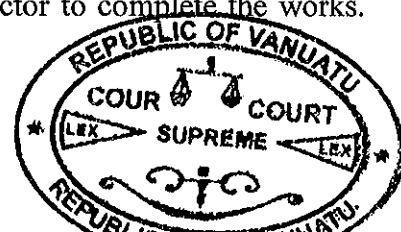
16. Mr Tufale stated in cross-examination that these payments and provision of goods would generally be a response to requests made by him from time to time to Mr Nguyen. When he needed cash or personal goods he would ask Mr Nguyen. Mr Tufale also acknowledged that he received (what he described as) a “Christmas present” from Mr Nguyen of Vt 300,000 cash probably in 2001 but possibly 2002.
17. Mr Tufale also said that during the EU contract works, Mr Nguyen and he agreed that two blocks of land, each worth Vt 900,000 would be transferred to Mr Tufale as part of his remuneration. However, Mr Tufale said that he has never seen any documentation on this and he does not know what happened in this respect. Regrettably, Mr Nguyen was not questioned about this.
18. Mr Nguyen was adamant that no agreement was reached between Mr Tufale and LTC along the lines that existed with the UNELCO works. He accepted that he had discussions with Mr Tufale as to the basis upon which Mr Tufale was to be engaged as project manager for the EU works but it was Mr Tufale who refused to enter into a formal arrangement or contract in that respect. It was Mr Nguyen’s belief that Mr Nguyen was reluctant to take the risk involved in such a large project and that he preferred to rely on his family member Mr Nguyen to do the decent thing by him. At that time Mr Nguyen said that he believed that Mr Tufale wanted to be involved to assist his two daughters, and particularly Nivalette, who were both working for LTC and with Nivalette a shareholder in the business.
19. Mr Nguyen went further in his evidence and stated that in addition to what Mr Tufale acknowledges he received from LTC during the EU contracts (paragraph 13 above), Mr Tufale received an envelope of Vt 200,000 cash each month from Mr Nguyen’s wife, Nivalette. The allegation that Mr Tufale received Vt 200,000 per month in cash was not specifically put to Mr Tufale in the course of his evidence but it was generally denied by him by his assertion that he only received those goods and cash to a total of Vt 4,150,000.



20. Mr Nguyen also stated in evidence that LTC suffered a loss on the EU contracts because Mr Tufale had made significant errors in the tender documents that he prepared by underestimating the quantities required. Against that allegation is the assertion from Mr Tufale's daughter Falai Louze, who was working as cashier at that time, that the EU contracts operated at a loss because Mr Nguyen artificially and dishonestly inflated the cost of the materials charged to the EU.
21. Mr Tufale's claim extends to further building works which Mr Tufale says involved an agreement known as the "*Intrus Agreement*" for the building of commercial premises at Lakatoro for LTC as well as other buildings including a house for LTC's shareholder, Sato Kilman. Mr Tufale claims that he is entitled to a reimbursement for these construction works on the same basis as existed for the UNELCO works. This is again denied by Mr Nguyen for LTC.
22. The claim accordingly alleges the existence of an ongoing contract between LTC and Mr Tufale for Mr Tufale's remuneration as project manager of the EU contracts and the *Intrus* works. The claim is that Mr Tufale's remuneration was to be calculated along the same lines as applied with the UNELCO works. That is, that Mr Tufale would be the Project Manager for LTC of the contracts entered into by LTC, the construction materials would be supplied by LTC on Mr Tufale's order, the construction workers would be employed and paid by LTC but managed by Mr Tufale and that the balance after the payment of all incidental expenses, including the construction material mark-up by LTC, would reveal Mr Tufale's return for his work.
23. The defence primarily asserts that the opportunity to enter into a formal agreement in respect of the EU works and the other works that followed was not taken up by Mr Tufale and in any event LTC suffered a loss on the EU contracts. Indeed, Mr Tufale's daughter Falai Lauze, who was the cashier at LTC at the time, acknowledged that LTC suffered a loss on the EU contracts but, of course, there are conflicting accounts as to how that loss arose or what caused it.

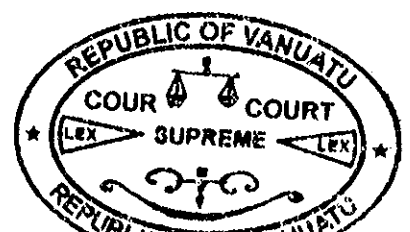


24. Furthermore, the defence is that the *Intrus* works could never have been structured on the same basis as the EU works as LTC was paying for that work itself and that it was accordingly subject to an entirely different costing structure that would not permit the type of calculation or assessment that Mr Tufale stated it was subject to for his remuneration.
25. Mr Nguyen said that Mr Tufale freely offered his services to assist what was essentially a new family business particularly because it would benefit his daughter Nivalette and he was adequately remunerated for what he did. Mr Nguyen also stated that, in respect of the EU works, there were significant complaints about the standard of Mr Tufale's construction work and his commitment to the work which resulted in the EU eventually bringing in its own contractor to complete two of the contracts.
26. Mr Nguyen was adamant that Mr Tufale received substantial payments from time to time both as he has acknowledged but also by the Vt 200,000 per month in cash that he received.
27. Where it is clear that business has been conducted between certain parties, the Court will look carefully at the available evidence and endeavour to ascertain what the terms of any contract between the parties might be. However, there is a need for certainty in respect of contractual terms and, while the Court is prepared to infer terms that appear obvious or necessary in respect of a particular business relationship, that does not generally give the Court free rein effectively to devise a particular contractual relationship that was not clearly within the contemplation of the parties at the time the business commenced. In some circumstances, relief against injustice can be provided through the Law of Restitution and I will return to that in due course. Furthermore, the Court can only assess the case based on the evidence placed before it.
28. There is no doubt, having regard to the evidence, that Mr Tufale carried out substantial work in respect of all the building works mentioned. There is no dispute taken by Mr Tufale to the fact that at least two of the contracts with the EU for the building of schools fell into difficulties such that the EU brought another contractor to complete the works.



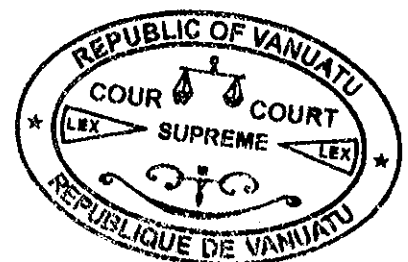
However there is no counterclaim for LTC in that respect. That is hardly surprising given the uncertain nature of the business relationship between Mr Tufale and LTC and the family connection.

29. There is apparently also no dispute that LTC suffered a loss on the EU contracts which would mean that Mr Tufale would be entitled to nothing if, indeed, his claim was upheld absent proof of fraud.
30. Mr Tufale generally impressed me with his evidence and I found him to be straightforward and generally credible as a witness although a little uncertain on the sort of detail that I would have expected he should have a clear idea about. This in particular in respect of the detail surrounding the terms of his engagement for the EU work. I expect that this lack of clarity came about because Mr Tufale was dealing with "family" and that he would have insisted on greater clarity if this was an *arm's length* transaction with a stranger. Mr Tufale appeared far more at home discussing the actual building work undertaken by him.
31. Mr Nguyen did not make such a favourable impression on me although I could not pinpoint exactly why that was. However, I could find no reason to dismiss his evidence that it was never agreed that Mr Tufale was to be remunerated for the EU contracts on the same basis as for UNELCO.
32. However, even putting Mr Nguyen's evidence aside for the moment, Mr Tufale was unable to satisfy me that it was more likely than not that he had reached a clear oral agreement with LTC that Mr Tufale would be remunerated for the EU works and/or the *Intrus* works on the same basis as had applied to the UNELCO works.
33. A contract of the type asserted by Mr Tufale could well be capable of being inferred having regard to the history of dealings between the parties. However, the only history to the parties' business dealings was the single UNELCO contract which paled in significance and size to the EU contracts; Vt 6,398,961 for the UNELCO works as against at least Vt 136,475,539 for the EU works.

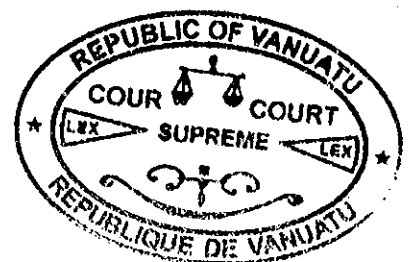




34. If Mr Tufale simply assumed that the contractual basis for his remuneration for the EU works would be calculated on the same basis as applied to the UNELCO works then that was rather naïve of him if not reckless. Indeed, the best view I was able to form of Mr Tufale's evidence was that this may have been an assumption on his part notwithstanding his protestation that a clear oral agreement was reached with Mr Nguyen. Surely, if such an oral agreement was reached for contract works of this magnitude, which were projected to return an amount of at least Vt 60 million to Mr Tufale based on the 45% project management fee he said that he loaded in to the tenders, at least one or the other of Mr Tufale and Mr Nguyen would have insisted on this being recorded in writing. While Mr Tufale may have arguably been prepared to accept an oral agreement as he has claimed, I find it very difficult to accept that Mr Nguyen would have allowed such an agreement to be left on such uncertain terms.
35. Equally, Mr Nguyen made sense with his comment that, even if such a remuneration arrangement existed for the EU contracts, it could never have been carried over to the *Intrus* works because they were building works undertaken by LTC effectively for itself and subject to an entirely different costing structure. I accept that this must be so. It is another cause for the concern that I have come to hold about the accuracy or reliability of Mr Tufale's recollection of his dealings with Mr Nguyen.
36. It is not inconceivable that Mr Tufale did indeed undertake this work on the uncertain basis mentioned by Mr Nguyen principally to assist his daughter Nivalette who was an integral part of the LTC business. The parties were not only family but they all lived in the small island community at Lakatoro on Malekula.
37. This appears to be a case where the parties have embarked upon a commercial relationship with the best of intentions between each other but, for one reason or another, the personal relationship has soured at some stage and one party (Mr Tufale) is left dissatisfied with his remuneration for his work but without a clear and understandable contract for work performed.



38. I would have been prepared to infer a contract between the parties that Mr Tufale was at least entitled to be remunerated for his work at a reasonable rate. However, the evidence simply does not assist as to exactly what might be reasonable remuneration. Additionally, I cannot dismiss the possibility that what Mr Tufale did receive was reasonable remuneration given the surrounding family circumstances, the commercial risk taken alone by LTC entering in to the EU contracts, and furthermore the loss that apparently occurred as a result of Mr Tufale not performing well in respect of two of the EU contracts.
39. Mr Tufale does not claim on a *quantum meruit* for work performed. That would have been another means by which Mr Tufale could have asserted that, although there was never a certain (as in definable) contract for his remuneration, he performed work which benefitted LTC and to deny him a reasonable reward for his labour would be effectively to enrich LTC unjustly. However, the evidence is also not compelling that, in all these circumstances, Mr Tufale did not receive reasonable remuneration.
40. On Mr Tufale's evidence, he received just over Vt 4,150,000 in cash or kind. Furthermore, there is also the assertion by LTC that Mr Tufale's daughter paid him Vt 200,000 per month in cash during these building works. There is also Mr Tufale's evidence that it was agreed that two blocks of land worth a total of Vt 1.8 million would be transferred to him by LTC as part of Mr Tufale's remuneration for the EU works and/or the Intrus works. However, there is no claim by Mr Tufale requiring LTC to perform the agreement in respect of those two blocks of land. If there was that agreement, that would mean that Mr Tufale received an overall return of approximately Vt 6 million without taking in to account the assertion of cash of Vt 200,000 per month.
41. Whatever the exact position, I have not been left by the evidence with the sense that Mr Tufale did not receive reasonable remuneration for his services. It was incumbent on Mr Tufale to prove this on the balance of probabilities.



42. Mr Tufale simply claims that he is entitled to remuneration based on his assertion that he had a stake in the EU contracts that provided him with a means by which his return could be calculated. I am not satisfied on the evidence that this is probably so.
43. For these reasons, the claim by Mr Tufale must fail. Judgment is accordingly entered for the defendant together with costs on a standard basis to be agreed or taxed.

**BY THE COURT**

