

BETWEEN: RANCH DE LA FALAISE LIMITED
First Claimant

AND: MAAK QUARRY LIMITED
Second Claimant

AND: LAKENASUA ENTERPRISES LIMITED
Third Claimant

AND: REPUBLIC OF VANUATU
Defendant

Coram: Justice D. V. Fatiaki

Counsels: Mr. G. Boar for the Claimants
Mr. F. Gilu for the Defendant

Date of Decision: 21 March 2016

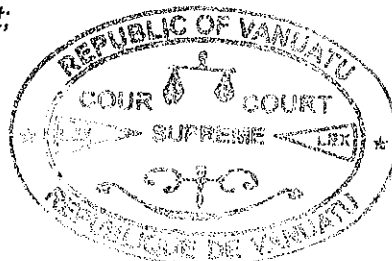
JUDGMENT

1. On 27 September 2013 judgment was entered for the claimants in the following terms:

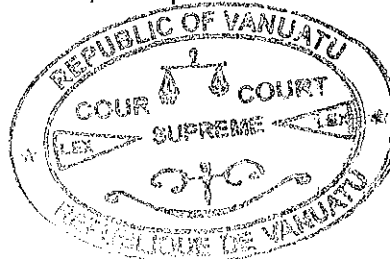
"Judgment is entered in favour of the claimants on the second contract as pleaded for an amount to be quantified in accordance with a joint Memorandum to be agreed by the parties with interest of 5% per annum calculated from 20 January 2011 and (to be) submitted within 14 days for the Court's consideration".

2. Earlier in its judgment the Court enumerated various expenditures that it accepted was reasonably and necessarily outlaid by the claimants in their preparation for the project including:

- "Attending several briefing meetings with the government committee established to run the projects, namely, the Millennium Challenge Account – Vanuatu ("**MCA – Vanuatu**");
- Visiting potential quarry sites on Efate and Santo and negotiating, where necessary, with custom land owners of the identified sites;
- Taking measurements, samples and testing to ensure sufficient and acceptable quantities of raw materials would be available to produce suitable aggregate for the project;



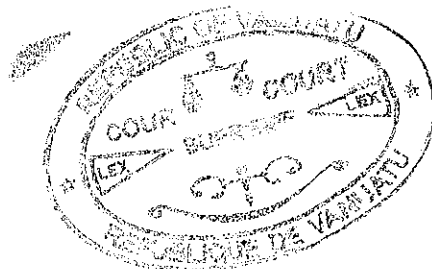
- *Applying for and obtaining the necessary quarry permits for the identified quarry sites;*
 - *Obtaining finance for the purchase of necessary plant and machinery for the extraction, processing, storage and transportation of the aggregate including purchasing an excavator, a crusher and screener, two (2) tipper trucks, a grader and loader as well as identifying and negotiating for the lease of land on which to locate the crushing plant and store the processed aggregate; and.*
 - *Undertaking negotiations and providing information to the successful tenderer for the project as to the quantities and type of aggregate that would be required for the project as well as costings."*
3. Judgment having been accepted by the defendant, the Court ordered sworn statements to be filed by the claimants setting out the evidence in support of the various claims for goodwill, loss of profits and other heads of damages. The principals of each of the claimant companies filed sworn statements namely, **Jean Paul Virelala** (x2) for Ranch De La Falaise Limited ("*RDF*"); **Joe Lauto** for Maak Quarry Limited ("*MQL*") and **Toara Kalorib** for Lakenasua Enterprises Limited ("*LEL*").
 4. The defendant filed sworn statements from **George Maniuri** (May 2011), **Tony Tevi** (March 2012) and **Johnson Wabaiat** (December 2013). Notable by its absence is a sworn statement from **Russel Nari** the then Director-General in the Ministry of Lands who played an active and pivotal role in negotiating the return of the claimant's quarry licences.
 5. The absence of a sworn statement from **Lennox Vuti** the Program Director MCA – Vanuatu at the relevant time, or from **Downer – EDI Works** the contractor who built the Efate ring-road is also significant.
 6. In this regard too it is noteworthy that the original Program Director of MCA – Vanuatu was **Lennox Vuti** who signed the Design and Build Contract Negotiations Decisions in April 2008 then in July 2008, **Allen Faerua** was Acting Director. He appears to have been replaced by **Tony Sewen** in about October 2008 and it was only in early 2009 (4 months after the 04 November 2008 Agreement letter had been written) that Johnson Wabaiat is mentioned as the Program Director of MCA – Vanuatu.
 7. In the result, a large amount of Johnson Wabaiat's evidence which was purportedly based on documents contained in the MCA – Vanuatu files is essentially hearsay in regard to the crucial pre-2009 meetings, the actual agreements reached, the parties motivations, and personal understandings



including the pressures under which negotiations were undertaken between representatives of the claimant companies and government and MCA – Vanuatu officials in the lead up to and after the letter of 4 November 2008.

8. One thing is clear however and that is, that the actual extraction figures for aggregate used on the Efate ring road was not known in 2008 or at the time of the 4 November 2008 letter nor was it ever disclosed to the claimants at any time thereafter even after it became known to the defendant. In fact the first disclosure to claimant's counsel of the actual extraction figures is contained in the letter of the Attorney General dated 3 December 2013 which is more than 5 years after the letter of 4 November 2008.
9. All witnesses were cross-examined and counsels filed helpful written submissions. I am grateful for the assistance provided to the Court.
10. In its further amended claim the claimants claim the following reliefs:
 - "1. An order for specific performance against the defendant.
 2. An order that the defendant pays:
 - (a) VT40 million being expenses for the first claimant;
 - (b) VT1,5 million being expenses for the second claimant;
 - (c) VT2 million being expenses for the third claimant;
 3. An order that the defendant pays:
 - (a) VT52,255,873 being goodwill payment for the first claimant;
 - (b) VT22,747,937 being goodwill payment for the second claimant;
 - (c) VT26,396,190 being goodwill payment for the third claimant;
 4. An order that the defendant pays:
 - (a) VT127,649,105 being the first claimant's loan obtained from ANZ Bank;
 - (b) VT23,790,000 being the second claimant's loan obtained from Westpac Banking Corporation
 5. An order that the defendant pays:
 - (a) First claimant's loan interest at VT50,727,228;
 - (b) Second claimant's loan interest at VT9,991,800.
 6. An order that the defendant pays:
 - (a) First claimant's net profits at VT380,390.328;
 - (b) Second claimant's net profits at VT123,390,357".

In summary, the heads of damages are: "preparation expenses"; "goodwill payment"; "bank loans"; "loan interest"; "net profits" and "costs".



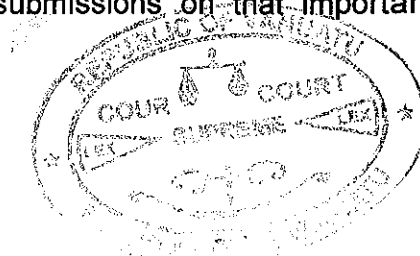
11. The defendant denied that the claimants are entitled to any relief at all. That is plainly wrong although I accept in the present circumstances there can be no award for loss of profit or specific performance.
12. The claim for "*specific performance*" is predicated on the existence of the agreement evidenced by the letter of 04 November 2008 wherein the defendant agreed to pay to the claimants for the return of their exclusive quarry permits, 15% of the royalties paid to the Government (as opposed to the Government's share) based on the quantity of aggregates to be used on the Efate ring-road estimated at about 1,932,000 m³ with a royalty rate of VT500/m³ which simply computes as:

$$VT(1,932,000 \times 500 \times 15\%) = \underline{VT144,500,000}.$$

13. I accept however, the defence submission that the claimants cannot place strict reliance on the extraction figure in so far as it is an "*estimated*" figure subject to "*monthly adjustments*" based on the "*actual aggregate uplifted by the contractor*". Having said that, in my view, the onus of proving the actual quantity of aggregate uplifted by the contractor rests fairly and squarely on the defendant who had the means and the contractual right to obtain that information from the contractor.
14. In this latter regard the Minutes of a meeting on 29 July 2009 attended by the principals of the claimant companies and Johnson Wabaiat clearly records the view of Tony Tevi the then Commissioner of Mines to the following effect:

"Tony Tevi in his statement mentioned that he has just received the volume records of building materials used on the MCA ring-road project. He also stressed that the quantity of materials used is confidential information until such time that the quarry permits are expired/relinquished. He also mentioned that EDI Downer is to settle royalty payments by the month of September 2009. He also stated that subsequent to the royalty payments to the Vanuatu government, a good will payment will be made to (the claimants) as a token of appreciation for the transfer of quarry permits to EDI Downer".

Given such confidentiality and the date of the meeting one would have expected the defendant to have either disclosed the relevant figures of the actual volume of aggregate used on the Efate ring-road or sought to renegotiate the goodwill agreement on the basis of the actual figures. Unfortunately the figures were never provided or disclosed to the claimants as they should have been and this non-disclosure adversely affects the credibility of the defence witnesses and submissions on that important aspect.



15. In that regard too the email of Virelala to Toney Tevi of 17 August 2009 is telling wherein he writes inter alia:

"... Last time you were arguing that the amount of the uplift aggregates is confidential, we accept that but we need to know the amount to be paid to each of us. You cannot argue that this amount is confidential because it is an agreement between you and us. Since you have the figures from EDI works, you are able to calculate the respective share of the licence holders".

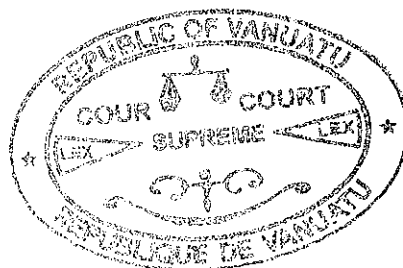
Still the figures were not disclosed.

16. Be that as it may, the disclosed photocopy sheet of the so-called actual aggregate extraction figures annexed as "JW3" to the sworn statement of Johnson Wabaiat gives no indication of its origin, source, or its authorship. By the defendant's own admission in it's counsel's letter of 3 December 2013 ("JW11") the possible authorship of the sheet is revealed to the effect that:

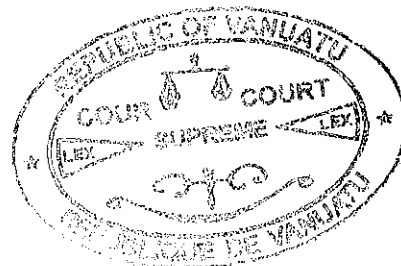
"... an independent company called Queensland Consulting Project Partners Pty Ltd. ... was tasked to determine how much quantity of aggregate was used for each quarry permit by Downer EDI Works Limited".

Unfortunately no sworn statement from a responsible and knowledgeable officer of the above-named company was provided by the defendant and the claimants were again seriously handicapped in their cross-examination on this crucial aspect of their claim.

17. The defendant having itself created that critical lacuna in the claimants' evidence, defence counsel highlights the onus on the claimant to plead and prove its claims and submits that the claimants *"... have failed to bring evidence that would justify any claim (for goodwill payments) envisaged by them"*.
18. I disagree with the submission which ignores the defendant's own duty to disclose to the claimant any and all evidence that it has in its control and possession that it relies upon in its defence. In the present case the actual extraction figures although known since July 2009 was neither pleaded by the defendant in its defence nor was the table of the actual extraction figures discretely disclosed in its mandatory list of documents or attached to the sworn statements of George Maniuri or Toney Tevi filed in 2010 and 2011 respectively.



19. In other words the actual extraction figures which were known to the defendant since July 2009 were treated as "*confidential*" and were withheld from the claimants until after the claim was filed and even after judgment was entered against the defendant on the basis of its letter of 4 November 2008, in September 2013.
20. In my view such covert ambush tactics are unacceptable and will not be countenanced or condoned by the court upholding defence counsel's submission. The quarry sites were identified and tested with the full cooperation and assistance of technical officers employed by the defendant and exclusive quarry permits were issued to the claimants on the basis that the sites were satisfactory and suitable to be used to extract the aggregate needed for the Efate ring road.
21. Furthermore the unsuitability of the claimants' quarry sites only became evident after the road had been built and at a time when the exclusive quarry permits had already been surrendered to the defendant. Whatsmore the unsuitability of the claimants' quarry sites was determined by Downer – EDI Works with which the defendant (not the claimant companies) had a contractual relationship and control.
22. Indeed, on the basis of the quarry sites identified in the so-called extraction sheet, no aggregate was actually extracted from 10 of the quarry sites over which the claimants held permits. On defence counsel's submission MQL and LEL would not be entitled to any goodwill payment whatsoever under the 4 November 2008 letter because none of their quarry sites were actually used to extract aggregate to build the Efate ring road. In counsel's words: "*even if not surrendered the permits were worthless in their hands*".
23. I cannot accept that submission either which is based on convenient hindsight. In my view the negotiations for the surrender of the claimant's quarry permits was premised on them being valuable and necessary to be recovered by the defendant at the time and that consideration was paramount in the agreed goodwill formula. The fact that subsequent events rendered most of the claimants' quarry sites unsuitable is a consequence that must be borne by the defendant who had retrieved the permits by that time and not the claimants as defence counsel appears to suggest.
24. If I may say so that was certainly not the attitude of the defendant when it offered the claimants VT15,000,000 to settle the goodwill payment as disclosed in Virelala's undated letter to Russel Nari, George Maniuri and Toney Tevi possibly in late 2008 or early 2009 and which defence counsel



describes: "... to a reasonable man, would have been an adequate amount of general damages for the claimants ..." in the absence of actual proof of damages.

25. Whatsmore a close reading of the letter of 4 November 2008 reveals no necessary relationship between the claimants surrendered quarry permits and the agreed goodwill formula which merely refers to actual extraction figures (unrelated to the claimants' quarry sites) and an agreed rate of VT500 per m³. Furthermore, the defendant's acknowledged purpose for retrieving the claimants' quarry permits was: "... to allow ... the contractor to have full access to existing sites and new quarry sites of their preference". That purpose was achieved by the surrender of the claimants' exclusive quarry permits irrespective of their suitability for the contractor's purposes.
26. Viewed in that light and based on the defendant's actual extraction figures the claimants are entitled to the following goodwill payment:

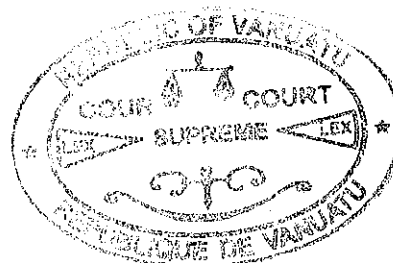
$$VT(260,810 \text{ m}^3 \times VT500 \text{ per m}^3 \times 15\%) = \underline{\underline{VT19,560,750}}$$

and I so order in the claimants' favour and to be shared in the following agreed percentages:

- 63.67% in favour of RDF (VT12,454,330);
- 16.73% in favour of MQL (VT3,272,513).
- 19.60% in favour of LEL (VT3,833,907);

(see: letter dated 3 November 2008 from Toara Kalorib the principal of LEL to Russel Nari confirming the above shares).

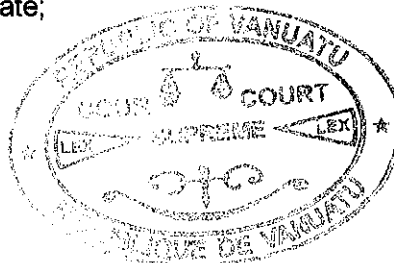
27. So much for the goodwill claims, next, I propose to set out various general principles of law dealing with the nature of claimable damages; the establishment and proof of the same; and the basis of calculation or assessment. I shall then deal in some detail with the evidence led in the case and finally, make an assessment, where possible, of the amount(s) to be awarded to the claimants.
28. The relevant legal principles may be summarized as follows:
- (a) It is for each claimant to establish its respective claim(s) on a balance of probabilities both as to the fact of damage sustained and also as to any quantum (see: Rule 4.10 of the Civil Procedure Rules);



- (b) This being a breach of contract claim damages to be awarded to the claimants should be such as to put them in the same situation as if the contract had been performed;
- (c) The fact that damages cannot be assessed with certainty does not relieve the defendant from paying damages or the court from doing the best it can, having regard to the character, nature and circumstances of the defendants' action(s) that caused the damage;
- (d) For a claim for damages to succeed, either (1) the loss must have been foreseeable to any reasonable person in the defendants' position or (2) if the parties were in possession of particular information indicating the likelihood of a given loss in the event of breach then the defendant would be liable for that loss; [see: Butterworth Common Law Series: **The Law of Damages** (2nd edn) edts. Tattendorn and Wilby para 6.07 at p. 155/156).
- (e) "... Losses directly incurred, as well as gains prevented, may furnish a legitimate basis for compensation of the injured party. And among such immediate losses expenditure fairly incurred in preparation for performance or in part performance of the agreement, where such expenditures are not otherwise reimbursed, form a proper subject for consideration where the party injured, while relying upon his contract, makes such expenditures in anticipation of the advantages that will come to him from completed performance ..." (per Brennan J. in The Commonwealth of Australia v. Amann Aviation Pty Limited [1991] 174 CLR 64 at 106).
- (f) "The role of the court in making an assessment of damages which depends upon its view as to what will be or what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certainty. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate ... and reflect those chances ... in the amount of damages it awards". (per Diplock LJ in Mallett v. McMonagle [1070] AC 166 at 176).

29. I turn next to consider the evidence. **Jean Paul Virelala** ("Virelala") who is the principal director and beneficial owner of RDF deposed that RDF was issued with five (5) quarry permits valid for the period 1 January 2008 to 31 December 2009 as follows:

- Permit No. VAQP28006 – granting an exclusive right to extract limestone from Kakoula area, Efate;
- Permit No. VAQP28007 – granting the exclusive right to extract limestone from La Cressionaire, Elluk, Efate;
- Permit No. VAQP27113 – the exclusive right to extract 20,000m³ of limestone from Fatkau, Lelepa landing Efate;



- Permit No. VAQP27114 – exclusive right to extract 20,000m³ limestone per annum from Savati, Paunagisu area, Efate;
- Permit No. VAQP27107 – granting the exclusive right to extract 20,000 m³ limestone aggregate per annum also from Fatkau, Lelepa landing, Efate;

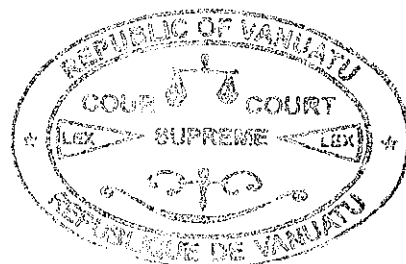
Each permit required RDF "(to) ... supply limestone aggregate for the Ring Road Project under this permit unless specified by the Commissioner of Mines" and each had a fee of VT50,000.

30. Virelala also deposed that he organized and attended a total of 34 consultation meetings with custom landowners, government officers and MCA – Vanuatu officials in Efate and Santo and had expended money on transport, food, rental vehicles and accommodation during the period of 2007 and 2008. He had also collected with the assistance of the Department of Geology officers, aggregate samples from various quarry sites which were sent for analysis in New Caledonia and New Zealand. He had also provided consultancy services for the claimant companies during protracted negotiations with government and MCA – Vanuatu officials leading up to the acquisition of the claimants' quarry permits and, thereafter, on the terms and conditions of their surrender to the government ("*preparation expenses*").
31. RDF's preparation expenses spread over 8 months in 2007/2008 are conveniently summarized in counsel's submission as follows:

"VT3,400,000 on 24 consultation VT510,000 on food to feed the community people, VT210,000 for land transport around Efate for 14 meetings held with the chiefs and custom landowners, VT374,160 for 12 return tickets to Santo for Tony Tevi, Brooks Rakau and Camilla (government officers) VT368,000 for hiring a 4x4 Hilux and VT258,000 for 42 night hotel accommodations".

From the above the total amount expended by RDF is VT5,120,160 which is significantly less than the VT40,000,000 claimed in the reliefs sought. MQL claims a sum of VT1,500,000 and LEL claims VT2,000,000 for its preparation expenses.

32. In cross-examination Virelala agreed that as a result of surrendering the quarry permits no fees was actually paid for them. He also accepted that he had no receipts to produce for the expenditures he claims were incurred in respect of the 34 consultation meetings on Efate and Santo. Indeed he frankly accepted that annexures "V6" to "V10" detailing the number, nature and expenses for the consultation meetings were all prepared by himself.



That does not mean that the meetings did not take place or that no expenses were outlaid.

33. I accept Virelala's evidence despite the absence of any detailed accounts and receipts to verify the exact amounts claimed or expended. His evidence is fully supported by the undisputed sworn statements of technical officials of the Department of Geology, Mines, and Water Resources. In particular Brooks Rakau the Minerals Coordinator in the Department who deposed:

"The claimants approached the office of the Commissioner of Mines to request assistance in identifying potential quarry sites around the islands of Efate and Santo.

We then assisted the claimants in identifying potential quarry sites.

After we had identified the quarry sites the claimants proceeded to negotiate with the landowners and came up with agreements. I signed some of those agreements as witness which enabled the quarry committee to enter the potential quarry site for the purpose of assessing the quarry sites.

The claimants lodged the quarry applications on several occasions beginning from 12 November 2007 to 26 November 2007.

I got the (Commissioner of Mines) approval and assisted Mr. Virelala in mapping the potential sites on Efate and Santo.

During the mapping samples were collected and tested pursuant to the meeting of 28 April 2008.

We assisted the claimants because they requested our assistance and offered to pay for our accommodation, food and airfares".

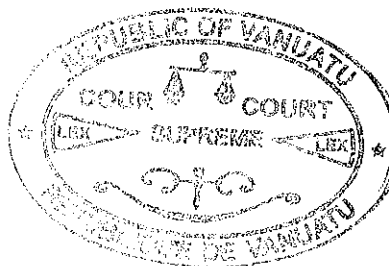
34. In similar vein Camillia Garae the Geologist in the Department deposed:

"The claimants approached the office of the Commissioner of Mines and requested assistance in collecting and sampling limestone and basalt for analysis. This is not unusual ... as the outcome of the analysis will provide relevant information as to whether there is sufficient material to be extracted.

The Department of Mines after receiving the claimant's application has to carry out preliminary Environment Impact Assessment (the "EIA") as normal procedures.

However when the office of the Commissioner receives the application there is insufficient fund to carry out the EIA ... and there was no budget for the additional work program as such.

Then the claimants in an attempt to fast track their application offered to pay for our accommodation, airfare and food to assist in the preparation of the EIAs".



35. The above is also orally confirmed by Toney Tevi the then Commissioner of Mines when in cross-examination he answered counsel's question:

Q: *Jean Paul Virelala paid for tickets, food etc to go to Santo and on Efate for preparatory work to be done?*

A: *That's correct but don't know how much."*

36. There is also annexed to Virelala's sworn statement, a map of eleven (11) identified quarry sites on Santo Island and a signed Memorandum of Agreement dated 30 March 2008 between 3 named individuals and Virelala forming the Santo Quarry Operators Association with the express purpose:

"... to bid for the supply of the road aggregates for the funded MCA Santo East Coastal Road Project and other materials ..."

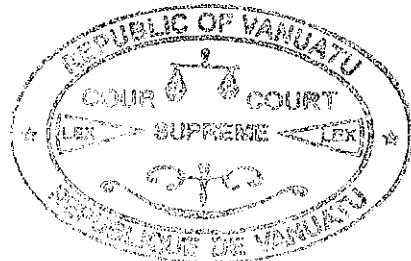
Despite the unfortunate absence of any primary documentary accounting evidence such as receipts, invoices, vehicle hire charges, air tickets and hotel bills, I am satisfied that some preparation costs and expenses were properly incurred and expended by RDF in its pursuit of 3 identified quarry sites on Santo Island as well as in establishing a business network with interested persons based in Santo.

37. Defence counsel opposes these claims as unparticularised and unquantified special damages. Furthermore the claimants have not *"produced receipts or invoices and or bills (at least) ... to prove that they actually expended money in undertaking the said activities"*. In the absence of such documentary evidence which would have existed for larger items of expenditure, I uphold the submission in part and allow 50% of RDF's claim in recognition of the amount of work Virelala did under this head. For MQL and LEL, I allow 25% of their respective claims.

38. The claimants are awarded the following sums for preparation expenses:

- RDF – $VT(5,120,160 \times 50\%) = VT2,560,080$
- MQL – $VT(1,500,000 \times 25\%) = VT375,000$
- LEL – $VT(2,000,000 \times 25\%) = VT500,000$

39. As for the consultation fees of VT18 million, Virelala deposed he was acting for the quarry operators and in support thereof he produced a copy of Business Licence dated 30 January 2007 issued in his name for the



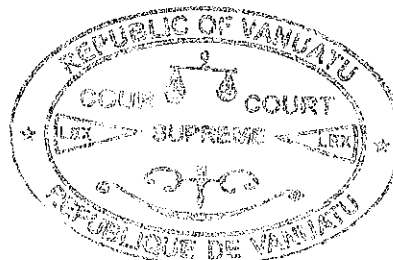
provision of business consultancy services. No invoice was produced for payment of the services rendered by Virelala over a period of 8 months in 2007/2008 and although the defendant would have also benefitted from Virelala's personal involvement in the extended negotiations and meetings with the claimants, the fact remains that he was principally acting on his own behalf as well as for the other claimants. This head of claim is disallowed. Virelala must look to the claimant companies for payment of his professional fees.

40. I turn next to consider the claimants' claim for bank loans and bank loan interest in respect of RDF and MQL from ANZ Bank and Westpac bank respectively. Virelala deposed that in anticipation of being contracted to supply aggregate for the Efate ring road he had purchased the following heavy machinery:

- (a) Caterpillar D8K Bulldozer costing VT9,481,150;
- (b) Caterpillar 950F Wheel loader costing VT9,264,995;
- (c) Komatsu PC200-6 Track Excavator costing VT7,875,000;
- (d) ERF EC10 12m³ Tipper Truck costing VT7,376,713;
- (e) Hyundai HD72 4m³ Tipper Truck costing VT4,000,000;
- (f) Toyota Landcruiser HZ79 Truck costing VT3,886,000;
- (g) Mitsubishi L200 Truck costing VT3,000,000;
- (h) Full set crushing plant costing VT15,024,978;
- (i) Full set screener plant costing VT4,279,644;
- (j) Gizzly for a cost of VT576,000.

41. Virelala was unable to produce any direct documentary evidence of any of the purchases other than unhelpful prints of black and white photographs he claimed were of the purchased machinery. He did provide however, copies of relevant registration of ownership cards in respect of the following vehicles:

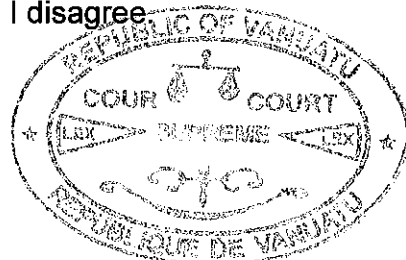
- (1) ERF tipper truck Registration No. 8390 in the name of RDF dated 24 December 2007;
- (2) Hyundai Dump truck Registration No. 7915 in the name of RDF dated 26 July 2007;
- (3) Toyota Landcruiser truck Registration No. 4126 in the name of Virelala Paul undated;
- (4) Mitsubishi L200 (4x4) truck Registration No. 7042 in the name of Jean Paul Virelala dated September 2007.



42. The singular documentary evidence tendered in support of the bank loan(s) Virelala claims he obtained to purchase the heavy machinery was an amended claim in **Civil Case No. 23 of 2009** filed by ANZ Bank against himself and RDF and an Enforcement Warrant (Non-Money Order) issued on 12 October 2010 in respect of the mortgagee sale orders in the same case.
43. In his evidence Virelala stated that he had mortgaged several real estate titles to secure a loan of VT50,000,000 from ANZ bank to purchase the heavy machinery and vehicles and the enforcement warrant was issued because he had defaulted on the mortgage repayment as a result of not receiving any of the goodwill payment(s) due from the defendant for the surrender of RDF's exclusive quarry permits.
44. I have perused the relevant amended claim which confirms that Virelala mortgaged 6 leasehold titles to ANZ to secure the following 3 loans:
- Loan (1) – dated 29 June 2004 for the sum of VT12,600,000;
 - Loan (2) – dated 30 June 2004 for the sum of VT12,000,000;
 - **Loan (3) – dated 18 July 2007 for the sum of VT50,000,000.**

As for loans (1) and (2), I agree with defence counsel that these loans are wholly unrelated to this case and preceded by several years, the grant of any of RDF's quarry permits.

45. Loan (3) however was granted in July 2007 to RDF for "... a fully drawn advance facility in respect of the company Ranch de la Falaise in the sum of VT50,000,000". This third loan was additionally secured by a third party mortgage given by RDF over its registered lease title No. 03/1103/004 and a third party mortgage given by Virelala over title No. 12/0641/001.
46. Although details of Loan (3) are sparse Toney Tevi confirms that quarry permit applications were received from the claimants in 2007 and 2008 and were paid for by Virelala's personal cheque. It was receipted on 13 April 2007. The five (5) quarry permits for RDF were issued between mid-November 2007 and mid-January 2008.
47. Defence counsel in opposing the claim for the loans and loan interest argued in supplementary submissions, that the loans obtained by the claimants for the purchase of heavy machinery and vehicles were not foreseeable and too remote to render the defendant liable for damages that may arise through any default on those loans. I disagree.



48. In a meeting as early as 27 April 2008 attended by Lennox Vuti the then MCA – Director, the principals of the three claimant companies and the Commissioner of Mines, and well before the decision to retrieve the claimants' exclusive quarry permits was taken, Virelala on behalf of the claimants is recorded as saying during his presentation at the meeting:

"... each operator will purchase from overseas 1 – excavator, 1 – loader and 1 – dozer each. The three permit holders have planned to purchase 1 – crushing plant and screen which will be shared by the three permit holders. In total 3 – excavators, 3 – dozers, three loaders and a crushing plant and screen will be purchased to produce aggregates from the twelve (12) permitted quarry sites around Efate".

49. The Minutes also record that Mr. Vuti "... requested the operators to provide a list of their equipments currently in the country. He also requested the permit holders to sample their sites for geotechnical testing".

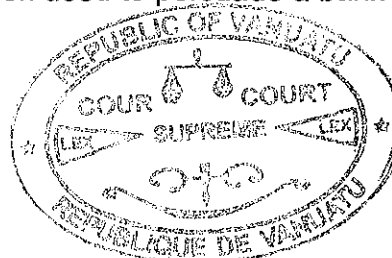
50. Furthermore Toney Tevi relevantly deposes in his sworn statement that:

"prior to the issuance of the quarry permits I met with Jean Paul Virelala, a representative of the claimants and informed him that the claimants did not have the machinery likely to be required for the quarry operations supplying the ring road project".

51. Although no list of equipment was actually provided by the claimants as requested, there is no doubt in my mind that there was a firm expectation that the claimant companies would acquire the necessary machinery in order to successfully extract, process, and transport aggregate from their respective quarry sites on Efate.

52. Such a clear expectation renders it entirely foreseeable in my view, that the claimant companies would either use their own funds to purchase the heavy machinery and vehicles or, (the more likely alternative) secure loans from commercial banks in order to do so. Furthermore although I accept that the repayment of the loan is the primary responsibility of the borrower, if default is caused in part by the defendant failing to pay a debt it owed to the claimant then the defendant is liable for any resultant loss or penalty.

53. Viewed in the above light, Toney Tevi's "**To Whom It May Concern**" letter of 23 April 2008 confirming the exclusivity of the claimant companies quarry permits to the MCA project (Efate Ring Road) and the projected quantity of aggregate to be used on the Efate ring road project speaks volumes of the value of the permits and could well have been used to persuade a banker to lend money to the claimants.



54. I am fortified by the judgment of the Court of Appeal in Vanuatu Copra and Cocoa Exporters (VCCE) v. Vanuatu Coconut Product Ltd. (VCPL) [2011] VUCA 20 where the Court discussed remoteness of damage in the following terms:

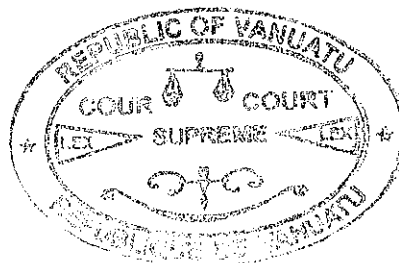
"[13] The basic rule governing the law of remoteness of damage in contract was stated by Alderson B in Hadley v. Baxendale [1854] EWHC J70; [1854] 156 ER 145 at 151: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie, according to the usual course of things, from such breach of contract itself, OR such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

[14] The word "OR" has been emphasized to indicate that there are two branches or limbs to the rule in Hadley v. Baxendale. Under the first limb damages awarded are broadly described as "general" damages, and those awarded under the second limb as "special" damages. The general damages are those which the law presumes to follow "naturally" from the breach, whereas special damages are of an exceptional nature and are only recoverable where the defendant had prior knowledge of a likelihood that the loss would be suffered.

[15] The development of the rule in Hadley v. Baxendale, and a modern statement of the rule may be found in Chitty on Contracts, 29th edition, vol 1 at paragraph 26-044 and following. losses of a kind that are unlikely to be considered as arising naturally or in the ordinary cause of things from a failure to pay a liquidated debt, will not be recoverable unless at the time when the contract was made the defendants were made fully aware that the claimant intended to outlay (monies) in the particular ways now alleged by the Appellant. (cf. Virelala's statement at paragraph 48 above)

[16] In Dods v. Copper Creek Vineyards Ltd [1987] 1 NZLR 530 the plaintiff was held entitled to recover under the second limb of Hadley v. Baxendale special damages equal to the interest incurred as a result of late payment of a debt. The Court was satisfied by the evidence in that case that it would have been in the contemplation of both parties, at the time the contract was made, that such a loss would be the probable result of the failure to pay the debt ..."

55. It should be remembered that the Millennium Challenge Award was awarded to Vanuatu in early 2006 and the contract to design and build the Efate ring road was eventually signed with Downer – EDI Works in May 2008. There were therefore 2 years of preparation time to finalize the terms of the project, identify potential local entrepreneurs and quarry sites for the purpose of sourcing aggregate materials for use on the Efate ring-road and conclude the tender process.

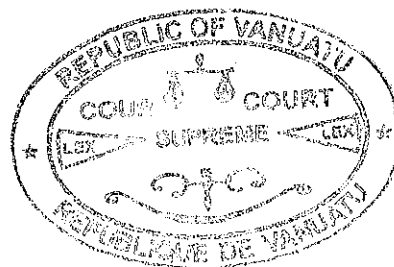


56. In my view given the historical context and lengthy preparation time-frame and the close proximity of the ANZ loan application and the grant of RDF's quarry permits, I am satisfied and accept Virelala's evidence that Loan (3) was obtained for the purpose of purchasing reconditioned heavy machinery and vehicles for use on RDF's quarry sites. Having said that, in my view, RDF is not entitled to recover the costs of the machines and vehicles which belong to RDF and Virelala and could have been used to generate income or be sold to recoup the loan. RDF is entitled however, to recover the interest component of the loan as charged in the usual course of commercial loans.
57. The calculation of the interest figure which RDF is entitled to receive should have been an easy matter of referring to the terms of the agreement for Loan (3) but, unfortunately, the loan agreement with ANZ was not produced as it could easily have been, nor is there any evidence to support or substantiate RDF's bare claim for "*loan interest at VT50,227,228*" in the reliefs sought in the substantive claim. This evidence was Virelala's plain duty to provide and he did not. Accordingly the interest rate and repayment terms that the court adopts is: 13.5% per annum for a period of 2 years which translates into a sum of:

$$VT(50,000,000 \times 13.5\% \times 2) = \underline{VT13,500,000}.$$

58. The claim by MQL is similar to RDF's but simpler and more straight forward in terms of evidence. In summary, MQL claims loss of profits; preparation expenses; goodwill payment; a loan and loan interest; I have dealt with preparation expenses, loss of profit and the goodwill payment under RDF's claim and need only deal with the evidence in support of MQL's claim for loan and loan interest which comes from its principal **Joe Lauto**.
59. He deposed that over a period of 8 months in 2007/2008 he incurred expenses of VT1,500,000 for negotiating, locating, analyzing and testing quarry sites around Efate and as a result of which MQL was successful in obtaining three (3) exclusive quarry permits as follows:

- Permit VAQP 28009 – dated 21 January 2008 for limestone extraction at Eru, Pangang;
- Permit VAQP 28005 – dated 21 January 2008 for limestone extraction at Kilkas, Pangang;
- Permit VAQP 28004 – dated 21 January 2008 for a site at Ulei, Efate.



60. Joe Lauto also deposed that on the basis of the quarry permits he obtained loans from Westpac Bank to purchase heavy machinery and a house as disclosed in tendered written loan agreements as follows:

- Loan (1) – dated 13 May 2008 in the sum of VT4,240,000 to purchase a “*New Tip Truck*”. The interest rate was “*14.75% per annum*” for a term of 3 years;
- Loan (2) – dated 4 June 2008 in the sum of VT16,629,000 “*to purchase a residential property at Malapoa area*”;
- Loan (3) – dated 1 September 2008 in the sum of VT15,000,000 to purchase a “*New Caterpillar and Excavator for the Quarry business*”;
- Loan (4) – dated 5 May 2009 in the sum of VT7,300,000 “*to assist with the purchase of a used Mobile Power Plant for the Quarry business*” and a Screener.

Helpful colour photos of the machinery was also annexed to the sworn statement and clearly shows that the tip truck, caterpillar and excavator were all brand new.

61. I immediately reject the claim based on Loan (2) for the purchase of the Malapoa residential property which I consider would not be within the contemplation of the parties during the relevant time and is too remote in its relationship to MQL's exclusive quarry permits and the goodwill payment for their surrender. Likewise I reject the claims to recoup the principal sums borrowed to purchase the machinery.

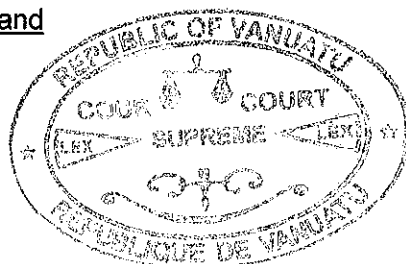
62. However I am satisfied that MQL is entitled to recover the full interest charges paid for loans (1), (3) and (4) at the rate of 14.75% for 3 years. This translates into a sum of:

$$VT(27,140,000 \times 14.75\% \times 3) = \underline{VT12,009,450.}$$

63. Lastly I turn to the claim by LEL as deposed in the evidence of its principal **Toara Kalorib**. His evidence concerning the loans taken from Credit Corporation to purchase a new Hyundai truck, a Bulldozer D6C Caterpillar and a Hyundai Tipper is also clear and I accept it.

64. In particular he deposed to purchasing:

- A new Hyundai HD72 Flat Tray for VT3,690,000;
- A Bulldozer D6C Caterpillar for VT2,500,000; and
- A Hyundai Tipper truck for VT4,100,000



for use on the 4 exclusive quarry permits that were granted to MQL.

65. Besides dull black and white photos of the machines, loan detail statements of the 3 loans were annexed as follows:

- Loan 101378 – opened 2 October 2008 for “*One only new Hyundai HD72 Flat Tray Reg # 9749*” for the sum of VT3,690,000 with a penalty interest rate of 25% for unpaid repayments;
- Loan 105775 – opened 31 May 2010 for “*1 x Bulldozer D6C Caterpillar*” in the sum of VT2,560,000; and
- Loan 107268 – opened 21 December 2010 for “*1 x only Hyundai Tipper Reg # 12017*” in the sum of VT4,100,000.

All 3 loans have been paid off including some penalty interest and Toara Kalorib frankly admitted that long before the acquisition of the quarry permits MQL was incorporated in 2005 and was operating as a timber/logging entity. He frankly accepted in cross-examination that the purchased machines were being used in his logging business and would have been available for quarry works in the event the permits were not surrendered.

66. LEL’s loan statements reveals the following pre-charged opening interest figures:

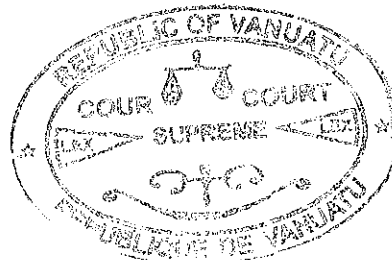
- On loan 101378 – VT409,666
- On loan 105775 – VT571,200
- On loan 107268 – VT1,142,400 and a further sum of VT936,330 for penalty interest.

There is also mention in counsel’s submissions of a figure of VT2,475,735 as the total loans interest paid by LEL in discharging all of its loans.

67. I am satisfied that LEL is entitled to attribute a proportion of the loan interest paid for the loans, to the acquisition and surrender of its 4 exclusive quarry permits which I fix at 50%. Accordingly under this head LEL is awarded:

$$VT(2,475,735 \times 50\%) = \underline{VT1,237,868}.$$

68. In conclusion, all claims for loss of profits, the amount of the loans, and consultancy fees by RDF are dismissed. All other claims for goodwill



payment, bank loan interests and preparation expenses are allowed as follows:

- **RDF**

Preparation expenses	–	VT2,560,080
Goodwill payment	–	VT12,454,330
Bank loan interest	–	<u>VT13,500,000</u>
TOTAL	–	<u>VT28,514,410</u>

- **MQL**

Preparation expenses	–	VT375,000
Goodwill payment	–	VT3,833,907
Bank loan interest	–	<u>VT12,009,450</u>
TOTAL	–	<u>VT16,218,357</u>


- **LEL**

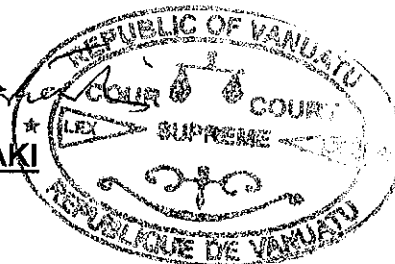
Preparation expenses	–	VT500,000
Goodwill payment	–	VT3,272,513
Bank loan interest	–	<u>VT1,237,868</u>
TOTAL	–	<u>VT5,010,381</u>

Interest of 5% per annum is awarded in respect of all the above total sums with effect from the filing of the substantive claim on 26 April 2010 together with costs to be taxed by the Master if not agreed.

DATED at Port Vila, this 21st day of March, 2016.

BY THE COURT


D. V. FATIAKI
Judge.



The seal is circular with the text 'REPUBLIC OF VANUATU' at the top and 'REPUBLIQUE DE VANUATU' at the bottom. In the center, it says 'COUR SUPREME' and 'COUR SUPREME' with a scale of justice above it. There is a small star on the left side of the seal.