

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

Civil Case No. 20 of 2011

BETWEEN: EDENHOPE LIMITED

Claimant

AND: VENEER LOGGING LIMITED

Defendant

Coram: Mr Justice Oliver A. Saksak

Counsel: Marie Noelle Ferrieux Patterson and Robert Sugden for the Claimant
John Malcolm for the Defendant

Date of Trial Hearing: 1 – 2 December 2015

Date of Submissions Hearing: 26 February 2016

Date of Judgment: 6 May 2016

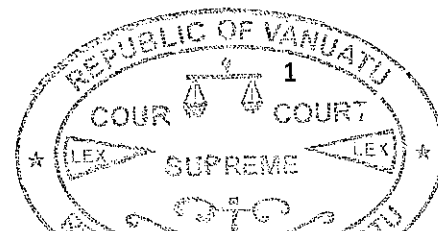
JUDGMENT

Introduction

1. This case was filed by the Claimant pursuant to paragraph 14 of the judgment of the Court of Appeal in the Case of Edenhope Ltd v. Santako Ltd and Veneer Logging Ltd [2011] VUCA 5: Civil Appeal Case 03 of 2011 (8 April 2011).

The Court of Appeal said this:

“The other issue discussed in contentions on the appeal is what Edenhope is entitled to in relation to the 91 cubic metres of timber still held by Veneer. As is apparent from the amended statement of claim, Edenhope did not formally raise that matter. The trial judge in his reasons at [21] understandably, referred the matter only in general terms. This is an issue which will have to be resolved either by agreement or by separate proceedings. During the hearing of this appeal, Counsel for Veneer



acknowledged that the timber could be collected by Edenhope provided it paid accrued storage costs; apparent since the contract to make the prefabricated kits was brought to an end in August 2009. Whether by agreement or by litigation, Edenhope and Veneer will therefore have to address whether, in the circumstances, Veneer is entitled to charge storage for that timber and, if so, over what period those storage charges may be recovered and what is the proper amount for those storage charges.”

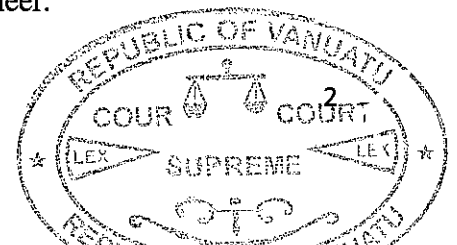
2. The Parties have endeavored to resolve those outstanding issues by agreement since the Court of Appeal decision but have failed to reach any consensus. Edenhope therefore filed its amended claim on 9 March 2015 through Hudson & Co claiming –
 - a) damages for breach of bailee’s duties;
 - b) damages for conversion; and
 - c) costs.

3. The defendant on the other hand filed an amended defence and counter-claims and set-off on 16 April 2015 and a further amended defence and counter-claims and set-off on 9 July 2015. They counter claim for:
 - a) Damages and losses of VT8,586,926;
 - b) Damages at VT10,000 per day for storage costs from 15 June 2011 up until date of judgment;
 - c) Interests at 5% per annum on the damages;
 - d) Costs; and
 - e) Such other orders as the Court deems just.

In the alternate, Veneer claims a quantum meruit for work done in construction of prefabricated kits.

Chronology of Events

4. It is necessary to understand the chronology of events leading up to and giving rise to these various or consequential claims by both Edenhope and Veneer as follows:-
 - a) October 2008 – Santako delivered 91 cubic metres to Veneer.



- b) October 2008 – August 2009 – Veneer cut and constructed prefabricated kits from timber delivered pursuant to agreement with Edenhope.
- c) August 2009 – The agreement between Edenhope and Veneer was cancelled for alleged failure to deliver prefabricated kits.
- d) August 2009 – July 2011 – Uncut timber and components of pre-fabricated kits already constructed (and not delivered) were continued to be stored at Veneer's yard.
- e) July 2011 – Edenhope uplifted the uncut timber plus other timber but not the components of pre-fabricated kits.

There appears to be little or no dispute as to these chronological facts.

Issues

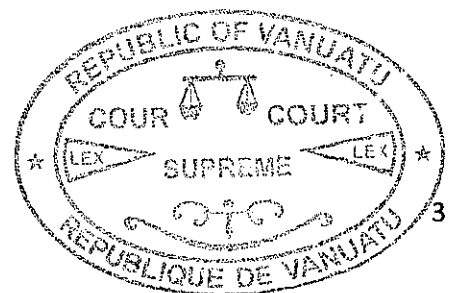
5. The issues appear to be –

a) From the Claimant's perspective

- (i) Whether or not the defendant can bring a cross-claim for a quantum meruit and for storage charges?
- (ii) Whether or not the defendant is liable to pay damages for alleged breach of bailee's duties?
- (iii) Whether or not the defendant is liable to pay damages for alleged conversion?; and
- (iv) Whether or not the defendant is liable to pay costs?

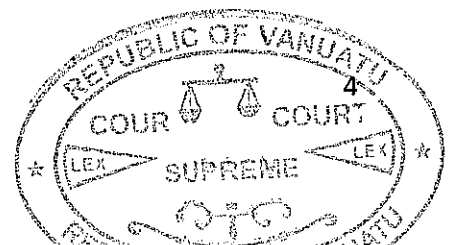
b) From the defendant's perspective –

- (i) Whether or not Veneer had performed work on the Claimant's timber to entitle them to a quantum meruit claim?
- (ii) Whether or not Veneer stored the Claimant's timber after August 2009 to 2011 to entitle them to storage charges?
- (iii) If so, by how much?

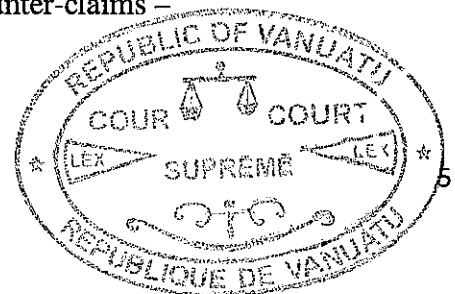


Discussions

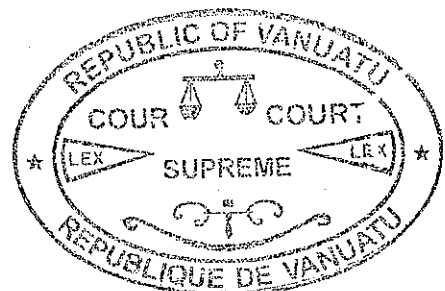
6. On the first issue by the Claimant, Counsel argued that the defendant was estopped from bringing a counter-claim or a separate claim against the Claimant as the Court of Appeal had ultimately decided that issue in 2011.
 - 6.1. The short answer to this argument is that it is untenable and is hereby rejected and dismissed. The Court of Appeal could not be any clearer in its decision in paragraph 14. If the Claimant's argument were valid (which is not) it should also be open to the defendant to raise a counter-argument (although they have not) that the Claimant is equally estopped from further raising those issues when they could have done so in their original claim and did not.
 - 6.2. This is a long standing dispute which cries out for finality. There is therefore no room for such arguments to be raised as to allow it would be to create an obstacle to finality of the case or dispute. The Claimant's claims fail on this first point.
7. The second issue for the Claimant is whether or not the defendant is liable to pay damages for alleged breach of a bailee's duties?
 - 7.1. Before the issue can be answered, a further question that arises is whether the Claimant has shown by evidence that Veneer had breached its duties as bailee of their timber?
 - 7.2. The defendant accepts it had bailment over the claimant's timber. Veneer also accepts that Santako had delivered 91 cubic metres of natora timber belonging to the claimant in 2008. Veneer accepts also that it used 10.93 cubic metres of that timber to construct completed doors, louvres and window frames which have not been uplifted by the claimant and they remain on Veneer's property to date. Lisa Schick's evidence by sworn statement filed on 19 November 2013 is unchallenged and it confirms this position. Veneer however argued that the balance of the timber was uplifted by the claimant on 26 April 2011. In addition the claimant uplifted other timber which were not theirs and has used them up.



- 7.3. The Claimant relied on the evidence of Stephen Neil Croucher and of Stephen Quinto. However Neil Croucher's evidence does not show any breach by the defendant and likewise Stephen Quinto's evidence. The contrary is shown that the claimant's timber was returned.
8. The next issue is how much timber was returned? Mr Quinto's evidence does not assist and neither does Mr Croucher's, as neither of them took care and time to measure the timber that were uplifted, including other timber they took that were not theirs. It was their responsibility to do that but they failed or omitted to do so. They cannot therefore shift the blame onto the defendant. For the defendants they received 91 cubic metres which they stored on behalf of the claimant because he lacked space to store them. Then it is in their pleadings which is accepted, that they used 9.93 cubic metres (10 m³ rounded up) of those timber to construct doors, louvres and window frames, and cut 16.44 m³ for Bungalows. All that totals up to 26.37 cubic metres. The defendant accepts that this is the only timber they still hold in their container(s) on their premises to date.
9. In all probability therefore the claimant uplifted the balance of their timber for 74.63 cubic metres on 26 April 2011. The claimant has not shown any loss of any of their timber by the defendant. Therefore their claims for damages for (a) breach of bailee's duties and b) for conversion fails in their entirety and I so rule.
10. It follows logically from this that the claimant's claims fail and are hereby dismissed.
11. The claimants have been paid VT12 Million by the defendant pursuant to the Court of Appeal Judgment. They have removed 74.63 of their remaining timber on 26 April 2011. The only balance currently held by the defendant is 10 cubic metres of pre-fabricated kits and 16.44 of special cut timber. Adding all these up. We get a total of 91 cubic metres. This is not a mystery. It is all there in the pleadings and evidence.
12. Now for the issues raised by the defendant on their counter-claims –



- a) Whether or not Veneer had performed work on the claimant's timber to entitle them to a quantum meruit? The answer to this issue is "Yes". Lisa Schick's evidence was not challenged. It shows photographs of the claimant's timber stored in the defendant's yards and the pre-fabricated kits constructed at the request of the claimant according to the plans as annexed. There is little or no room for the claimant to deny or rebut those evidence.
- b) As to the issue of whether or not Veneer stored the claimant's timber (uncut) together with pre-fabricated kits and special cut timber from August 2009 until 26 April 2011? From the evidence of Lisa Schick which is unchallenged, it is abundantly clear that Veneer continued to store the claimant's timber, uncut, cut and pre-fabricated on its premises despite clear demands that they uplift them and with clear notice that a storage charge of VT5,000 per day would be levied in the event of failure. This issue is also answered in the affirmative.
13. The law on quantum meruit in Vanuatu is not in doubt. The cases of Robert M. Bohn as Western Pacific Marine v. Vanuatu Maritime Authority [2003] VUSC 137 CC 115 of 2000 and Bill Cham & Tania Cham v. Kramer Vanuatu Ltd CAC 06 of 2015 (May 2015) lend strong support to the Court to award quantum meruit in favour of the defendant.
14. The claimant now contends that the work done by Veneer to construct pre-fabricated kits and special cut Bungalow Timber is of no use to them. That is not sufficient excuse. That work was performed by the defendant under their agreement and the defendant is entitled to be paid for it. The only other issue is how much?
15. In it's without prejudice offers to the claimant, the defendant offered the sum of VT4.000.000. The claimant declined the offer. The defendant has clearly pleaded in its amended defence and counter-claim the actual costs for the works done by them as follows:-



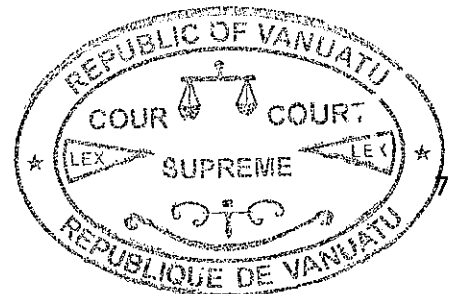
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| (a) For pre-fabricated kits: Doors, Louvres and window frames – | VT4,010,000 |
| (b) For special cut bungalow timber – | <u>VT3,452,925</u> |
| (c) Total - | <u>VT7,462,925</u> |

16. The claimant has not rebutted those claims but the defendant is not claiming judgment for that actual cost. They are claimant on a quantum meruit. Therefore in the opinion of the Court the amount to be awarded on a quantum meruit is **VT5,000,000**.

17. As for storage charges the defendant is entitled to them. These are transactions between business enterprises. Therefore the claimant could not expect that his timber could be stored by the defendant at no charge after August 2009. But to accept the charge of VT5,000 or VT10,000 per day is in my view a little on the high side. To assist these parties and their long standing dispute, the Court prefers to accept the claimant's rate of VT30,000 per month from August 2009 to July 2011. This is decreased to VT15,000 per month from August 2011 to April 2016 because the quantity of timber currently stored is substantially reduced.

18. At the above rate I calculate the amounts to be as follows:-

- | | | |
|--------|---|---------------------|
| (i) | 2009 – August to December – 5 months x VT30,000 = | 150,000VT |
| (ii) | 2010 – January to December – 12 months x VT30,000 = | 360,000VT |
| (iii) | 2011 – January to July – 7 months x VT30,000 = | 210,000VT |
| (iv) | 2011 – August to December – 5 months x VT15,000 = | 75,000VT |
| (v) | 2012 – January to December – 12 months x VT15,000 = | 180,000VT |
| (vi) | 2013 – January to December – 12 months x VT15,000 = | 180,000VT |
| (vii) | 2014 – January to December – 12 months x VT15,000 = | 180,000VT |
| (viii) | 2015 – January to December – 12 months x VT15,000 = | 180,000VT |
| (ix) | 2016 – January to April – 4 months x VT15,000 = | 60,000VT |
| | Total = | VT1,365,000. |



The Result

19. The defendant succeeds on his counter-claims against the claimant. And judgment is entered in the defendant's favour for the following sums –

a) Quantum meruit – VT5,000,000

b) Storage charges – VT1,365,000

Total - VT6,365,000

c) Interests at 5% per annum on VT5,000,000 from August 2011 to date of Judgment.

d) Costs on the standard basis as agreed or be taxed by the Master.

20. The Court hereby Orders the claimant to remove, within 7 days from the date hereof –

(a) All the pre-fabricated kits (Doors, louvres and window frames)

(b) All special cut bungalow timbers, from the defendant's property at his own costs and expenses.

(c) The claimant shall pay the defendant the sum of VT6,365,000 plus interests at 5% per annum within 14 days from the date hereof.

(d) The defendant shall submit its Bill of Costs to the claimant within 21 days from the date hereof.

DATED at Port Vila this 6th day of May 2016.

BY THE COURT


OLIVER A. SAKSAK

Judge

