

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

Civil

Case No. 17/156 SC/CIVIL

BETWEEN: International Green Structures LLC
Claimant

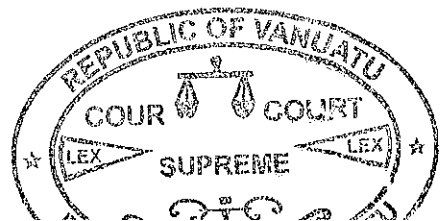
AND: National Housing Corporation
First Defendant
Republic of Vanuatu
Second Defendant
John Terry
Third Defendant

Date: 23 December 2019
Before: Justice G.A. Andrée Wiltens
In Attendance: Mr N. Morrison for the Claimant
Mr L. Huri for the First and Second Defendants
Ms S. Mahuk and Mr J. Malcolm for the Third Defendant
Date of Judgment: 21 January 2020

JUDGMENT

A. Introduction

1. This was a straight-forward case alleging loss arising from a breach of contract. The First and Second Defendants' defence was run on the basis that the contract was entered into by the Third Defendant, as the former General Manager of the National Housing Corporation ("NHC") without formal authority or approval. On that basis legal liability to the Claimant was disputed.
2. At the conclusion of the evidence and submissions by all counsel, I gave an oral "decision-only" judgment, without reasons.



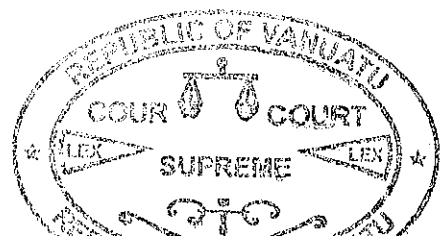
3. I made the following orders:

- Judgment is entered in favour of International Green Structures LLC as against the Second Defendant in the sum of US \$3,944,341.59;
- Interest is payable on that amount at 2% p.a. from 30 June 2016 (the date of the first formal demand) until 19 November 2019;
- Interest on the principal sum and the interest awarded is payable at the usual Court rate of 5% p.a. from 19 November 2019 until the amounts awarded have been in full;
- The Claimant and the Third Defendant are each entitled to indemnity costs as against the Second Defendant. The position adopted by the State as against the Claimant was indefensible. The involvement of the Third Defendant in this litigation as a scapegoat for the State's extremely poor behaviour was simply unconscionable. Counsel are invited to send their bills of costs to Mr Huri, and if they are not agreed within 14 days of submission, they are to be taxed. Once settled, the costs are to be paid within 21 days.

4. I indicated to counsel that reasons would be given, if required, upon written request for the same. What follows are the reasons for the decisions as to judgment for the Claimant and indemnity costs.

B. Case Background

5. In 2013, following earlier discussions dating back to mid-2012, an agreement was entered into between International Green Structures LLC ("IGS") and the National Housing Corporation ("NHC"), regarding the provision of 2,000 low cost and secure houses between 20 July 2015 and 30 June 2016. Two model houses were to be constructed by 28 February 2015, to ensure all parties were content with the agreement entered into. Then, a first "sample" batch of 100 such houses was to be completed. The houses contemplated were largely pre-fabricated overseas prior to being imported into Vanuatu. Construction on site was to be completed by a local building company, GRD Corporation (Vanuatu) Limited ("GRD").
6. In November 2014, a formal written contract was entered into between IGS, NHC and GRD. Earlier similar agreements involving other parties had not gone ahead for various reasons.
7. It was a term of the contract, set out in clause 34, that NHC was to open an irrevocable letter of credit ("L/C") facility with the ANZ Bank in Vanuatu for the benefit of IGS. IGS required to be able to draw-down funds as and when it needed. The date by which the opening of the L/C facility was to be opened, according to the contract, was one calendar month from 2 June 2015.
8. NHC did not open such a facility, as a result of which NHC was said to have breached the contract as of 3 July 2015. Nor has NHC opened such a facility at any time since.



9. IGS made formal demand of NHC on 28 October 2016 to reclaim all funds expended by it in complying with the terms of the contract. That demand has not been met with anything but delays and denials.
10. By interlocutory application, at the instigation of NHC and the State, Mr John Terry was joined to the action as the Third Defendant, without opposition by the Claimant.

C. The Issue

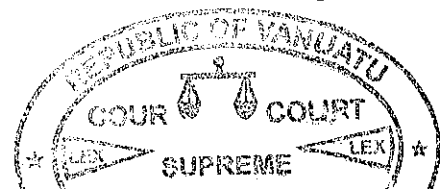
11. IGS presented in evidence a very large folder of material evidencing its expenditure in attending to comply with the contract entered into in November 2014. There was a helpful introductory summary setting out the amount claimed, with the various invoices confirming the expenditure following.
12. There was no challenge to the quantum sought.
13. Accordingly, the only factual issues to be determined were whether or not (i) Mr Terry had entered into the contract, (ii) with or without authority, and (iii) for his own benefit. There was also the submission made by Mr Huri that IGS was able to only seek recompense from NHC, not the State.

D. The Evidence

14. Mr Britt provided two sworn statements and was cross-examined. He explained how IGS had become involved in this proposal due to another company being made bankrupt. Thereafter IGS, and GRD, set about arranging for the housing NHC was looking for. He appended a copy of the written contract.
15. IGS dealt not only with Mr Terry, but also with the chair of the NHC Board Mr John Salong and other Vanuatu Government personnel – in particular Mr Ralph Regenvanu, the then newly appointed Minister for Lands.
16. Mr Britt advised that he had gone to the ANZ with Mr Terry in order to discuss the establishment of the L/C facility needed to finance the transaction. Mr Salong was not only present, but according to Mr Britt, he led the discussions from NHC's side. This evidence was not challenged by Mr Huri, nor contradicted by Mr Salong. Accordingly, I accepted it as correct.
17. Mr Britt told me that no L/C facility was ever established in favour of IGS. The inevitable outcome was that the contract failed, and Mr Britt attributed that solely to NHC and the Vanuatu Government. Mr Britt appended a number of items of correspondence to his sworn statements which confirmed the need for the L/C facility and set out several explanations as to the delay in attending to that.
18. The second sworn statement followed the amended defence filed by Mr Huri, with the counter allegations against Mr Terry articulated. The appendices to this statement were designed to show that IGS did not deal solely with Mr Terry, and further that the Vanuatu Government was fully aware and supportive of the arrangements entered into to provide the 2,000 houses for the benefit of the people of Vanuatu.



19. In particular I noted a news article in the Vanuatu Post of 14 May 2015 which reported on the completion of the sample houses. There was reference in the item to the launching of the project involving "the Government, Chief of Ifira Mantoï Kalsakau III and Mr Barack Sope". Another story in the Vanuatu Post the next day dealt with the proposed further 300 houses to be constructed on Ifira Island and quoted Mr Regenvanu as the Minister for Lands and National Housing Corporation, who spoke at the custom ceremony put on by Chief Kalsakau for "the Government".
20. Mr Britt appended a third news item from the Vanuatu Post dated 4 July 2015, which referred to the NHC Memorandum of Agreement with the Ifira community to build 300 houses on Ifira Island. It also spoke of longer term plans to construct the same housing on Tanna, Malekula and Espiritu Santo.
21. Mr Salong was the only witness for the First and Second Defendants. He confirmed he was Chair of NHC's Board between 21 July 2013 and July 2015. He was later reappointed to that position on 7 March 2016, and remained so appointed at the date of trial. He set out the history of this particular housing plan, which initially did not involve IGS. He advised that Mr Terry was the NHC General Manager dealing with the project on behalf of NHC – as approved by the Board in respect of the original contract not involving IGS. The subsequent agreements entered into, Mr Salong insisted, were without the Board's sanction, or the Government's approval, and was contrary to the provisions of the Government Contracts and Tenders Act.
22. Mr Salong was critical of the fact that two model houses were constructed on Mr Terry's land at Freshwota, even though his Board was fully aware of that and had sanctioned the construction at Mr Terry's personal cost. He implied, rather surprisingly and without supporting evidence, that there was corruption involved. When he was challenged with documentary evidence which differed from his account (such as the 16 December 2014 NHC Board Minutes which refer to the model homes) he dismissed the documents as being merely "a paper trail" created by Mr Terry to deceive.
23. Mr Salong appended a number of documents to his sworn statement which largely related to the previous contracts, and which were, quite frankly, unhelpful.
24. The document Mr Salong provided of most relevance was a letter to Minister Regenvanu of 20 May 2015 recording that the NHC request for import duty and VAT exemption for importing the 4 model houses "and also for import of actual houses, housing materials, equipment and furnishings for the NHC housing project" was the subject of Decision 16/2015 by the Council of Ministers ("COM"). The application was approved, and the letter signed by the COM's secretary advising the same was copied to the President, the House Speaker, the Prime Minister, the Deputy Prime Minister and all the other Government Ministers, as well as to others. In light of that, I struggled to understand how could it seriously be maintained that Mr Terry was on a frolic of his own?
25. Mr Salong also provided a telling response when it was suggested that the Government was considerably involved in the project prior to July 2015. He agreed.
26. Mr Terry also gave evidence. He was NHC's General Manager between 3 December 2010 and 15 December 2015. He stated that with the Board's consent and full knowledge he

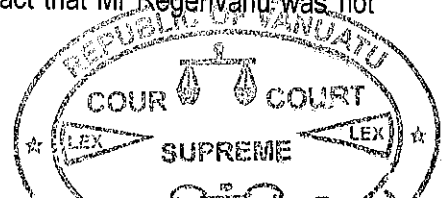


signed the first contract, which was with a party other than IGS. He signed the contract with IGS subsequent to one of the original parties having been made bankrupt. When he signed this second contract, he did so with the full knowledge and approval of the NHC Board. He maintained that the Board's minutes of meetings on 16 and 22 December 2014 evidenced that.

27. Mr Terry confirmed his and Minister Regenvanu's attendance at the project launch in November 2014, as well as the when the sample houses on Ifira had been completed. He maintained that the Vanuatu Government was fully aware of the contract and endorsed it.

E. Discussion

28. The credibility and accuracy of witnesses' evidence is not to be assessed solely by how the witness appears in Court. The clues that might be relied on to gauge such matters are not obvious simply based on appearance or conduct. Of course those aspects of observation are a part of the process of evaluation, but only a small part. What is far more significant is to look for consistency. I looked for consistency within a witness' account, and also when comparing that account with the accounts of other witnesses and when comparing the accounts with documentary exhibits. On that basis I formed certain views of the accuracy and veracity of the witnesses.
29. I also had regard to the inherent likelihood of the situation.
30. Mr Britt was palpably an honest and accurate witness. His evidence dove-tailed with the documentary material provided, as well as the evidence of Mr Terry.
31. Mr Salong was unimpressive. He did not accept contrary evidence and gave an impression of wanting to avoid all responsibility for what had occurred while he was Chair of the NHC Board. The easiest way for him to achieve that was to put all the blame on Mr Terry, regardless of the reality that existed. All the evidence pointed to NHC and the Government desperately wanting the project to proceed. I did not accept Mr Salong's evidence save where it was supported by other independent evidence. As a result, there was little of his evidence on which I was able to place any reliance.
32. Mr Terry was a solid witness. I accepted his account. Although he did end up with one of the model houses on his property, he paid the price set by the NHC Board for that. He had nothing else to gain by his participation in the project – and he already had his house when the contract was voided. The suggestion that he had a personal motive and was acting outside of his authority lacks any substance.
33. I would have been better assisted if cross-examination of Mr Britt and Mr Terry had complied with rule of *Brown v Dunne*. In the end I was left with only the bare defence allegations unsupported by credible oral or any written evidence.
34. Further, Mr Regenvanu was a hugely important witness for the defence. He was in a position to give highly pertinent evidence to the main issue of whether or not Mr Terry was acting without Government knowledge or authority. The fact that Mr Regenvanu was not



called leads to an adverse inference being available from his absence at the hearing, relying on the authority of *Jones v Dunkel* [1959] HCA 8. I consider that authority relevant in this instance. I infer that had Mr Regenvanu been called as a defence witness his evidence would have undermined the Government's defence position and supported the defence presented by Mr Terry.


35. There is no doubt that NHC, COM, and the Vanuatu Government were fully aware and supportive of the housing project which was the basis of the contract agreed to. There is no cogent evidence that Mr Terry was off on a frolic of his own doing for his own benefit.
36. There was a clear breach of contract by NHC, and accordingly, it is liable for the losses suffered by IGS – to put IGS back in the same position as it was prior to entering the voided contract. Additionally, section 57(2) of the Public Finance and Economic Management Act requires the Government to meet NHC's financial obligations. The loss suffered was proved by Mr Britt.
37. Indemnity costs were appropriate due to the manner in which the litigation was conducted – *Whaley's (Bradford) Limited v Bennett and Cubitt* [2017] EWCA Civ 2143. Far from being a model litigant, the Government, no doubt at the behest of Mr Salong, attempted to blacken Mr Terry's good name and character without proper cause and without sufficient evidence to merit such conduct. The belated attempt to mislead the Court by blaming a man of good standing in the community failed; and it warrants costs being awarded on the indemnity basis.

F. Result

38. IGS is entitled to its judgment. The Vanuatu Government is vicariously (see *Bartonshell Coal v McGuire* (1885) Macq 300) and statutorily (section 57(2) of the Public Finance and Economic Management Act) responsible to reinstate IGS to the position it was in prior to entering into the contract.
39. IGS and Mr Terry are entitled to costs on the indemnity basis.

Dated at Port Vila this 21st day of January 2020

BY THE COURT


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Justice G.A. Andrée Wiltens

