IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU

Civil
Case No. 22/2940 SC/CIVIL

BETWEEN: ENTREPRISE DINH VAN TU LIMITED
Judgment Creditor

AND: THE REPUBLIC OF VANUATU
Judgment Debtor

Date: 6th September 2023
Before: Justice W.K. Hastings
Counsel: Mr M. Fleming for the Judgment Creditor
Ms N. Robert for the Judgment Debtor

JUDGMENT

Introduction

1. This judgment concerns the remaining matter requiring resolution. It is a claim for damages arising as a result of the defendant's breach of contract. The damages claimed take the form of payments of 8 percent interest charged by Bred Bank on an overdraft the claimant says would not have been incurred had the defendant not repudiated the contract. The claim is essentially for Hungerfords damages, (*Hungerfords v Walker* (1989) 171 CLR 125), representing the loss sustained as a result of being deprived of money that could have otherwise been invested to accrue interest or used to pay debts in order to reduce interest owing.

Background

2. On 14 April 2023, Justice Geoghegan granted summary judgment in favour of the claimant on the outstanding invoices in the sum of VT 225,094,188 with interest at 5% per annum. The judgment was recalled and the interest calculation corrected by Justice Spear on 5 June 2023. In paragraph 32 of his judgment, Justice Geoghegan did not enter summary judgment for the claimed work and materials and loss of profit because the Court wanted better evidence.

3. The hearing set down for 29 August 2023 was intended to test that better evidence which was submitted by the claimant in the form of a sworn statement of Cyrille Mainguy and the fourth sworn statement of Loic Dinh, both dated 6 July 2023, to which are annexed a spreadsheet showing the calculations for the

cost of materials and labour to complete the contract and the lost profit that would have been made had the contract not been repudiated.

4. At 6pm on 28 August 2023, Ms Robert emailed Mr Fleming to say the Republic accepted the claim of VT 115,978,977 for wasted costs and loss of profit. This made a hearing into these matters unnecessary.

5. Costs were resolved in chambers. There is no reason to depart from Justice Geoghegan's award of indemnity costs in his judgment of 14 April 2023.

6. Mr Fleming provided an itemised bill of costs that covered work done from 17 April 2023 to 29 August 2023. Ms Robert challenged the claim for VT 200,000 for reviewing the spreadsheets annexed to the sworn statements of Messrs Dinh and Mainguy that were prepared for this morning's vacated hearing, but given the level of detail in those spreadsheets, created because the Court asked for better evidence, I do not think the time spent reviewing them with Mr Dinh was unreasonable. The bill of costs also included VT 320,000 for attendance at this morning's trial which was vacated after the bill of costs was created. I allowed VT 80,000 for attendance in chambers this morning instead. Taking this reduction into account, I awarded costs to the claimant in the amount of VT 1,516,000.

7. I signed an order on 29 August 2023 that the defendant pay the claimant VT 115,978,977 for wasted costs and loss of profit, and VT 1,516,000 costs. That leaves the claim for interest damages sought by the claimant.

8. The claim is for VT 9,278,318 interest on the amount of VT 115,978,977 which the Republic now accepts for wasted costs and loss of profit. The interest is calculated at 8% (the Bred Bank overdraft rate) on the full amount of VT 115,978,977 from 1 September 2022 to 1 September 2023 (the date repudiation was accepted is 25 August 2022). I requested a memorandum that set out the interest actually paid on the overdraft during that period.

Submissions

9. Mr Fleming submitted that the damages claimed arise as a result of the defendant's repudiation of the contract; they are unrelated to the 5 percent interest on late payments in the contract. He submitted that interest paid on an overdraft which would not have been incurred if the contract had been performed is recoverable as Hungerfords damages for the following reasons:

    a. Interest was claimed in the pleadings, the claimant would not have incurred overdraft interest but for the defendant's breach of contract, and the defendant was given notice at paragraph 16 of the claim: "It was reasonably foreseeable and within the knowledge of the defendant that should the defendant breach or neglect to pay the debt the claimant would suffer banking interest losses, reasonably calculated with charges to be 15% per annum";

    b. The defendant knew or ought to have known that maintaining an overdraft facility is a common business practice. The claimant did not need to specifically say this to the defendant and if the

defendant had turned its mind to the issue, it would have reasonably concluded that the loss claimed (interest on the overdraft) was likely to result;

c. As a foreseeable direct loss, it arises naturally from the repudiation of the contract by the defendant under the first branch of *Hadley v Baxendale* [1854] 156 ER 145 at 151.

10. Ms Robert submitted first that the Republic did not expect, when it settled the aspects of the claim not resolved by Justice Geoghegan in the summary judgment, that a further claim would be made for Hungerfords damages. She submitted there was no mention of a bank overdraft in the pleadings and that 5 percent interest is all that was claimed. She submitted that having to pay interest on a bank overdraft was not a foreseeable loss because in his sworn statement of 18 January 2023, Mr Dinh said they were able to take on the project and by inference the defendant was entitled to believe the claimant would therefore be able to complete the project without an overdraft. She submitted that the claim for Hungerfords damages is a claim for special damages that should have been specifically pleaded in terms of r.4.1.

Discussion

11. The claim raises two questions. Is interest paid on an overdraft which would not have been incurred if the contract had been performed recoverable as damages? If so, are the damages calculated correctly?

12. The answer to the first question is yes.

13. This is not a claim for interest under the contract; the settlement of the matters left open by Justice Geoghegan has dealt with that. This is a claim for damages arising from the breach of the contract. Damages are awarded for breach of contract if a compensable and measurable loss has occurred which was caused by the breach, is not too remote, and could not have been avoided*: Cheshire and Fifoot's Law of Contract (8th Australian edition)*, p. 973.

14. In *Hungerfords v Walker* [1989] 171 CLR 125 the High Court of Australia upheld an award of damages equal to the interest on money they had paid out in consequence of a breach of contract under the principle that "the plaintiff is entitled to full compensation for the loss which he sustains in consequence of the defendant's wrong, subject to the rules as to remoteness of damage and to the plaintiff's duty to mitigate his loss" (at 143). The award was based on the *actual* interest costs which the plaintiff had incurred: "...even in the case of incurred expense, it is at least strongly arguable that a plaintiff's loss or damage represented by this expense is not too remote on the score of foreseeability. In truth, it is an expense which represents loss or damage flowing naturally and directly from the defendant's wrongful act or omission, particularly when that act or omission results in the withholding of money from a plaintiff or causes the plaintiff to pay away money." (at 144).

15. The Vanuatu Court of Appeal *in Vanuatu Copra and Cocoa Exporters (VCCE) Limited v Vanuatu Coconut Product Limited (VCPL) and the Republic of Vanuatu* [2011] VUCA 29 (Civil Appeal No 18 of 2011) confirmed the availability of Hungerfords damages in Vanuatu. The Court of Appeal "urged the parties to consider" the *Hungerfords* case which it discussed at [17]:

"[17] In Hungerfords v Walker, the High Court of Australia upheld an award to the plaintiffs of damages equal to the interest on money they had paid out in consequence of a breach of contract under the first limb of the rule in Hadley v Baxendale. The Court did so on the ground that the cost of obtaining that money by a commercial enterprise was a loss "according to the usual course of things" following the defendant's breach of contract. In that case, the award was based on the actual interest costs which the plaintiff had incurred, and the award was based on compound interest rates."

16. In his 4th sworn statement dated 29 August 2023, Loic Dinh stated "had the contract have been completed and all payments made as per the contract, this money would have been paid into the Bred Overdraft account ... that charges interest." He continued: "this [interest] has been payable on the entire amount now being agreed to be paid, and I believe would not have been payable had the defendant complied with the contract ...".

17. I do not accept Ms Robert's submission that having to pay interest on an overdraft was not a foreseeable loss and that the factual basis for this loss needed to be specifically pleaded. It is clear from both *Vanuatu Copra* and *Hungerfords* that the cost of obtaining money that would not have been needed if payments under the contract had been made is recoverable, because it is a loss arising "in the natural course of things," is foreseeable, and is not too remote. Indeed, in *Vanuatu Copra*, the Vanuatu Court of Appeal explicitly said such a loss falls within the first branch of *Hadley v Baxendale* as general damages. In *EZ Company Limited v Lapi and the Republic of Vanuatu* [2017] VUCA 19, the Vanuatu Court of Appeal considered each claim (none of which explicitly claimed interest on an overdraft paid as a result of the defendant's breach of contract by non-payment). The Court of Appeal said at para 16 "It was readily foreseeable that the appellants would suffer further losses at commercial interest rates if anticipated income was withheld. In such cases it is appropriate to award interest at a commercial rate [see: *Hungerford v Walker* (1989) 171 CLR 125]."

18. I also do not accept Ms Robert's submission that the defendant was entitled to take some assurance from the fact that the claimant was able to take on the project that the defendant could not have known that the claimant would need an overdraft. Apart from an overdraft being ordinary business practice, expressing confidence in being able to perform a contract at the outset says nothing about being able to continue to perform the contract when the other party has breached it through non-payment.

19. For these reasons, the claimant is entitled to Hungerfords damages. On the unchallenged evidence of Mr Dinh, the interest paid on the overdraft would not have had to be paid if the defendant had not withheld payments to the claimant in breach of contract. The damages claimed are not too remote, they are foreseeable and they arise naturally from the defendant's accepted breach of contract.

20. I turn now to the second question, are the damages calculated correctly?

21. The initial request for Hungerfords damages was calculated on the basis that Bred Bank charged 8 percent interest per annum. This was supported by a letter dated 29 August 2023 from Bred Bank. The agreed time frame is from 1 September 2022 to 1 September 2023. The calculation was 8 percent of

VT 115,978,977 (the loss accepted by the defendant by email dated 28 August 2023) for one year. This worked out to be VT 9,278,318 in interest, which formed the basis for the Hungerfords damages claim.

22. I expressed concern at the conference held on the morning of the vacated trial that the overdraft would not have remained steady at VT 115,978,977 throughout the year, and that the interest calculation would as a result be affected by the varying size of the overdraft in any given month. In the *Vanuatu Copra* case, the Court of Appeal expressed similar concern about proving a Hungerfords damages claim at [18]:

> *"the application of these decisions [Hungerfords, Hadley v Baxendale and Dods v Cooper Creek Vineyards Ltd [1987] 1 NZLR 530] could result in the appellant obtaining an award of general damages if it incurred interest costs on money borrowed to make up for the failure of the respondents to pay the copra subsidy on time. It will be a matter for evidence to show the extent of the interest costs which the appellant incurred, and whether, to the extent that the so-called "excess fees" are claimed, whether the excess fees were the result of non-payment of the subsidy, or whether excess fees were a long standing feature of the appellant's business due to the way in which it arranged its monetary affairs. The three pages of bank statements dated 4th October 2010 annexed to one of the appellant's sworn statements are insufficient to throw any useful light on that question."*

23. In this case, there is more evidence than was available to the Court of Appeal in *Vanuatu Copra.* The evidence in Mr Dinh's sworn statement is unchallenged and he was present at the conference. I have no evidence that the claimant arranged its business affairs in an other than competent manner, and there is confirmation from Bred Bank as to the interest it charged.

24. My concern has been addressed in an email from Mr Fleming dated 5 September 2023 which shows the actual interest paid on the overdraft account between 1 September 2022 and 31 August 2023. It does indeed fluctuate month to month. The actual interest paid in that time was VT 8,907,912. That is VT 307,406 less than what is claimed, and is a more accurate calculation of the loss suffered. That answers the second question.

Result

25. As a result, and for the reasons above, the claimant is entitled to VT 8,907,912 in Hungerfords damages.

Costs

26. Costs were resolved in the orders made on 29 August 2023.

Dated at Port Vila this 6th day of September 2023
BY THE COURT

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Justice W.K. Hastings

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