

**BETWEEN:** Enterprise Dinh Van Tu Limited  
Claimant

**AND:** The Republic of Vanuatu  
Defendant

Date of Hearing: Thursday April 6<sup>th</sup>, 2023  
Date of Judgment: Friday, April 14<sup>th</sup>, 2023.  
Before: Justice JP Geoghegan  
Distribution: Mr M Fleming for the Claimant  
Mrs FW Samuel for the Defendant

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## **JUDGMENT**

**Judgment of 14 April 2023 recalled, corrected as to the interest calculations in para 35 and reissued this 5<sup>th</sup> day of June 2023 by Justice RLB Spear in the absence of Justice JP Geoghegan**

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1. The Claimant, Enterprise Dinh Van Tu Limited seeks summary judgment against the Defendant in the following sums:
  - (a) VT411,096,198 for unpaid invoices in respect of construction work undertaken by the Claimant at the Port Vila Central Hospital;
  - (b) VT11,431,945 constituting 5% interest per day from the date the invoices were due to the date of the judgment and thereafter at VT56,315 per day until the judgment is paid;
  - (c) VT45,000,000 for materials and goods wasted;
  - (d) VT100,000,000 for loss of profits;
  - (e) VT1,616,000 for costs on an indemnity basis.

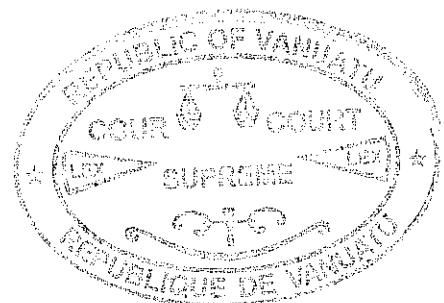


2. The granting of summary judgment in respect of the sums sought is opposed by the Defendant, although the State acknowledges and accepts that summary judgment could be granted in the sum of VT225, 096,188 being the sum accepted as owing to the Claimant. The basis for the claim arises from a contract entered between the parties for the construction by the Claimant of three buildings known as the "Vila Central Hospital New Containment and Transition Facility Buildings," in Port Vila.
3. The background to the contract was set out in the sworn statement of Tu Van Dinh, a director of the claimant, dated 18<sup>th</sup> January 2023, filed in support of the claim. Mr Dinh stated that he was contacted by the then Minister of Finance, the Honourable Johnny Koanapo and the Minister's First Personal Assistant, Mr Benjamin Shing in March 2022. He was told that the Government wanted to urgently build a hospital centre to allow for the borders to open and that they had contacted Mr Dinh because they had identified that his company could build a tilt up concrete wall system which allowed for fast building at a low cost.
4. Mr Dinh was told that there was urgency to have the work done as the Government wanted to open the borders shut due to Covid-19, by 1<sup>st</sup> July 2022 and that the work has been approved to commence. The civil engineer was a firm known as Mainguy Consulting who would certify the works and the Claimant should deal with them for pricing of the contract.
5. Mr Dinh stated that he made it very clear that a priority contract like this meant that the Claimant would need to engage all its workforce, machinery, and management, meaning that other jobs and opportunities would be stopped, or contracts not taken with other parties during the proposed time frame.
6. An inspection of the Claimant's Erakor pre-fabrication plant was conducted by the Minister and Mr Shing on 24<sup>th</sup> March 2022. Mr Dinh stated that he suggested that the Minister go and inspect a Freswota Project the Claimant was constructing and subsequently received advice that the Minister has done so. After discussion with Mr Cyril Mainguy from Mainguy Consulting it was agreed the base square metre rate to build the facility would be VT170,000 per square metre. Additional to that would be machine costs,



drainage, electrical, services, special hospital grade equipment and so forth. The total budget estimate was VT605,207,050.

7. At around this time, Mr Dinh received letters from the Ministry of Finance and the Ministry of Health, both dated 25<sup>th</sup> March 2022, and signed by the respective Ministers, stating that the Government through the Council of Ministers has resolved to commence the health and restructure development programme with a view to constructing a new facility for the current pandemic crisis and to cater for a rising demand for proper health services in the country. To ensure that the work continued without the disruption of essential medical services the Government had resolved to conduct the work in a phase and sequential manner, which would involve a first phase involving the construction of two buildings that would be used as containment and transition facilities. The Claimant was requested to commence site preparation as the Government wished to have a ground-breaking ceremony on 30<sup>th</sup> March 2022. The correspondence was marked as having been forwarded to other relevant ministers and senior officials including the Prime Minister. The letters were annexed to Mr Dinh's statement.
  
8. Despite having started the works as directed, the Claimant was requested to complete a response for tender form which was signed on or about 18<sup>th</sup> April 2022. Mr Dinh deposed that he was told that this was just a formality. He attached to his sworn statement a copy of a contract which he was forwarded by the Defendant for execution. The contract described the works which were to be undertaken, namely a new containment facility with 56 beds and two new transition facilities one with 56 beds and one with 72 beds. The contract price was recorded as VT605,207,050. The contract contained a provision for terms of payment. It provided that: *"payment should generally be made within 28 days following the Consulting certification of the claim invoice and associated documents"*.
  
9. Under a heading, **"Seven specific conditions of contract (SCC)"** there was provision for interest on overdue payments which provided: *"the contract shall accrue interest prorated at an annual rate of 5% on late payments from the employer for each complete*



*week of delay in payment beyond the subsequent month following the submissions of satisfactory invoice and support documentation".<sup>1</sup>*

10. The Claimant commenced works as requested. One of the reasons for this was that, according to Mr Dinh, the Claimant had undertaken some 30 urgent projects under contract for the government due to natural disasters. Examples of those given by Mr Dinh were as follows:

(a) Work undertaken in 2019/2020 known as the Green Hill/Teouma Road to improve feeder roads to allow people who could not readily access the main areas to sell produce and bring it to markets. The urgency related to imports and exports coming to a halt due to Covid. The work was undertaken before contract documents were sent and the sum of approximately VT360,000,000 was invoiced and paid;

(b) Work undertaken in 2019, to repair the Teouma Bridge after significant rainfall has rendered it in danger of collapsing. Again, the contract documentation was sent after the Claimant had started work and it was invoiced and paid, the contract sum being approximately VT50,000,000.

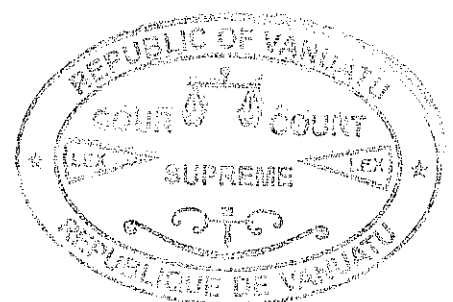
(c) Work undertaken after Cyclone Pam in 2015, on roads and bridges around Efate. The contract sum was approximately VT100,000,000.

11. Accordingly, the course of conduct between the parties and the circumstances of emergency reassured the Claimant that it was appropriate to proceed with the works.

12. Works started on 1<sup>st</sup> April 2022. On 6<sup>th</sup> April 2022, the Prime Minister, and other dignitaries in the presence of the media conducted a ground breaking ceremony. Thereafter the evidence of Mr Dinh is that the Claimant put all its efforts and resources into undertaking work on the project. A weekly certification report was done by the engineers. On 6<sup>th</sup> July

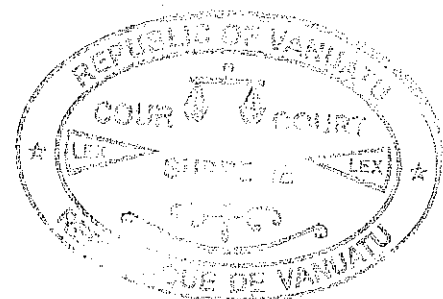
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<sup>1</sup> See page 43 of the sworn statement of Dinh dated 18<sup>th</sup> January 2023.



2022, an invoice was issued for VT327,508,051. It was duly certified by Mainguy Consulting. No issue was taken with it however payment was not made.

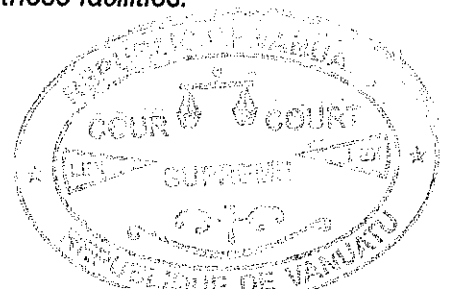
13. Mr Dinh stated that work continued for a short time and then on 9<sup>th</sup> September 2022, a further invoice in the sum VT83,586,137, accompanied by an appropriate certification was issued. A copy of the certification and invoice was attached to Mr Dinh's statement. The certification showed that 100% of Building 1 had been completed, 80% of Building 2 had been completed, 40% of Building 3 had been completed and overall, 72% of all work under the contract had been completed. On 31<sup>st</sup> August 2022, Mr Malcolm Tarileo, the Director of the Public Works Department, forwarded a letter to the Director of the Department of Finance certifying that all construction works had been completed in accordance with all applicable technical standards plus specification and the construction plans approved and supervised by Mainguy Consulting.
  
14. Mr Dinh stated that after the non-payment of the first invoice he contacted various government departments and ministers due to the amount of money outstanding. His evidence is that he was then told by the Minister of Public Works, the Honourable Jay Ngwele, that the first invoice had been given to the Central Tenders Board and that the Board had declined the request to pay the money owed as they held that the contract was in breach of the relevant legislation. Mr Dinh deposed that Mr Ngwele had told him that the government had wanted to pay the money owing, but the Central Tenders Board was refusing to recognise the contract. Minister Ngwele handed a number of documents to Mr Dinh relating to that issue. They included a letter from the Chairman of the Central Tenders Board to Mr Johnson Iauma, the Director General of the Ministry of Infrastructure and Public Utilities advising that the Board had declined to approve a request for an exemption to the government tender process on the basis that firstly, an exemption could only be granted in a declared state of emergency and there was no such circumstance and secondly, that there had been a breach of the tender process pursuant to Section 12(2)(a) of the Government Contract and Tenders Act [CAP. 245], namely that the Task Force had gone about procurement of the project without the Central Board's consideration and approval to instruct both Mainguy Consulting and the Claimant. This is



notwithstanding that the design had been undertaken and the constructions works were ongoing and near completion.

15. The second document was a letter from the Attorney General to the Director General to the Office of the Prime Minister dated 14<sup>th</sup> August 2022. Having been provided to Mr Dinh by the Minister, I take the view that any privilege attaching to that document has been waived. The letter referred to the issue presented by the Central Tenders Board and referred to the Court of Appeal decision in IMPI Limited v Central Tender Board Civil [2019] VUCA 72, and the emphasis by the Court of Appeal that the Tender rules and procedures set in the Government Contracts and Tenders Act were mandatory and must be followed. The Attorney General identified that notwithstanding the mandatory rules and procedures there were situations where the operation of the regulation of the rules can be exempted or suspended which included work undertaken during a declared state of emergency. The Attorney General referred then to the declaration of public health emergency No. 6 of 2022, which may provide a basis of such an exemption and that if the Tender Board had not been informed of the order, then they should be so informed and asked to reconsider.
16. A further letter provided to Mr Dinh was a letter dated 29<sup>th</sup> August 2022 from the Attorney General to the Director General of the Ministry of Finance and Economic Management. That letter recorded as follows:

*"We understand that since our advice of 14<sup>th</sup> August 2022, this matter has been tabled before the COM again (subject to COM's final decision) COM had directed that the matter be resubmitted to the Tender Board for the Board's reconsideration in light of the fact that the Tender Board has previously approved certain payments incurred by the government during the period of the state of emergency and the period of the declaration of public health emergency which payments amounted to high value government contracts. While this matter has been resubmitted to the Tender Board's consideration, it must be noted that whilst the tender process under the Act and the regulation has not been complied with and the construction of the containment facility, the contractor has nevertheless incurred substantial costs. The government MUST pay the cost of the construction of these facilities."*

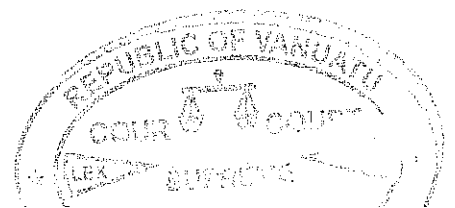


17. By letter dated 23<sup>rd</sup> February 2023 from the Solicitor General to Mr Fleming. Mr Fleming was advised that: *"we wish to inform you that fruitful discussions and resolutions were made in principle by the government to settle your client's outstanding invoices in the sum of VT411,096,188. This sum will be settled by two instalments payments, the first by coming Friday 1<sup>st</sup> March 2023 and the second on 21<sup>st</sup> March 2023"*.
18. On 21<sup>st</sup> March 2023, the government paid to the Claimant the sum of VT186,000,000. The balance of VT225,094,188 has not been paid despite the letter from the Solicitor General.
19. The statement of defence filed by the Defendant refers to the Government Contracts and Tenders Act and the failure to comply with that. The Defendant effectively relies on its own conduct to prevent it from paying sums which are owed to the Claimant and in respect of which a significant sum of VT186,000,000, has already been paid notwithstanding the statement of defence.
20. The statement of defence also refers to the fact that substantial work has been done on Building 1 but it is yet to be completed and Building 2 has yet to be completed *"with much work still to be done"*.
21. At paragraph 13 of the statement of defence the defendant denies that the claimant is entitled to payment of the invoices, materials and goods and loss of profit and states that:

*"Such sum could only be paid to the claimant upon certification that works and have been fully completed and up to expected standard."*
22. That of course flies in the face of the very contract documents provided by the defendant and relied upon by the claimant. It also ignores the clear evidence as to the certification of the works undertaken.
23. The defendant also pleads that should the defendant be liable to the claimant then such liability should be on the basis on quantum meruit. That also ignores that fact that, even adopting a quantum meruit approach to this situation the claimant has provided invoices which are independently certified as being appropriate including certification from the Director of the Public Works Department.



24. The only sworn statement filed on behalf of the defendant is a sworn statement by Mr George Iapson, first political advisor to the Minister of Finance. That sworn statement takes no issue with the invoices tendered by the claimant and stated the following:
- “6. *After the [Judicial] Conference on 22<sup>nd</sup> February 2023, at 2pm the Solicitor General Frederick John Gilu (the “SG”) and the Principal State Counsel Florence Williams Samuel met with the Minister of Finance and was in attendance to discuss the matter. The SG stressed in the meeting that the Government must seriously consider resolving this matter.*
  7. *Having been aware of this matter prior to our meeting I have progressed the matter to ensure compliance with the Public Finance and Economic Management Act [COA 244] in respect to the pay out from Public Fund. At the meeting on 22 February 2023, the pay out in respect to this matter was discussed and confirmed by the Minister that funds had been appropriated in 2022 for the contract but it would be referred to the Council of Minister’s Meeting (COM) for approval.*
  8. *I confirm that a COM paper is in order and I will arrange for the COM to meet on Friday purposely to consider the pay out to the outstanding invoices in this matter.*
  9. *At the COM meeting this morning, it considered the COM paper and the Council of Ministers decided to defer its decisions in order to be provided with further information so that they can make an informed decision given that the government is a newly formed government.*
  10. *It is envisaged that this matter will go before the Council of Ministers meeting again next week on Friday.*
  11. *It is the wish of the Government that the Claimant’s claim is sorted and that it be settled.”*
25. A further month has now passed without the matter being settled.
26. At this hearing, I was advised that work had now ceased on the project, the claimant having taken the position that the contract was repudiated. That is extremely unfortunate given the nature of the project.
27. Mr Fleming referred me to my own judgment in *Union Électrique Du Vanuatu Limited v. Republic of Vanuatu* [2017] VUSC 31; Civil Case 760 of 2016 (24 March 2017) where I referred to summary judgment in the threshold to be attained. I stated in that judgment:





"48. The relevant rules referring to the granting of summary judgment is set out in Rule 9.6 of the Civil Procedure Rules.

49. The real issue in this case is whether it could be said that the claimant is satisfied the requirements of rule 9.6 (7) and 9.6 (9) which provide:-

(7) If a Court is satisfied:-

- a) The defendant has not real prospect of defending the claimant's claim or part of the claim; and
- b) There is no need for a trial of the claim or that part of the claim, the Court may:
- c) Give judgment of the claim or part of the claim; and
- d) Make any other orders the Court thinks appropriate.

.....

(9) The Court must not give judgment against the defendant under this rule if it is satisfied that there is a dispute between the parties about a substantial question of fact, or a difficult question of law."

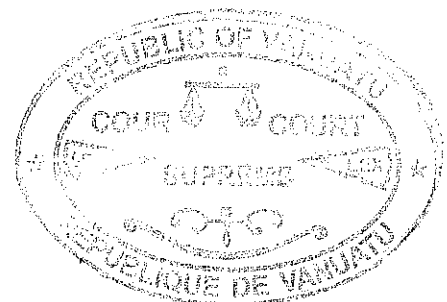
51. In Bokissa v. Race<sup>[21]</sup>, the Court of Appeal accepted that the test is whether the prospect of defending the claimant's claim is realistic rather than fanciful.

54. The remedy of summary judgment is a discretionary one, so even in the event of the court being satisfied that the defendant has no real prospect of success the court is not required or compelled to grant judgment although there would, I suggest, have to be good reason for not doing so.

28. I am satisfied that, at least as far as the remaining balance outstanding under the issued invoices is concerned, the defendant has no reasonable prospect of success in terms of defending the claim. Despite the alleged breach of the Government Contracts and Tenders Act such a breach cannot relieve the defendant of liability to pay a contract entered into at the behest of the defendant, under urgency and against a background of previous similar dealings between the parties. The alleged breach which has occurred, has occurred not as result of any conduct by the claimant but because of the conduct of the defendant. It would be unconscionable to permit the government to rely on its own conduct to avoid liability in circumstances such as this.



29. There is a contract between the parties which is partly written and partly oral. The terms of the contract are clear. The contract was provided by the defendant which acknowledges liability by virtue of the fact that it has already paid a significant sum to the defendant. The contract has been substantially performed.
30. Even if I am wrong in concluding that the contract is a partly written and partly oral document with the terms of the contract being principally as per the documents provided by Mr Dinh, on a quantum meruit basis the defendant would also be entitled to judgment given the invoices which have been provided and the certification of those invoices relating to quantum together with the additional certification from the Director of Public Works.
31. I am equally satisfied that there is no realistic prospect of the defendant resisting a claim for interest on the outstanding sum again due to the contractual documents provided. I am satisfied that interest of 5% should be awarded.
32. I am not however persuaded that it would be appropriate to enter summary judgment for the claimed work and materials and loss of income. I consider that in respect of both of those matters the Court is entitled to better evidence than that which is currently before it, particularly in relation to the issue of loss of income. While Mr Fleming submitted that appropriate calculations could be done by way of estimates based on the documentation provided by the claimant, I am not satisfied, particularly given the significant sums involved, that the calculation of such losses should be left to rough guess work rather than specific expert evidence.
33. On the issue of indemnity costs, costs are sought in the sum of VT1,616, 000. Mrs Williams does not necessarily dispute the amount of costs but rather the hourly rate underpinning that amount and submits that an hourly rate should be VT30 000 rather than VT40, 000.
34. This is a case where, as has already been observed, there is no dispute that the government approached the defendant with an urgent and worthy project which would have been of considerable benefit to the citizens of Vanuatu. No dispute is taken with the evidence of Mr Dinh that the pattern of previous conduct led the claimant to the reasonable view that it could accept the contract and proceed urgently with the work which, despite the defendant's pleadings have been substantially completed. Despite that, the defendant's own conduct has led to circumstances where the claimant has been seriously out of pocket despite engaging in reasonable attempts to settle. The claimant has been left with no option but to engage in legal proceedings. In such circumstances, I am satisfied that indemnity costs should be awarded as sought by the claimant.



35. Accordingly, I make the following orders:

a) Summary judgment is granted in favour of the claimant against the defendant on the outstanding invoices in the sum of VT 225, 094, 188.

b) Interest of 5% per annum to 14 May 2023 is awarded to the claimant in the total sum of VT 12,759, 730 calculated on the following basis:

i. First Invoice

1. On VT 327,508,051 from 6 August 2022 to 21 March 2023 amounting to VT 10,184,154

2. Following the payment of VT 186 million on 21 March 2023, on VT 141,508,051 from 22 March 2023 to 14 April 2023 amounting to VT 445,847

ii. Second invoice – On 83,586,137 from 9 October 2022 to 14 April 2023 amounting to VT 2,129,729

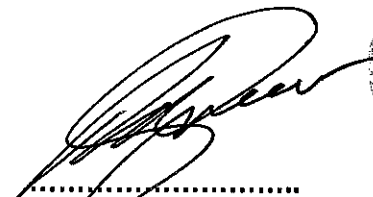
c) Costs are awarded in favour of the claimant in the sum of VT1, 616, 000.

36. The Total Judgment sum calculated to 14 April 2023 amounts to VT 239,469,918 which will accrue interest at the rate of 5 % per annum from 14 April 2023.

37. There will be an enforcement conference before Justice Hastings at 9 am on 7 July 2023.

**Dated at Port Vila, this 5<sup>th</sup> day of June 2023**

**BY THE COURT**



Justice RLB Spear

(in the absence of Justice JP Geoghegan)

