

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

Civil
Case No. 23/2220 SC/CIVL

BETWEEN: NAMEN KALI JEAN YVES
Claimant

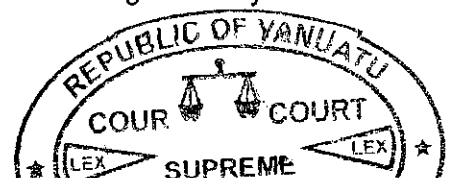
AND: ALAIN JEAN PASCAL
Defendant

Date of Trial: 18 March and 24 June 2024
Date of Judgment: 10 December 2024
Before: Justice W K Hastings
Submissions: 25 June 2024 from the Claimant
25 June 2024 from the Defendant
Counsel: Ms A Cyrel for the Claimant
Mr E Macreveth for the Defendant

DECISION

Introduction

1. The Claimant claims the Defendant owes him money in respect of an *"incomplete and failed job"* of supplying and installing cyclone proof glass in the windows and doors of the Claimant's new two storey building. The Claimant specified that the glass had to be cyclone proof. The Defendant supplied and installed 6.38mm thick laminated glass. The Claimant says this was inadequate because it was too thin to be cyclone proof. The Claimant says the glass should have been 10.38mm thick. As a result, the Claimant says he had to remove the 6.38mm glass and replace it with 10.38mm glass. The Claimant claims VT1,474,605 as the cost of replacing the 6.38mm glass with 10.38mm glass.
2. The Defendant says he quoted VT2,153,280 to supply and install 6.38mm glass in the doors and windows of the Claimant's building. He says in his opinion, this glass was sufficient to be used as a cyclone proof glass in the Claimant's building. He says he



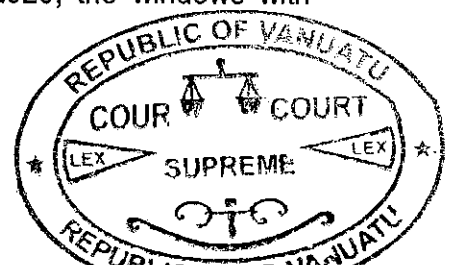
conveyed this opinion to the Claimant, after which the Claimant accepted the quote by making the first payment. He says it was not until after the Claimant accepted the quote that the Claimant consulted an engineer who told him 6.38mm glass was inadequate. The Defendant denies that he owes any money to the Claimant in the circumstances, and that the Claimant is not therefore entitled to the relief he seeks.

3. Sworn statements from Namen Kali, Christophe Dinh and Cyrille Mainguy in support of the claim were filed and served. Each was cross-examined. The Defendant filed and served four sworn statements, one in support of the defence, and three in response to each of the three sworn statements in support of the claim.

Evidence

Namen Kali Jean Yves

4. The Claimant Namen Kali Jean Yves deposed that in early 2019 he contracted Cyrille Mainguy to be the engineer on the project to build the two storey building. He said the main contractor for the project was Christophe Dinh Construction. He said he "made it specifically clear" to the Defendant that he wanted cyclone proof windows. He said the Defendant submitted a quotation for the windows. Construction of the building commenced around September 2019. On 14 May 2020, Mr Mainguy, the project engineer, inspected the project and asked the Claimant to obtain from the Defendant the specification for the glass used in the windows. The Defendant complied. The specification was for 6.38mm glass. Mr Mainguy advised the Claimant that in his opinion 6.38mm glass could not withstand the impact of cyclones unless the Defendant was able to provide a test certificate to prove it could. No test certificate was forthcoming, nor did the Defendant return to the project site as requested to install 10.38mm glass in the windows. Vanuatu Glass and Aluminium was then contracted to supply and install 10.38 glass instead.
5. Under cross examination, the Claimant said he asked the Defendant as a family friend to look at a plan for a two storey building that was prepared by a builder in Malekula. This plan had shutters specified for the windows. He said he showed the plan to Mr Dinh, who advised he needed an engineer to redraw the plan. He said Mr Dinh recommended Mr Mainguy, who redrew the plan. The new plan still showed louvred windows. The Claimant said he told Mr Mainguy and Mr Dinh that he now wanted glass that was cyclone proof instead of louvres. He confirmed he did not ask specifically for 10.38mm glass, only that it be cyclone proof. He said he was unaware of what thickness of glass was required because he is not a glass specialist, which is why he asked his friend the Defendant, who is a glass specialist, for advice. Construction started after he told Mr Mainguy, Mr Dinh and the Defendant that he wanted cyclone proof glass. By the time of Mr Mainguy's inspection of the project in May 2020, the windows with 6.38mm glass had been installed.



6. In his Affidavit in reply to the Claimant's sworn statement, the Defendant deposed that the Claimant approached him at his home on 4 March 2018 with a plan for a two storey building and requested a quotation for glass windows *"based on my experience."* He said the Claimant did not want the louvred windows shown on the plan. The Defendant deposed that *"based on my experience I decided to apply 6.38mm clear safety laminated glass on every windows and doors with reasons that his drawn windows and doors are small in size."* The Defendant said he quoted VT2,153,280 for the windows, and the Claimant accepted the quotation on 15 October 2019 by making a 50% payment of VT1,076,640. The Defendant said he sourced the raw materials, took final measurements on site for fabrication, and began to install the windows after 5 May 2020. He said he did not receive the query from Mr Mainguy until 25 May 2020, after the windows were installed.

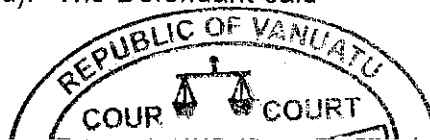
Christophe Dinh

7. Christophe Dinh deposed that he organised an onsite meeting with the Claimant and the subcontractors before construction began in September 2019. He said he *"clearly specified"* that for the glass to be cyclone proof it had to be *"10.38mm laminated which is the cyclone proof glazing recommended with no cyclone shutters."*

8. Mr Dinh said the undated letter addressed *"to whom it may concern"* annexed to his sworn statement was prepared after these proceedings began on 21 August 2023. It states that the Defendant was at the meeting in September 2019, and that *"it was specified in that meeting that that all glazing will need to be 10.38mm laminated which is the cyclone proof glazing recommended if you do not want cyclone shutters"*.

9. Under cross-examination, he said he could not remember the exact date of the meeting, but he remembered that the Defendant was present, along with the Claimant and his wife, Mr Dinh's foreman, and the electrician. He said Mr Mainguy was not present. He confirmed that he told the Defendant that the glass had to be 10.38mm to be cyclone proof because of the height of the windows. He said the quotation the Defendant gave to the Claimant did not reflect what was discussed at the meeting.

10. In his Affidavit in reply to Mr Dinh's sworn statement, the Defendant deposed that he was not at the September 2019 meeting. He said his first and only meeting was on site in February 2020 when he took measurements on the new building to start fabricating the glass for the doors and windows. He said Mr Mainguy was not present, and Mr Dinh *"did not give me any engineer specification requirement for the 10.38mm clear laminated glass."* He said if he had been given such specifications, he *"would have made changes to the sizes of the windows and glass as I have still not fabricated them."* The windows were fabricated during March and April 2020 and were installed beginning on 5 May 2020. He said he received an email from Mr Mainguy on 25 May 2020, after the glass had been installed, inquiring about the glass specification. He said he received a report from Mr Mainguy on 19 March 2021, following an inspection on 21 January 2021 (to which the Defendant said he was not invited). The Defendant said



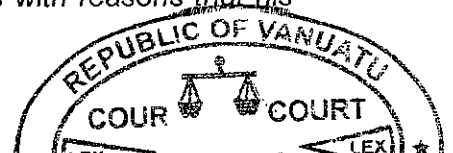
the report contained the 10.38mm specification which, he said, was never given to him by the Claimant or Mr Dinh. He said neither the Claimant nor Mr Mainguy *"had demanded me to replace or rectify the 6.38mm with 10.38mm laminated glass prior to fabrication and installation of doors and windows on the building."*

Cyrille Mainguy

11. Cyrille Mainguy deposed that his firm was responsible for designing and drafting the plans for the Claimant's two storey building project. He said he advised that all windows had to have 10.38mm glass if no shutters were to be put on the windows. He confirmed that Mr Dinh advised the Defendant at that meeting (which Mr Mainguy was not at) of his, (Mr Mainguy's), requirement that the windows had to be 10.38mm. He said the Defendant informed him that he had supplied a quote for 6.38mm glass, and that the Claimant had accepted the quote on that basis. He said *"the Defendant did not abide with the Engineer's (Mr Mainguy's) requirements to install the 10.38mm glass panels."* Mr Mainguy deposed that the *"Claimant had only discovered that he was cheated on the measurements of the glass panels after the Defendant had already installed all the windows to the ground and first floors."* He said the Claimant advised him *"that it was not what he wanted in the first place"* and that he wanted the glass panels replaced with 10.38mm glass.
12. Under cross examination, Mr Mainguy said he finalised the redrawn plans in April 2019. He said the plans he provided specified 10.38mm glass, and that these were the plans he gave to Mr Dinh the contractor before construction began. He said he did not give them to the Defendant, only to his client the Claimant, and Mr Dinh. He said he trusted Mr Dinh to pass on the 10.38mm specification to the Defendant. He said this happened at the meeting of September 2019. Not being at that meeting, he admitted that he had no personal knowledge of what Mr Dinh said to the Defendant.
13. In his Affidavit in reply to Mr Mainguy's sworn statement, the Defendant deposed that Mr Mainguy was not present at the meeting attended by the Defendant in February 2020. He said this was the first and only meeting he attended on site, and that he did not receive any engineer specifications from either Mr Dinh or the Claimant requiring the glass to be 10.38mm. He deposed (as he did in his Affidavit in reply to Mr Dinh's sworn statement) that he did not receive any engineer specifications requiring 10.38mm glass until 19 March 2021, well after the 6.38mm glass had been fabricated and installed.

Alain Jean Pascal

14. The Defendant Alain Jean Pascal deposed that the Claimant approached him with a plan on 4 March 2018. The plan showed louvre windows and contained no specifications for glass. The Defendant said the Claimant asked him to quote for glass instead of louvres. The defendant deposed *"based on my experience I decided to apply 6.38 clear safety laminated glass on every windows and doors with reasons that his*



drawn windows and doors are small in size." He deposed that on 10 October 2019 *"acting on his demand I issued a validation of the two quotes totalling to an amount of VT2,153,280 including VAT with a condition that a 50% payment be made upon acceptance so that we could place our order for the material overseas."* The quote annexed as AJP4 refers explicitly to 6.38mm glass. On 15 October 2019, the Claimant *"accepted the revalidated quotation by making a 50% payment of VT1,076,640 by way of a cheque."* The Defendant placed the orders for the raw material overseas. When the raw material was delivered on 9 December 2019, the Defendant says that he informed the Claimant verbally that he was ready to take final measurements on site.

15. He said the *"first and only meeting"* on site that he attended was in February 2020. In attendance were the Claimant and his wife, Mr Dinh, Mr Dinh's foreman, the electrician and the Defendant. He deposed that he was not told that the Claimant had now engaged Mr Mainguy as engineer. He said he sent an email to Mr Dinh on 5 May 2020 that the glass was ready to be installed. Installation of the 6.38mm glass began on 5 May 2020. The Defendant sent the Claimant an email on 19 May 2020 referring to 6.38mm glass, the small window openings, and an observation that *"this doesn't stop you to install shutters if you wish too depending on your budget in the future."* On 22 May 2020 the Defendant received an email from Mr Mainguy asking for a test certificate showing that 6.38mm glass had been tested against cyclone wind and impact. On 6 July 2020 the Defendant replied that there was no test certificate for 6.38mm glass. He agreed with Mr Mainguy that to obtain cyclone insurance, shutters would be required.
16. The Defendant deposed that he did not receive window specifications until 19 March 2021 when Claimant sent an email attaching Mr Mainguy's report stating the 6.38mm glass was not fit for purpose. The Claimant said in the email he had specified that the glass was to meet cyclone proof standards and *"mi never bin wantem shutters since our first meeting before construction I start and decision blong mi i never change."* The Defendant deposed that neither *"the Claimant nor his engineer had issued any complaint or demanded me to replace or rectify the 6.38mm clear laminated glass with 10.38mm laminated glass prior to fabrication and installation on the building."*
17. Under cross-examination, the Defendant said the Claimant was not merely seeking advice, he was looking for a quote when he showed the plans prepared by Mr Massing in Malekula to the Defendant in March 2018. As the plans shown to the Defendant disclosed no glass specifications, the Defendant said he based the quote on his opinion that 6.38mm glass would be sufficient. For 18 months, from March 2018 to the time construction began in September 2019, the Defendant said he did not see any plan prepared by Mr Mainguy. He denied attending the meeting in September 2019, but confirmed that he attended a meeting in February 2020. He said Mr Mainguy was not at that meeting, there was no discussion of window specifications, and he was not instructed to ensure the glass was 10.38mm. He said at the time of that meeting, the glass had already been ordered. He said the Claimant had consistently said he wanted cyclone proof windows without shutters. He said in his opinion based on his expertise, 6.38mm glass is manufactured to withstand a category 5 cyclone. He said if he had

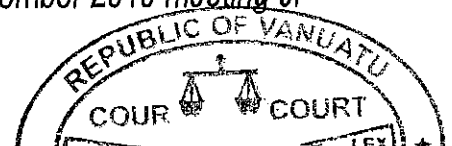


specifications specifying 10.38mm glass, he would have complied with them, but he did not receive such specifications until 19 March 2021, well after the 6.38mm glass that was the basis of the accepted quote had been ordered, fabricated and installed.

18. The Defendant said the quotation of 10 October 2019 referred to 6.38mm glass because the Claimant did not specify 10.38, he did not receive any revised plans from Mr Mainguy, he was not at the September 2019 meeting where Mr Dinh said he orally specified 10.38mm glass, and the quotation was accepted by the Claimant on 15 October 2019. He said neither Mr Dinh nor the Claimant ever told him that 10.38mm glass was required. He said Mr Dinh only talked about measurements. He said Mr Dinh never instructed him to change the glass to 10.38mm. He said the Claimant had enough time between 4 March 2018 when the first quotation referring to 6.38mm glass was given to the Claimant, 10 October 2019 when the second "revalidated" quotation referring to 6.38mm glass was given to the Claimant, and 15 October 2019 when the Claimant paid half of the quoted price, to have carefully considered the references to 6.38mm glass, to have consulted an engineer, and to have asked that the glass be 10.38mm, but he did not. Instead, he accepted the quote on the basis that the glass would be 6.38mm.

Discussion

19. This construction project was unusual in that the Defendant Mr Pascal was not a sub-contractor of the main contractor, Christophe Dinh Construction. There was therefore no direct line communication between Mr Dinh and the Defendant. Mr Pascal was instead contracted directly to the Claimant to supply and install the glass.
20. I turn now to consider whether or not the Claimant has proved on the balance of probabilities that Mr Dinh communicated specifically to Mr Pascal, who was not his subcontractor, that the glass had to be 10.38mm thick. Mr Dinh said he did in the undated letter "to whom it may concern" annexed to his sworn statement, but he conceded this letter was prepared after these proceedings had commenced on 21 August 2023. It is not a contemporaneous, or near contemporaneous, account. I accept that Mr Dinh linked glass thickness to the presence or absence of shutters, but I am not persuaded that this was ever communicated to the Defendant. No independent evidence, perhaps in the form of Mr Dinh's diary, was produced to confirm who was in attendance at the September 2019 meeting or what was said to whom at that meeting.
21. Against this is Mr Pascal's consistent denial that he was at the September 2019 meeting, and his consistent denial that Mr Dinh ever communicated to him that the glass had to be 10.38mm thick. Mr Pascal's evidence was not damaged in cross-examination. The quote expressly specified 6.38mm glass and the Claimant after the September 2019 meeting accepted the quote by paying half the quoted price. Having accepted the quote for 6.38mm glass in October 2019, the Claimant did not seek any variation to the contract he had with the Defendant. In the absence of any contemporaneous evidence that the Defendant was at the September 2019 meeting or

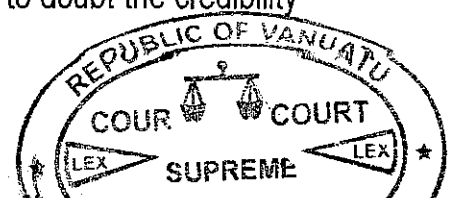


independent evidence that Mr Dinh otherwise communicated the 10.38mm specification to the Defendant who was not one of his subcontractors, I am not satisfied that the Claimant has proved on the balance of probabilities that anyone communicated to the Defendant that the glass had to be 10.38mm thick before the Claimant accepted the quote that explicitly referred to 6.38mm thick glass.

22. I heard no evidence of an objective or independent standard for cyclone proof glass. There was evidence that the Defendant did not have a test certificate for 6.38mm glass. The Defendant insisted that in his opinion, 6.38mm glass was adequate given the size of the windows. Mr Mainguy on the other hand said only 10.38mm glass would be cyclone proof. This seems to me to be a contest of opinions.
23. It might have been argued (but was not) that the Defendant's acceptance in the email of 6 July 2020 that cyclone shutters would be required is acknowledgment that the 6.38 glass was inadequate, but the context of that email related to obtaining insurance, not the resilience of 6.38mm glass. The absence of a test certificate for 6.38mm glass is an absence of evidence, not evidence of unsuitability. It is not evidence that a statement that 6.38mm glass could withstand a cyclone is untrue. The defendant throughout his sworn statements and in cross-examination consistently said five things: that he received no glass specification when he quoted a price; that 6.38mm glass was, in his opinion and based on his expertise, sufficient to withstand a cyclone; that the quotation explicitly referred to 6.38 glass; that the Claimant accepted the quote on that basis; and that the Defendant did not receive any indication that the glass should be 10.38mm until well after the 6.38mm glass had been installed. I have found the Defendant's evidence to be credible.
24. The authors of *Burrows, Finn and Todd, Law of Contract*, (7th New Zealand edition) at 267, and the authors of *Cheshire and Fifoot's Law of Contract* (9th edition) at 249, state in identical terms that:

The expression of an opinion properly so called, ie the statement of a belief based on grounds incapable of actual proof, is not a representation of fact, and, in the absence of fraud, its falsity does not afford a title to relief.

25. The problem in this case is that the Defendant's statement of belief *is* probably based on grounds capable of actual proof one way or the other, but no evidence apart from Mr Mainguy's opinion was produced as proof of the inadequacy of 6.38mm glass in this trial. Mr Mainguy's opinion is not "*actual proof*" that 6.38mm glass is not cyclone proof. Evidence of a national or independent standard would be such proof. Nor is there any evidence of fraud on the part of the Defendant. Indeed, he said if he had received specifications 10.38mm glass before the 6.38mm glass was manufactured and installed, he would have complied with them. I have no reason to doubt the credibility of his evidence.



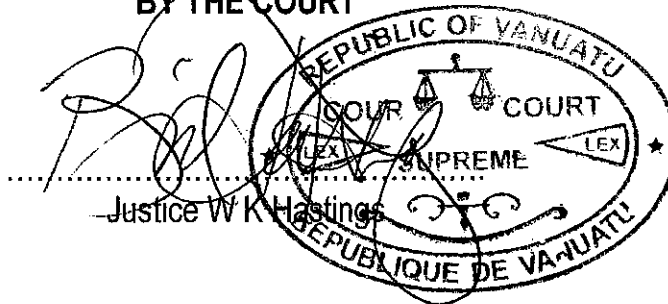
26. On the other hand, if it can be proved that the Defendant did not genuinely hold his opinion, or that a reasonable person possessing his knowledge could not honestly have held it, or that only the Defendant was in a position to know the facts upon which his opinion must have been based, there is a misrepresentation of fact for which a remedy lies (*Cheshire and Fifoot*, at 250). In this case, there was no evidence that the Defendant did not genuinely hold his opinion; indeed, he was upfront that he based his opinion that 6.38mm glass was adequate on his years of experience in the glass trade and his assessment of the size of the windows. There was no evidence that a reasonable person possessing the defendant's knowledge could not honestly have thought that 6.38mm glass was adequate. Mr Mainguy's opinion differed, but he is no more nor less a reasonable person than Mr Pascal.
27. For these reasons, I find that the Claimant has not proved his claim against the Defendant on the balance of probabilities.

Result

28. The Claim is dismissed.
29. Costs follow the event. If they are not agreed, they are to be taxed.

DATED at Port Vila this 10th day of December 2024

BY THE COURT



Justice W K Hastings