

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Civil Appellate Jurisdiction)

Civil Appeal Case No 9 of 2013

BETWEEN: PETELO TUFALÉ
Appellant

AND: LAKATORO TRADING CENTRE LIMITED
Respondent

Coram: Honourable Chief Justice Vincent Lunabek
Honourable Justice John von Doussa
Honourable Justice Oliver Saksak
Honourable Justice Daniel Fatiaki
Honourable Justice Raynor Asher
Honourable Justice Dudley Aru
Honourable Justice Mary Sey

Counsel: Mrs MNF Patterson for the Appellant
Mr Jack Kilu for the Respondent

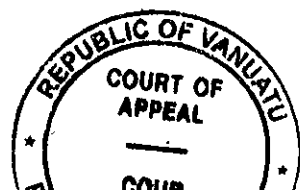
Date of Hearing: 17th July, 2013

Date of Judgment: 26th July, 2013

JUDGMENT

Introduction

1. The appellant Petelo Tufale brought this action against Lakatoro Trading Centre, a company that is substantially owned by his daughter Nivalette and his former son-in-law, now deceased, Bernard Nguyen. He claims that the company owes him a significant portion of its earnings from certain contracts to the value of Vt136,475,539. He failed in this claim in the Supreme Court before Spear J. and now brings this appeal.
2. The context in which the dispute arose is largely uncontested. Mr Tufale is an experienced contractor who has over 30 years of involvement in joinery carpentry and concrete work, and has the ability to tender for and supervise significant construction



projects on Malekula. His daughter Nivalette formed a relationship with Mr Nguyen in the 1990s. By 2000 Nivalette and Mr Nguyen had married and had a close association with Mr Tufale.

3. On 16 January 2001 the respondent Lakatoro Trading Centre Limited (LTC) was formed. There was some controversy at trial as to the basis on which it was set up, but it is clear that the share holders were Mr Nguyen, Nivalette Tufale and a Mr Sato Kilman. Significantly, Mr Tufale was not a shareholder.
4. In 2001 LTC entered into a building contract with an entity known as UNELCO to construct a commercial building, an associated residence and other related buildings. It is clear that Mr Tufale was closely involved with this enterprise. He ran the tender and was the project manager of the construction works. LTC sourced and supplied the building materials as requested by Mr Tufale. It would employ the construction workers but they would be supervised by him. The judge described him as an independent contractor, and that was not challenged on appeal.
5. Importantly, by agreement Mr Tufale's remuneration was the balance left after payment of the construction materials, exclusive of the LTC mark up and the labour costs. It follows that LTC's profit was limited to its mark up. The total value of the job was Vt 6,398,961 of which Mr Tufale received Vt 2,741,053 which amounted to approximately 43% of the total contract price.
6. The contracts that are the subject of this appeal were undertaken towards the end of or after the completion of the UNELCO works. These were four construction contracts entered into with the European Union for the construction of four schools in Malekula, (the EU contracts). There were also some later additional agreements for further works including the supply of furniture, electrical installations and staff housing for the schools.
7. There seems little doubt that Mr Tufale prepared the tenders for the construction work on behalf of LTC and was again the project manager of the construction works. He would notify LTC of the building materials required and LTC would supply them. He would also arrange for the employment of the workers, but their employer was LTC, and they were paid by the company on the basis of records provided by Mr Tufale.
8. Re-constructing the times as best we can, it appears that although the EU contracts were negotiated through 2001, the work was done over almost two years between October 2001 and September 2003. Ultimately the gross payment to LTC for the EU contracts was Vt 136,475,539 for the four principal contracts, and a further unspecified amount for the additional contracts.
9. There was a third building contract entered into by LTC and involving Mr Tufale, known as the Intrus contract. This was for a commercial building, and it seems that the work went on during 2001 and 2002 at the same time as the EU contracts. The amounts involved were modest in comparison, being it would seem Vt 6,500,000.
10. By November 2002 the parties had suffered a severe falling out. On 23 November 2002 an urgent ex parte order was granted against Mr Tufale at the request of Mr Nguyen restraining Mr Tufale from using firearms and going within 100 meters of the Nguyen family, or physically or verbally abusing them. As a consequence Mr Tufale's



home was searched, and on 29 November 2002 the orders were varied but remained in essence in place.

The Issue

11. Mr Tufale received payments and other benefits for his work on the EU and Intrus contracts. He argued that he was underpaid on the Intrus contract but he has not pursued this claim on appeal.
12. Mr Tufale's appeal concerns his payments for his work on the EU contracts. He asserted in the Supreme Court that it was agreed that he would be paid on the same basis as he was paid on the first of the construction works in which he and LTC were involved, the UNELCO contract. In other words, he should have received for his work on the EU contracts the balance left after payment of the construction materials, exclusive of the LTC mark up and the labour costs. He did not put an exact figure on what this would come to, but it would be a big sum if it came to 43%, in excess of Vt 50,000,000,
13. LTC denied liability for this sum, and denied that there are any sums owing to Mr Tufale for the work he did. It asserted that Mr Tufale had received his full entitlement for his work. While admitting the terms of the UNELCO agreement between them, it denied (ultimately) that that arrangement applied to the EU contracts.
14. It is clear that Mr Tufale received Vt 4,150,000 being the amount he admitted receiving from LTC or the Nguyens for his work on the EU contracts broken down as follows:

a) In goods:

i)	A4 x 4 Toyota Hilux motor vehicle	Vt 1,800,000
ii)	An aluminium boat	Vt 300,000
iii)	Outboard Motor Engine	Vt 400,000
iv)	Cement Mixer Machine	Vt 200,000

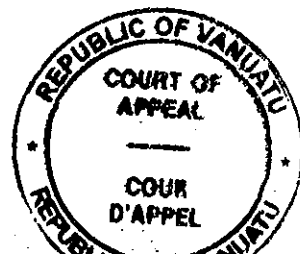
b) In cash

i)	Project South West Bay Contract	Vt 250,000
ii)	Project Rensari Contract	Vt 500,000
iii)	Project Olal	Vt 700,000

TOTAL Vt 4,150,000

In addition Mr Nguyen asserted that his wife paid Mr Tufale Vt 200,000 a month for a period, by giving him cash in envelopes. There was also a suggestion that Mr Tufale received some land.

15. The issue that arises is the nature of the arrangement between LTC and Mr Tufale in relation to the EU contracts. Was it as Mrs Patterson argued before us that he be paid on the same basis as for the UNELCO contract? Or was it rather as Mr Kilu submitted an unspecified family arrangement where Mr Tufale did the work and would be given considerable goods and cash in return, which he received.



The Amendment

16. Mrs Patterson also challenged the judge's order granting permission to LTC during the trial at the close of her case to amend its statement of defence. The effect was to amend the statement of defence that had admitted terms of the agreement as to his payment on the EU contracts as pleaded by Mr Tufale, to one which denied the pleaded contract.
17. On the face of it this seems a significant amendment, reversing a critical admission. However, Mr Nguyen in his sworn statements of 19th March 2010 and 11th April 2011 had made it quite clear that the contract as pleaded by Mr Tufale was denied. Moreover, Mrs Patterson conceded to the judge at the time of the amendment that she suffered no prejudice from the amendment. Indeed, she appeared to withdraw her opposition to it. There was no application to recall Mr Tufale.
18. In such circumstances we can see no basis for a challenge to the judge's ruling. Indeed before us Mrs Patterson did not suggest that there had been any prejudice. We had some sense that Mrs Patterson was suggesting that the judge should have refused the amendment despite her concessions. To that we observe that the judge was in our view bound to allow the amendment as the effect was to do no more than make the statement of defence consistent with Mr Nguyen's sworn statements. His denials had been in Mr Tufale's lawyer's hands for a number of years.
19. Moreover it is counsel for a party who is best able to assess whether there has been prejudice to that party, and it would be most unusual for a judge to not accept counsel's assurance.
20. In short, we have no doubt that the judge was correct in allowing the amendment.

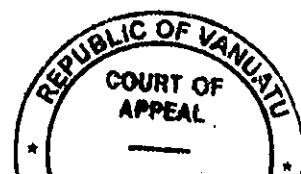
The Judgment

21. Spear J while impressed by Mr Tufale's evidence was unable to accept that an arrangement had been entered into on the basis he asserted. He considered that there were a number of features that arose from his assertions that made him doubt that any contract on the basis pleaded was in fact entered into.
22. Rather, he saw the events as part of an arrangement entered into with the best of intentions, where he might have been prepared to infer an agreement that Mr Tufale be paid for his services at a reasonable rate. But there had been no evidence adduced as to what would have been a reasonable rate. In the end, Mr Tufale had failed to prove the pleaded contract on the balance of probabilities.
23. We have considered and analyzed the evidence ourselves, while noting and being assisted by the assessment of the trial judge.

The relationship between the parties

24. There are a number of singular features about the arrangement which must be noted, as they assist in the assessment of whether there was a contract as pleaded.

25. Mr Tufale and the Nguyens were close family. The Nguyens had lived with Mr Tufale for a period and do not deny having had a close and trusting relationship. They do not dispute his description of events concerning the UNELCO contract. Mr Tufale received all the profit save for margin on the materials supplied by the Nguyens. It was an arrangement where the primary benefit of the contract, indeed 43% of the total income, went to Mr Tufale. This was a very high return, commensurate it might be thought with equitable ownership and control, although that was not suggested.
26. The LTC contract with the EU was a different sort of contract from the UNELCO job, involving a total contract price that was almost twenty times more, and a long term commitment of what was ultimately approximately two years intensive work, involving considerable time, effort and risk.
27. Mr Tufale had a key role it is clear in preparing the tenders for the EU contracts, and as the primary supervisor during those jobs. So it is clear did Mr Nguyen, whose name appears on the limited number of papers produced, as the representative of LTC.
28. The extent of the respective involvement of Mr Tufale and Mr Nguyen was demonstrated by a number of documents that were produced, including a document described as "*Description and qualifications of key personnel*" which set out details of both Mr Nguyen and Mr Tufale. It also listed a third person, Mr Aime. It showed Mr Nguyen having fifteen years of "*similar experience*" to the work in question, and Mr Tufale twenty five years. A general reading showed Mr Tufale to be the more experienced, but Mr Nguyen to be very much a part of the three person management group. A letter sent about EU contract matters showed Mr Nguyen as Managing Director and Mr Tufale as contractor. There were documents produced which showed Mr Nguyen requesting extensions of time for work on the EU contract, and signing variations of contract.
29. Mr Nguyen and LTC were clearly more than passive in their involvement, signing contract documents and paying the wages and providing the receipts for the considerable number of workers, on the basis of work records provided by Mr Tufale. Significantly, LTC assumed a serious responsibility and risk in taking on a contract of this size. LTC would be the party liable in the event of failure to complete on time, or workmanship issues, and it would take the risk of financial failure and collapse if the contract pricing was too low.
30. It is also significant that after the relationship ended between Mr Tufale and the Nguyens in November 2002 work continued on the EU contracts for another ten months, and it must be assumed that LTC without Mr Tufale was able to accomplish this.
31. On the basis of this background, putting to one side the assertions of the parties, it could be expected that the profits would go to LTC, but that there would have been generous remuneration for Mr Tufale up to November 2002. Perhaps that could have been a share of the profits, but not, it would be expected, the bulk of the profits.
32. The singular feature of the case is that while Mr Tufale had a key role in the implementation of the EU construction contracts, and while the sums involved were considerable, there was nothing to document his involvement or entitlement. There

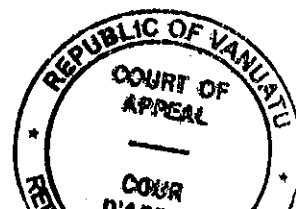


was discovery between the parties, and it could be expected that each would do everything possible to find documentary support for their position, but there was nothing produced. And while there were complaints by Mr Tufale about the honesty of LTC's discovery, he did not suggest that there were any missing documents that directly supported the agreement. We are satisfied that there was nothing more that could have been shown in a documentary sense to prove the position of either side. The accounts of LTC do not mention Mr Tufale as either creditor or debtor.

33. The position is made no more clear by examination of the documents that followed the completion of the EU contracts in 2003. From 2002 there are letters from Mr Tufale to LTC requesting payments. In 2003 and 2004 Mr Tufale sought payment from retention moneys. Mr Nguyen responded accusing Mr Tufale of mismanaging aspects of the job, and claimed that there were losses, and that Mr Tufale was responsible for retention moneys being withheld. There is a letter of 22 June 2004 from the EU representative taking sides with Mr Tufale on this, asserting that some retention money had been released, although it is clear that some was still being retained.
34. The written exchanges between the parties in 2002 and 2003 cast little light on the true position. They show Mr Tufale making claims as might be expected from mid 2002. It must be assumed that by the time of the ex parte orders in November 2002 he had ceased to do work for LTC. But he made no formal claim. Indeed following the mid 2004 exchanges there is no demand made of LTC until proceedings were issued in late 2007, although a lawyer's letter was sent on his behalf on 10 April 2006 to LTC seeking information about the payments on the EU contracts.

Our Assessment

35. It is clear that Mr Tufale played a major role in the EU contract work and could be expected to have received significant remuneration. He did receive some remuneration. But this analysis reveals the following further features.
 - There is no document in existence supporting Mr Tufale's claim to be paid the profits after materials and labour.
 - The documents that do exist do not show him as an employee (as LTC asserted in its statement of defence), but are consistent with him being an independent contractor. However there are no financial records indicating any contract, and no other records that explain his position.
 - By late 2002 Mr Tufale clearly considered himself entitled to some further remuneration and was making claims.
 - However he made no claim for remuneration on the basis he now puts forward, and apart from handwritten queries, there is no formal document in which he said he claimed the profits.
 - Mr Tufale took no steps in his evidence to explain his behavior that led to his arrest in late 2002. His behavior after that was consistent with him accepting the restraining orders.
 - He made no formal claim for the sums now pursued for almost five years, until 2007.
36. These factors are not supportive of his claim. In particular Mr Tufale offers no explanation as to why he took no steps for so long. An individual of modest means



who was in fact owed such a huge sum as he claims would not be expected to do nothing for so long. The explanation offered in submissions was the family connection, but there were already proceedings between him and the Nguyens in relation to restraining orders, and by the end of 2002 they were clearly totally estranged. So in the end his behavior after the falling out is more consistent with Mr Nguyen's account of events, than his own.

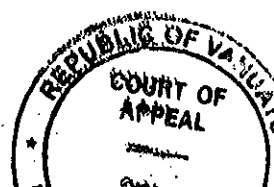
37. The judge found that it was most likely that Mr Tufale assumed that he would be paid on the same basis as he had been paid for the UNESCO conference. However, that was no more than an assumption on Mr Tufale's part, and we agree with the judge's assessment that Mr Nguyen would not have accepted such an arrangement.

Other Factors

38. There are a number of other factors which militate against accepting Mr Tufale's assertion of the oral contract.
39. He referred in his pleading to the other third set of contract works carried out by LTC with his involvement, which were for the entity known as Intrus, and claimed that there was outstanding remuneration for that contract as well as for the EU contracts. He did not pursue that claim in the appeal despite failing in the Supreme Court. However, it seems that during the hearing he gave evidence that he should have been remunerated in respect of the Intrus works on the same basis as the UNELCO contract. As the judge commented, that proposition was inherently unlikely as the Intrus contract was subject to an entirely different costing structure. His apparently incorrect claim in this regard casts doubt on the credibility of his EU claim.
40. Mr Tufale was clearly entitled to remuneration for his work. However he did get the payments and assets outlined worth Vt4,150,000. He appears to have had some additional remuneration in the monthly payments. We put to one side the suggestion that he also received some land, as that was not in any way documented. But the fact is he did get significant payments. They may have been sufficient given the extent of Mr Tufale's involvement.
41. It is, we think, most likely that Mr Tufale and the Nguyens, just slid from the UNELCO contract to the EU contract, and Mr Tufale was content to put his considerable abilities and hard work into the project out of affection for his family, without the parties discussing or indeed making specific assumptions as to how he would be paid. It was assumed that there would be a fair payment made in due course, and it was no more specific than that. Towards the end of the EU contracts but well before they were completed, the Tufales and the Nguyens fell out. Mr Tufale would not have had involvement from late 2002 with the Ranon and Olal school contracts completion which went through to September 2003, and he does not explain how in those circumstances he can claim for remuneration on all the EU contracts.

Conclusion

42. The judge clearly had some sympathy for Mr Tufale and so do we. The remuneration he actually received for all his work was modest. Given the responsibility, the skill



required, and the hours involved, it may well have been that if he had charged out his time at a reasonable hourly rate he would have ended up with more than he received.

43. However as Spear J observed when he addressed the issue, there was no quantum meruit claim pleaded. Moreover there was no evidence given by Mr Tufale of hours worked and suitable hourly rates that would have enabled the Court to make an assessment on a quantum meruit basis. And if the case had been pleaded in that way other issues would have loomed large such as the quality of Mr Tufale's work, and whether he made costly errors. It is not possible to reconstruct the EU transactions from the accounts of LTC as it had other jobs in process and other significant sources of income, which cannot be identified and separated from the EU contracts. Given the death of Mr Nguyen it would not be fair to refer the case back for consideration of a quantum meruit claim, and indeed Mrs Patterson did not suggest it.
44. We conclude that Mr Tufale did not make out his claim on the balance of probabilities, and that indeed it is unlikely that an agreement was ever reached as to how he would be paid. It is not possible to infer an agreement on the same terms as the UNELCO contract, as that was a very different contract on a far smaller scale, and it is our perception that the involvement of Mr Nguyen was greater, and that the risks for LTC of an entirely different dimension.
45. Thus for reasons that are largely the same as those of the trial judge, we do not consider that Mr Tufale has proved his claim; indeed he has failed to do so by a considerable margin. Accordingly the appeal must be dismissed.

Result

46. The appeal is dismissed.
47. The respondents are entitled to be paid costs by the appellant at the standard rate.

DATED at Port Vila this 26th day of July 2013

ON BEHALF OF THE COURT



Hon. Vincent Lunabek
Chief Justice

